University of New South Wales
University of New South Wales Faculty of Law Research Series
2010

Year 2010 *Paper* 61

Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer

Jane McAdam*

*University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/unswwps-flrps10/art61

Copyright ©2010 by the author.

Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer

Jane McAdam

Abstract

Drawing on field work in Tuvalu, Kiribati and Bangladesh, this article argues that advocacy for a new treaty to address climate-related movement is presently misplaced for a number of reasons. The article does not deny the real impacts that climate change is already having on communities, or that migration is a normal adaptive response to such change. Rather, it queries the utility – and, importantly, the policy consequences – of pinning 'solutions' to climate change-related displacement on a multilateral instrument, in light of the likely nature of movement, the desires of communities affected by it, and the fact that a treaty will not, without wide ratification and implementation, 'solve' the humanitarian issue. The argument is developed by examining some conceptual and pragmatic difficulties in attempting to construct a refugee-like instrument for people fleeing the effects of climate change, and by critiquing whether there are legal benefits, as opposed to political benefits, to be gained by advocating for such an instrument.

SWIMMING AGAINST THE TIDE: WHY A CLIMATE CHANGE DISPLACEMENT TREATY IS NOT *THE* ANSWER

Jane McAdam*

A INTRODUCTION

People have always moved in response to environmental and climatic changes. Indeed, movement is a normal part of adaptation to change, providing a means of escaping danger and increasing resilience (particularly when it is planned).[1] The 'newness' of displacement triggered (at least in part) by climate change is its underlying anthropogenic basis,[2] the large number of people thought to be susceptible to it,[3] and the relative speed with which climate change will occur, which means that people's traditional coping strategies are likely to be overwhelmed at some point. As the Intergovernmental Panel on Climate Change (IPCC) has observed, '[w]hile physical exposure can significantly influence vulnerability for both human populations and natural systems, a lack of adaptive capacity is often the most important factor that creates a hotspot of human vulnerability'.[4] A country's level of development is central to its adaptive capacity, since resources and technology increase capacity, while poverty limits it.[5]

According to the United Nations High Commissioner for Refugees (UNHCR), it is becoming increasingly difficult to categorize displaced people because of the

---

* BA (Hons) LLB (Hons) (*Syd*), DPhil (*Oxon*); Associate Professor, Faculty of Law, University of New South Wales, Australia; Research Associate, Refugee Studies Centre, University of Oxford. I am grateful to the Australian Research Council for funding this research, including field work in Kiribati, Tuvalu and Bangladesh. A related article, with a detailed focus on the Pacific context and Australian and New Zealand migration policy responses, will be published as: 'Refusing "Refuge" in the Pacific: (De)constructing Climate-Induced Displacement in International Law', in E Piguet, A Pécoud and P de Guchteneire (eds), *Migration, Environment and Climate Change* (UNESCO/Cambridge University Press, Paris/Cambridge, forthcoming). For detailed analysis of the Bangladeshi case study referred to here, see J McAdam and B Saul, 'Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh' (2010) 53 *German Yearbook of International Law* (forthcoming).

[1] IOM Background Paper (draft), *Assessing the Evidence: Environment, Climate Change and Migration in Bangladesh* (IOM, Dhaka, 2010) 40.

[2] That is not to say that 'natural' disasters are without anthropogenic bases: see eg B Wisner, P Blaikie, T Cannon and I Davis, *At Risk: Natural Hazards, People's Vulnerability and Disasters* (2nd edn, Routledge, London, 2004), which argues that few disasters are ever 'natural'; they are a combination of environmental *plus* socio-economic and political factors.

[3] President of the Global Humanitarian Forum, Kofi Annan, described 'millions of people' being 'uprooted or permanently on the move as a result' of climate change, with '[m]any more millions' to follow: Global Humanitarian Forum, *The Anatomy of a Silent Crisis* (Human Impact Report Climate Change, Geneva, 2009) ii, http://ghfgeneva.org/Portals/0/pdfs/human_impact_report.pdf (accessed 7 December 2009). Debates about numbers remain highly contentious: see eg D Kniveton and others, 'Climate Change and Migration: Improving Methodologies to Estimate Flows', IOM Migration Research Series No 33 (2008); S Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate', *New Issues in Refugee Research*, Working Paper No 70 (2002).

[4] Intergovernmental Panel on Climate Change (IPCC), *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 University Press, Cambridge, 2007) 317.

[5] Referred to in IOM (n 1) 22.

Hosted by The Berkeley Electronic Press

Electronic copy available at: http://ssrn.com/abstract=1714714

combined impacts of conflict, the environment and economic pressures.[6] While the term 'refugee' describes only a narrow sub-class of the world's forced migrants, it is often misapplied to those who move (or who are anticipated to move) for environmental or climate reasons. As explored below, this is not only erroneous as a matter of law, but is conceptually inaccurate as well.

However, the lack of a clear international legal framework to respond to people displaced by climate change has resulted in calls from a variety of sectors for a new international instrument to protect so-called 'climate refugees'. This article provides a partial response to such calls. It is partial, because it does not engage in a detailed discussion about whether new substantive norms or machinery are needed,[7] or respond to the particular detail of each proposal mentioned. Nor does it examine issues of compensation or responsibility-sharing—matters which might usefully be addressed in a multilateral instrument (and which some of the proposals suggest). Rather, this article addresses only the appropriateness of defining a 'climate displaced person' category within an international protection paradigm. By an 'international protection paradigm', I mean something akin to refugee protection: requiring States, as a matter of international treaty law, not to return people to climate-related harms and to grant them a domestic legal status.

Drawing on field work in Tuvalu, Kiribati and Bangladesh, this article argues that advocacy for a new treaty to address climate-related movement is presently misplaced for a number of reasons. The article does not deny the real impacts that climate change is already having on communities, or that migration is a normal adaptive response to such change. Rather, it queries the utility—and, importantly, the policy consequences—of pinning 'solutions' to climate change-related displacement on a multilateral instrument, in light of the likely nature of movement, the desires of affected communities, and the fact that a treaty will not, without wide ratification and implementation, 'solve' the humanitarian issue. The argument is developed by examining some conceptual and pragmatic difficulties in attempting to construct a refugee-like instrument for people fleeing the effects of climate change, and by critiquing whether there are *legal* benefits, as opposed to *political* benefits, to be gained by advocating for such an instrument.

As the field work in particular highlights, a *universal* treaty may be inappropriate in addressing the concerns of particular communities. The role of 'international movement' as a response to climate change is conceived of differently in Tuvalu, Kiribati and Bangladesh because of their particular geographical, demographic, cultural and political circumstances, and it may be that localized or regional responses are better able to respond to their needs. Such approaches can take into account the particular features of the affected population, in determining who should move, when, in what fashion, and with what outcome. Staggered migration, circular migration, or

[6] See remarks made by High Commissioner Antonio Guterres in an interview with *The Guardian* in J Borger, 'Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN', *The Guardian* (17 June 2008) http://www.guardian.co.uk/environment/2008/jun/17/climatechange.food (accessed 2 December 2009).

[7] On which, see W Kälin, 'Conceptualising Climate-Induced Displacement' in J McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, Oxford, 2010); J McAdam and B Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' in A Edwards and C Ferstman (eds) *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, Cambridge, 2010).

http://law.bepress.com/unswwps-flrps10/art61

Electronic copy available at: http://ssrn.com/abstract=1714714

the promise of a place to migrate to should it become necessary might be welcome measures that could appeal both to host and affected communities alike.[8] Furthermore, by contrast to many other triggers of displacement, the slow onset of some climate change impacts, such as rising sea levels, provides a rare opportunity to *plan* for responses, rather than relying on a remedial instrument in the case of spontaneous (and desperate) flight.

The context of the article also needs to be understood lest the argument be misconstrued. There is a widespread, non-critical assumption, predominantly among those not versed in international law, that a treaty will provide *the* answer to climate change-related displacement. This argument is flawed for a number of reasons, explored below. The article should therefore not be read as an outright rejection of any future treaty regime by which States might accept a duty to assist people displaced in part by climate change and agree to responsibility-sharing mechanisms.[9] Indeed, as field work in the Pacific and Bangladesh has shown, people are already moving in response to environmental changes,[10] and States will ultimately need to develop coordinated responses that acknowledge the need for cross-border movement in certain circumstances and which regularize the status of those who move, either through humanitarian or migration schemes. Recognition of a duty to assist could help to encourage international cooperation on sharing the responsibility for displaced people and facilitate the establishment of institutional mandates (such as by creating a lead UN agency or focal point).

Rather, my concern is that if a treaty becomes the *main* focus of international policy development, attention may shift from the more immediate, alternative and additional responses that may enable people to remain in their homes for as long as possible (which is the predominant wish among affected communities), or to move safely within their own countries, or to migrate in a planned manner over time. Drafting a treaty necessitates an intent focus on defining who is 'within' or 'outside' its scope of

[8] This is the preferred approach of the government of Kiribati, for example. See eg author interview with President Anote Tong (Kiribati, 12 May 2009); comments of Kiribati's Foreign Secretary, Tessie Lambourne, cited in L Goering, 'Kiribati Officials Plan for "Practical and Rational" Exodus from Atolls' *Reuters AlertNet* (9 December 2009) http://www.alertnet.org/db/an_art/60714/2009/11/9-181804-1.htm.

[9] For example, the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (entered into force by signature, 5 April 1995) 2069 UNTS 3 is a regional treaty between four States that establishes a *framework for cooperation* 'in all fields of su stain able development, utilization, management and conservation of the water and related resources of the Mekong River Basin ... in a manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences and man-made activities' (article 1). It also establishes an institutional framework, the Mekong River Commission, 'to provide an adequate, efficient and functional joint organizational structure to implement this Agreement and the projects, programs and activities taken thereunder in cooperation and coordination with each member and the international community, and to address and resolve issues and problems that may arise from the use and development of the Mekong River Basin water and related resources in an amicable, timely and good neighbourly manner' (Preamble). Thus, at a minimum, it commits States to negotiate on the issues, through 'consultation and evaluation' and 'a dynamic and practical consensus' (Ch II definitions).

[10] See eg 'Carteret Islanders Become First Climate Refugees: PNG Relocates Families as Island Home Disappears', *Pacific Island Report* (4 May 2009) http://archives.pireport.org/archive/2009/may/05-04-09.htm (accessed 10 June 2009), reporting a story from the *Papua New Guinea Post-Courier* (1 May 2009). More generally, see the special issue on climate change and displacement: (2008) 31 *Forced Migration Review*.

Hosted by The Berkeley Electronic Press

application, and while such deliberations are occurring, other opportunities may be missed. As one commentator has observed of the current international climate change negotiations, concentrating on a treaty can ironically encourage *inaction* on climate change, since discussions tend to get bogged down in linguistic detail rather than substance, and the very process of negotiation provides an excuse to do nothing until an outcome is achieved—an outcome that is likely to be a considerable compromise given that consensus is required.[11]

B THE IMPETUS: TREATY PROPOSALS

A variety of actors has called for a new international treaty on climate change displacement, or a Protocol to the Refugee Convention[12] or the United Nations Framework Convention on Climate Change,[13] to create a new class of refugee-like protected persons. At the State level, for example, the Maldives in 2006 proposed amending the 1951 Refugee Convention to extend the definition of a 'refugee' in article 1A(2) to include 'climate refugees'.[14] In December 2009, in the lead-up to the Copenhagen climate change conference, the Bangladeshi Finance Minister similarly stated: 'The convention on refugees could be revised to protect people. It's been through other revisions, so this should be possible'.[15] A Bangladeshi NGO network, Equity and Justice Working Group Bangladesh (EquityBD), called for a new Protocol to the UNFCCC 'to ensure social, cultural and economic rehabilitation of the "climate refugees" through recognizing them as "Universal Natural Persons".'[16]

Some scholars have also proposed new legal instruments to address climate change-related movement. Biermann and Boas suggested a UNFCCC Protocol on the Recognition, Protection, and Resettlement of Climate Refugees.[17] A group of legal

---

[11] Dr Jon Barnett, speaking at 'Innovation, Energy and Climate Change in the Developing World' (Deakin Lectures 2010, Melbourne, 10 June 2010), available at http://abc.com.au/rn/backgroundbriefing/stories/2010/2947337.htm (accessed 11 July 2010).

[12] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2), read in conjunction with Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[13] UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1993) 1771 UNTS 107 (UNFCCC).

[14] Republic of the Maldives Ministry of Environment, Energy and Water, *Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (Male, Maldives, 14–15 August 2006) cited in F Biermann and I Boas, 'Protecting Climate Refugees: The Case for a Global Protocol', *Environment* (November–December 2008).

[15] See H Grant, J Randerson and J Vidal, 'UK Should Open Borders to Climate Refugees, Says Bangladeshi Minister', *The Guardian* (4 December 2009) http://www.guardian.co.uk/environment/2009/nov/30/rich-west-climate-change/print (accessed 8 December 2009).

[16] EquityBD, 'Climate Change Induced Forced Migrants: In Need of Dignified Recognition under a New Protocol' (December 2009). An earlier version of this is Md Shamsuddoha and Rezaul Karim Chowdhury, 'Climate Refugee: Requires Dignified Recognition under a New Protocol' (April 2009) http://www.equitybd.org/English/Press%20040409/English%20Position%20paper.pdf (accessed 10 November 2009). EquityBD no longer uses the 'refugee' terminology: interview with Md Shamsuddoha and Rezaul Karim Chowdhury (Dhaka, 19 June 2010).

[17] F Biermann and I Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No 33 (November 2007), subsequently F Biermann and I Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' (2010) 10 *Global Environmental Politics* 60; see also Biermann and Boas (n 13); for criticism of their approach, see M Hulme, 'Commentary: Climate Refugees: Cause for a New

Institutional Repository

http://law.bepress.com/unswwps-flrps10/art61

scholars from the University of Limoges published a Draft Convention on the International Status of Environmentally-Displaced Persons.[18] Docherty and Giannini proposed an 'independent' or 'stand-alone' convention defining 'climate change refugee' and containing 'guarantees of assistance, shared responsibility, and administration'.[19] An Australian-based project also seeks to elaborate 'a draft convention for persons displaced by climate change', which would 'establish an international regime for the status and treatment of such persons.'[20] The Council of Europe Parliamentary Assembly's Committee on Migration, Refugees and Population has suggested 'adding an additional protocol to the European Convention on Human Rights, concerning the right to a healthy and safe environment' as a way of 'enhancing the human rights protection mechanisms vis-à-vis the challenges of climate change and environmental degradation processes'.[21]

There is variation among these proposals as to how the displaced are defined, whether they would be subject to individual status determination (like Convention refugees),[22] or whether protection would be extended *prima facie* on account of the objective country of origin conditions from which people flee.[23] While the underlying basis of each proposal is, presumably, to provide a rights-based framework for people forced to move when the impacts of climate change render life and livelihoods at home impossible, it is not self-evident that a treaty would presently best serve this end. There are three main reasons for this argument.

1 Empirical evidence on movement

First, treaty proposals are premised on certain assumptions about climate change and human movement that are not borne out in the empirical studies that are starting to emerge, which show that movement is likely to be predominantly internal and/or gradual, rather than in the nature of refugee 'flight'.[24] As the field work in Bangladesh shows, even if initial movement from a disaster is rapid, it will almost

---

Agreement?', *Environment* (November–December 2008). For another UFCCC-based proposal, see A Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 *Law & Policy* 502.

[18] Draft Convention on the International Status of Environmentally-Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) (2008) 4 *Revue Européene de Droit de l'Environnement* 375. Article 2(2) defines 'environmentally-displaced persons' as 'individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence and requires their relocation and resettlement.' A 'right to resettlement' is elaborated in article 9: States parties are to establish 'transparent and open legal procedures for the demand and grant or refusal of the status of environmentally-displace person based on the rights set forth in the present chapter.'

[19] B Docherty and T Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349, 350, 373.

[20] See 'A Convention for Persons Displaced by Climate Change', http://www.ccdpconvention.com/ (accessed 7 December 2009).

[21] The Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, 'Environmentally Induced Migration and Displacement: A 21st Century Challenge' Doc 11785 (23 December 2008) paras 6.3 and 121 respectively.

[22] Eg Maldives, Bangladesh, Limoges proposals.

[23] Eg Docherty and Giannini proposal, Australian proposal and Biermann and Boas proposal.

[24] See eg F Laczko and C Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva, IOM, 2009); EACH-FOR, *Synthesis Report* (14 May 2009).

Berkeley Legal Repository

Hosted by The Berkeley Electronic Press

always be internal movement.[25] Since the rationale behind a treaty is to address international movement, there is a risk that vast amounts of energy, time and resources will be channelled into treaty-related advocacy at the expense of other, perhaps more appropriate and community-attuned responses. As IOM in Bangladesh has observed, IPCC predictions of many millions of displaced people appear to be driving claims for a treaty, rather than an appreciation of the reality that much movement will be internal, gradual, and not necessarily suited to an international treaty response.[26] *If* a treaty is nonetheless thought desirable, it is important that it be viewed as one of a number of mechanisms that may respond to climate-induced displacement, rather than as *the* solution (which is often how it is posited).

(a) Kiribati and Tuvalu

Kiribati and Tuvalu frequently feature in the media and NGO reports as 'disappearing States' that will be uninhabitable by 2050, with their people becoming the world's first 'climate refugees'.[27] While the precise timeframe is uncertain,[28] what is clear is that movement is likely to be pre-emptive and planned in response to slow-onset changes that gradually degrade the islands, rather than in the nature of sudden flight.[29]

Kiribati has a population of around 100,000, while Tuvalu is the world's smallest State (apart from the Vatican), with only 10,000 people. Though relatively tiny, both countries suffer from overpopulation and crowding. Indeed, of the States threatened by eventual annihilation, Kiribati has the largest population (especially in light of future population growth), and virtually no capacity for long-term internal migration because of the absence of high land.[30] Half of Kiribati's population lives on the main island of Tarawa, and the population is increasing rapidly, particularly as people move from outer islands in search of work in the urban centre.[31] On its southern tip, the

[25] J McAdam and B Saul, 'Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh' (2010) 53 *German Yearbook of International Law* (forthcoming).
[26] Interview with Rabab Fatima and Anita Wadud, IOM (Dhaka, 17 June 2010).
[27] See eg N MacFarquhar, 'Refugees Join List of Climate-Change Issues', *New York Times* (29 May 2009) http://www.nytimes.com/2009/05/29/world/29refugees.html?_r=1&pagewanted=print (accessed 1 December 2009); J Bone and R Pagnamenta, 'We are Sinking, Say Islanders, but There is Still Time to Save the World', *The Times* (23 September 2009) www.timesonline.co.uk/tol/news/environment/article6845261.ece (accessed 10 December 2009); R Callick, 'Don't Desert Us, Say Sinking Pacific Islands', *The Australian* (30 July 2009) www.theaustralian.com.au/news/dont-desert-us-say-sinking-pacific-islands/story-0-1225756097220 (accessed 10 December 2009); J Lateu, 'That Sinking Feeling: Climate Refugees Receive Funds to Leave Islands", *New Internationalist* (March 2008) www.newint.org/columns/currents/2008/03/01/climate-change/ (accessed 10 December 2009).
[28] When pressed, most of those interviewed in Kiribati and Tuvalu adopted this timeframe.
[29] For background, see J McAdam and M Loughry, 'We Aren't Refugees', *Inside Story* (29 June 2009) http://inside.org.au/we-arent-refugees/ (accessed 1 July 2009).
[30] The average height of land in Kiribati and Tuvalu is less than two metres above sea level. Ironically, Banaba, which is the only high land, was all but depopulated in the 1950s when they were relocated to Fiji to enable phosphate mining to take place. The President of Kiribati has mentioned the possibility of eventually relocating the government there, to continue a presence on the territory for as long as possible: Interview with President Anote Tong (Kiribati, 12 May 2009).
[31] A 2005 census put South Tarawa's population at 40,300, an increase of almost 43 per cent over a decade: C Sherborne, 'Sinking Sandbanks', *The Monthly* (March 2009) http://www.themonthly.com.au/node/1472 (accessed 12 September 2009). See generally CW Stahl and RT Appleyard, *Migration and Development in the Pacific Islands: Lessons from the New Zealand Experience* (AusAID, April 2007).

Digital Commons@Newcastle Repository

http://law.bepress.com/unswwps-flrps10/art61

population density of the 1.7 square kilometre islet of Betio is greater than that of Hong Kong, but without the high-rise apartments to house it. Sanitation is poor and pollution is high, with beach toileting and washing very common. Only 20 per cent of households have access to a sewerage system; 64 per cent do not use toilets.[32] Septic tanks seep into the groundwater supply, which is often brackish, and the tank infrastructure is too rudimentary to keep up with population growth. Most people are unemployed: only a quarter have a regular job, and half of them work in government administration. The average annual wage on Tarawa is 3,000 Australian dollars.[33]

Tuvalu faces similar problems of unemployment, pollution and a general lack of resources, although each house has a rainwater tank (albeit not always functional or attached to a tap). Population pressure is not quite as severe, but there is considerable reliance on employed family members to provide for their relatives.

In the Otin Taai Declaration of 2004, the Pacific Council of Churches acknowledged the ways in which human-induced climate change will significantly affect Pacific island countries. Likely impacts include loss of coastal land and infrastructure due to erosion, inundation, sea-level rise and storm surges; an increase in the frequency and severity of cyclones, creating risks to life, health and homes; loss of coral reefs, with attendant implications for the ecosystems on which many islanders' livelihoods depend; changing rainfall patterns, leading to flooding in some areas, drought in others, and threats to fresh water supplies; salt-water intrusion into agricultural land; and extreme temperatures.[34]

The nature of these predominantly slow-onset climate processes does not sit easily within existing international refugee and complementary protection frameworks, which do not adequately address the time dimension of pre-emptive and staggered movement. Even though it is the severity of harm,[35] and not the timing of it, that determines a protection need, the two are necessarily interrelated. Since the impacts of slow-onset processes may take some time before they amount to sufficiently serious harm, the timing of a protection claim is crucial.[36] Certainly the ability of existing legal mechanisms to respond to climate-related movement—through complementary protection in particular—would depend on the point in time at which protection is sought, based on the severity of the immediate impacts on return. These are matters that any new international instrument would need to address.

(b) Bangladesh

[32] Sherborne (n 30), citing a Kiribati government report, *The Challenge: Things (Beginning to) Fall Apart.*

[33] Sherborne (n 30).

[34] Otin Taai Declaration: A Statement and Recommendations from the Pacific Churches' Consultation on Climate Change (Tarawa, Kiribati, March 2004)

[35] In refugee law, to constitute 'persecution' acts must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, or they must amount to an accumulation of measures of equivalent severity: GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 91.

[36] This is apparent in some of the cases that have already been brought before the Refugee Review Tribunal in Australia and the Refugee Status Appeals Authority in New Zealand: see eg *0907346* [2009] RRTA 1168 (10 December 2009). For other cases, see J McAdam, 'Review Essay: From Economic Refugees to Climate Refugees?' (2009) 10 *Melbourne Journal of International Law* 579.

Hosted by The Berkeley Electronic Press

Similarly, in Bangladesh, many of the same socio-economic pressures exacerbate the country's natural environmental vulnerability.[37] As a low-lying, densely-populated delta nation, with a significant proportion of its population living in coastal or flood-prone areas,[38] Bangladesh is ravaged annually by sudden-onset events such as flooding, cyclones, storm surges, water-logging, salinity intrusion and riverbank erosion, and slower-onset processes like coastal erosion (predominantly through rising seas, but also hydrological dynamics) and land loss.[39] Sea level rise from climate change is anticipated to worsen many of these processes and to subsume up to 30 per cent of Bangladesh's coastal land by 2080.[40]

Bangladesh is often cited as the country that will produce the largest number of 'climate refugees'. As the country most at risk of natural disasters[41] (likely to become more frequent and severe as a result of climate change), some alarmist predictions estimate that 30 million people[42] (one in every seven[43]) will be displaced from Bangladesh by 2050. But as IOM explains, these figures tend to be based on sea level rises which fall outside the 'harshest' scenarios of the International Panel on Climate Change; count land loss but not accretion; assume no adaptation measures are taken to reduce vulnerability;[44] and are long term, country-wide estimates which overlook 'more localized, fine-grained' contexts and greater sensitivity in time-frames.[45]

Common assumptions that displacement will involve large-scale international migration from Bangladesh is not supported by existing patterns of movement from

---

[37] For a detailed case study of Bangladesh, see McAdam and Saul (n 24).

[38] Global risk analysts, Maplecroft, use GIS data to identify countries according to their vulnerability to manage risks posed by future climate change. Of 166 countries, Bangladesh is rated 12th and is defined as extremely vulnerable: see http://maplecroft.com/portfolio/doc/climate_change/Climate_Change_Poster_A3_2010_Web_V01.pdf (accessed 3 May 2010). 60 per cent of Bangladesh's population lives in flood-prone areas: *World Bank*, 'Data: Climate Change and South Asia', available at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,contentMDK:22408900~pagePK:2865106~piPK:2865128~theSitePK:223547,00.html (accessed 25 February 2010). Some 40 million people live in coastal areas, with 5 million residing in highly vulnerable areas within 100 km of the coast and less than 12 meters above sea level: K Warner et al, *In Search Of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement* (CARE International et al, Geneva, 2009) 13.

[39] See generally IPCC (n 4) ch 10.

[40] J Pender, 'Community-Led Adaptation in Bangladesh' (2008) 31 *Forced Migration Review* 54, citing research by the UK Institute of Development Studies. The IPCC's Second Assessment Report suggested 17.5 per cent of land could be lost with a one metre sea-level rise: IPCC, *IPCC Second Assessment: Climate Change 1995: A Report of the Intergovernmental Panel on Climate Change* (1995) 34. See also C Paskal, 'How Climate Change is Pushing the Boundaries of Security and Foreign Policy' (Energy, Environment and Development Programme EEDP CC BP 07/01, Chatham House, June 2007) 4, citing modelling published by UNEP, University of Dhaka, World Bank et al.

[41] Maplecroft, Natural Disasters Risk Index 2010, available at http://www.maplecroft.com/about/news/natural_disasters.html (accessed 29 September 2010).

[42] Interview with Mihir Kanti Majumder, Secretary, Ministry of Environment and Forests, Bangladesh (Dhaka, 15 June 2010); Kurt Campbell et al, 'The Age of Consequences: The Foreign Policy and National Security Implications of Global Climate Change', Center for Strategic and International Studies, Center for a New American Security (November 2007) 5. Biermann and Boas 2010 (n 16) 70 calculate that there will be 26 million 'climate refugees' by that time solely on account of rising seas.

[43] 'Hasina Highlights Unfortunate Plight of Climate Migrants', *The New Nation* (25 September 2010) http://nation.ittefaq.com/issues/2010/09/25/news0170.htm (accessed 29 September 2010).

[44] IOM (n 1) 31 (fn omitted).

[45] *Ibid*, 9.

bepress Legal Repository

natural disasters, which provide the best indicators of future movement.[46] Despite annual flooding, cyclones and coastal and riverbank erosion, there is no evidence of mass cross-border movement from Bangladesh. There is, accordingly, scant evidence to justify claims that mass outflows of Bangladeshi 'climate refugees'[47] will threaten international or regional security.[48]

Displacement by sudden extreme weather or climatic events is typically internal, short-term, and across short distances. Even longer-term migration is predominantly within Bangladesh itself, largely because people's poor socio-economic circumstances preclude them from undertaking cross-border journeys. Some will move intra-rurally, while a large number will move from rural to urban areas within Bangladesh. Temporary and circular migration is a common longer-term survival strategy.[49] It provides a 'safety net' by opening up alternative livelihood opportunities and allowing remittances to be sent back home to family members. Since the displaced remain citizens of Bangladesh and therefore entitled to the protections that flow from that status, they will likely be treated as a domestic concern and not within the purview of international attention.

Only very few of the poor—the people most heavily impacted by climate change—will move *irregularly* across an international border, and typically only if they have family links there.[50] In a study of people displaced by riverbank erosion, for example only five per cent of flood-affected rural households could afford to send people abroad.[51] A close sense of attachment to land, family and culture inhibits movement abroad,[52] and as one prominent human rights advocate wryly observed, 'not every poor farmer wants to go to Australia'.[53]

---

[46] See eg G Hugo, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific' in McAdam (ed) (n 7) 9.
[47] See eg 'PM Warns of Climate Refugee Crisis', *The Daily Star* (22 September 2010) http://www.thedailystar.net/newDesign/latest_news.php?nid=26005 (accessed 24 September 2010); Hasina Highlights Unfortunate Plight of Climate Migrants (n 42). Bangladeshi NGO network, EquityBD, which has from time to time used the 'climate refugee' terminology (see documents in n 15) says it now rejects this: interview with Md Shamsuddoha and Rezaul Karim Chowdhury (n 15).
[48] German Advisory Council on Global Change, *World in Transition: Climate Change as a Security Risk: Summary for Policy Makers* (Berlin, WBGU Secretariat, 2007) 6; P Schwartz and D Randall, 'An Abrupt Climate Change Scenario and Its Implications for United States National Security' (October 2003) 3, 17; CNA Corporation, 'National Security and the Threat of Climate Change' (2007) 44; Prime Minister Kevin Rudd, 'The First National Security Statement to the Australian Parliament' (4 December 2008), http://pmrudd.archive.dpmc.gov.au/node/5424 (accessed 5 October 2010). For more detailed analysis, see McAdam and Saul (n 7).
[49] CR Abrar and SN Azad, *Coping with Displacement: Riverbank Erosion in North-West Bangladesh* (RDRS Bangladesh, North Bengal Institute, and Refugee and Migratory Movements Research Unit, Dhaka, 2004) 113.
[50] Interview with Rizwana Hasan, BELA (Dhaka, 16 June 2010).
[51] See MZM Rahman, 'Emigration and Development: The Case of a Bangladeshi Village' (2000) 38 *International Migration* 109, cited in IOM (n 1) 24.
[52] Interview with Ahmed Swapan Mahmud, VOICE (Dhaka, 14 June 2010); Interview with Senior Official, Department of Environment, Ministry of Environment and Forests, Bangladesh (Dhaka, 14 June 2010); Interview with Mihir Kanti Majumder, Ministry of Environment and Forests, Bangladesh (Dhaka, 15 June 2010); Interview with Abul Kalam Azad, Research Director, Bangladesh Institute of International and Strategic Studies (Dhaka, 15 June 2010).
[53] Interview with Sultana Kamal, Director General of Ain o Salish Kendra (ASK) (Dhaka, 21 June 2010).

Institutional Repository

Hosted by The Berkeley Electronic Press

Those who move in a *regular* or lawful manner across borders will tend to be wealthier professionals, or less skilled workers who are nonetheless financially able to migrate for work abroad. In most cases, international migration will manifest as a pragmatic livelihood strategy rather than as a plea for formal international legal 'protection' from State harm or State failure in Bangladesh itself.

Finally, it should also be noted that physical adaptation measures are helping to prevent displacement in Bangladesh, such as where people have developed indigenous knowledge to raise their houses on plinths, protected their houses or land with flood defences, or adjusted their farming techniques (including by using flood-resistant strains of rice or by developing 'floating gardens' to deal with water-logging).[54]

2 Does climate change 'cause' movement?

It is conceptually problematic and empirically flawed in most cases to suggest that climate change alone *causes* migration. In both Bangladesh and the Pacific islands, it is inherently fraught to speak of 'climate change' as the 'cause' of human movement, even though its impacts may exacerbate existing socio-economic or environmental vulnerabilities.

Indeed, even in the so-called 'sinking islands', a simple climate change 'cause and effect' is not so straightforward, and motivations for movement even less so. Climate change will have an 'incremental impact', '*add[ing]* to existing problems' and 'compound[ing] existing threats'.[55] As one government official in Kiribati observed, climate change overlays pre-existing pressures—overcrowding, unemployment, environmental and development concerns—which means that it may provide a 'tipping point' that would not have been reached in its absence.[56]

Similarly, a Bangladeshi government official explained:

> Let's say for example, one person is able to carry only 40 kg on his shoulders. That's his limit, and he's a poor man. Now on the top of that, I come, and I give him one kilogram on top of that. So now the question will be is: who is responsible for killing him? Is this the 40 kilograms he was already carrying on his head, or the one kilogram I have now put on the top of that?[57]

From a policy perspective, it would seem both practically impossible and conceptually arbitrary to attempt to differentiate between those displaced people who deserve 'protection' on account of climate change, and those who are victims of

[54] IOM (n 1) 23.

[55] Interview with Saber Chowdhury MP, Member of the All Parliamentary Committee on Climate Change, Bangladesh (Dhaka, 21 June 2010).

[56] Interview with Kiribati Solicitor-General David Lambourne (Kiribati, 8 May 2009). However, in Tuvalu, there is a concern that if climate drivers are overshadowed by other factors such as general poverty, which have traditionally not given rise to a protection response by third States, efforts to achieve funding for adaptation and migration options for the future will be stymied. This was the impression given in the author's interview with Enele Sopoaga, Secretary for Foreign Affairs, Tuvalu (25 May 2009).

[57] Interview with Abu M Kamal Uddin, Comprehensive Disaster Management Programme (CDMP) (Dhaka, 16 June 2010).

bepress Legal Repository

http://law.bepress.com/unswwps-flrps10/art61

'mere' economic or environmental hardship. For example, in urban slums in Bangladesh, it is difficult to distinguish those who move from general poverty from those who are affected by climate change.[58] Furthermore, '[i]f poverty continues to be a major issue, and climate change intensifies poverty, then indirectly it's causing it, but not by itself.'[59]

For this reason, some researchers have argued that it is arbitrary to identify 'climate change' as a driver of forced migration, while omitting other causes such as poverty, general conflict, or lack of opportunity (especially since they may impact on the lives of even more people).[60] They instead prefer the term 'survival migration',[61] which shifts attention away from particular causes of movement and towards a more comprehensive understanding of the multiple stressors that may compel people to leave their home. Of course, there is danger that this notion is all-encompassing (just another term for 'forced migration') and thus conceptually indistinct and unworkable in practice. However, it is useful to bear its rationale in mind when thinking about international policy responses, and which institutions should be responsible for addressing climate-related movement.[62] In particular, one might query the appropriateness of singling out a category of 'climate-displaced people' in an international treaty, especially since much of the 'responsibility' for movement resulting from these other drivers may be similarly attributable to international structures (economic and political) that perpetuate an ever-growing divide between rich and poor countries, rather than to acts or omissions of the government in the country of origin. In other words, should displacement be addressed in terms of what drives it, or rather in terms of the needs of those who move?

Multicausality is not, of itself, a sticking point for devising a treaty. For example, if we look at the refugee context, although some States require refugees to show that 'persecution' is 'the essential and significant reason' for flight,[63] the Refugee Convention does not mandate this. Furthermore, the standard of proof in refugee law—a 'well-founded fear of persecution'—can be less than a 50 per cent chance.[64]

---

[58] Interview with SM Munjurul Hannan Khan, Deputy Secretary, Ministry of Environment and Forests and National Focal Point for the UNFCCC and IPCC, Bangladesh (Dhaka, 15 June 2010). Discussions with slum dwellers showed that some had moved on account of environmental degradation, but this was a very small sample and no firm conclusions can be drawn from it: Interviews in Shonamia *bosti* (slum) (Dhaka, 18 June 2010).

[59] Interview with Saber Chowdhury MP (n 54).

[60] These drivers are not presently recognized as giving rise to refugee status unless they amount to persecution for reasons of the claimant's race, religion, nationality, political opinion or membership of a particular social group: in other words, they have a differential impact on the claimant because of his or her marginalization.

[61] See A Betts and E Kaytaz, 'National and International Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime', *New Issues in Refugee Research*, Research Paper No 175 (2009).

[62] This is explored in J McAdam, 'Environmental Migration', in A Betts (ed), *Global Migration Governance* (Oxford University Press, Oxford, forthcoming).

[63] Migration Act 1958 (Cth), s 91R.

[64] *INS v Cardoza-Fonseca*, 480 US 421, 431 (1987); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992), para 42, states: 'In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.'

Boston College Law School Digital Commons

Hosted by The Berkeley Electronic Press

Thus, the assessment of the intensity, severity and nature of *future harm*, based on the individual's circumstances, is the key factor that leads to refugee status being granted. That assessment is not a prediction, but rather a *supposition*, based on the available evidence.

However, a climate change displacement treaty would necessarily require *a* link to climate change. This is where several causation hurdles would need to be jumped. First, the decision maker would need to assess the nature of the alleged harm feared, for example, lack of food due to salt-water intrusion on agricultural land. Secondly, the decision maker would need to determine whether the source of that harm (salt-water intrusion from king tides or sea-level rise) is attributable to climate change.[65] This would necessarily seem to require some degree of latitude, since it may take decades before scientists can verify 'climate change' as a cause of an event or process, as opposed to natural causes. Thirdly, the decision maker would need to assess whether that harm amounts to a violation of a human right for which a protection response is forthcoming (such as a violation of the right to life). Given that climate change is bound up with underlying socio-economic circumstances, the degree to which climate change can—and needs to be—singled out as a factor would need careful consideration. These levels of complexity could lead to considerable difficulty and inconsistency in decision making. And again, they raise the question: why is 'climate change' the key?

There is also a risk that focusing on climate change as the (or at least a) cause of movement may backfire. In May 2010, an article was published in *New Scientist* which suggested that the islands of Tuvalu and Kiribati were in fact growing, not disappearing.[66] Some media commentators suggested that this undermined Pacific island claims for assistance with resettling their people.[67] Similarly, the Carteret Islanders in Papua New Guinea have argued for a number of years now that they are at risk of disappearing as a result of rising sea levels caused by climate change, yet other scientific theories suggest that the islands are subsiding as a result of natural processes.[68] This is the problem with making 'climate change' the focus, especially when it is *not* the only factor impacting on movement—and movement will occur regardless. Acknowledging the *multi*causal nature of movement means that studies like these do not discredit discussions about projected movements, and do not set back research (and policy development) on the issue.

3 Political obstacles to a new treaty

Thirdly, these conceptual critiques are linked to a more pragmatic one: the fact that States presently seem to lack the political will to negotiate a new instrument requiring

---

[65] A particular difficulty with isolating climate change as a driver of migration is that in many cases, it will only be long after movement has occurred that it can be scientifically 'verified' as a cause: see eg A Suhrke, 'Environmental Degradation and Population Flows' (1994) 47 *Journal of International Affairs* 473.

[66] W Zukerman, 'Shape-Shifting Islands Defy Sea-Level Rise', *New Scientist*, issue 2763 (2 June 2010), referring to research by Paul Kench and Arthur Webb.

[67] R Callick, 'Coral Islands Left High and Dry', *The Australian* (11 June 2010) http://www.theaustralian.com.au/news/features/coral-islands-left-high-and-dry/story-e6frg6z6-1225878132101 (accessed 12 June 2010).

[68] J Campbell, 'Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land' in McAdam (ed) (n 7) 68.

Legal Repository

http://law.bepress.com/unswwps-flrps10/art61

them to provide international protection to additional groups of people. As one Bangladeshi Parliamentarian observed:

> I think the first thing, before you go into the protocols and structures, what I think is needed is political weight, whether the appetite is there for governments, especially in the developed world, the Annex I countries to address the issue in Bangladesh, because I think if you have that will, if you have that willingness, that acceptance ... then you can always work something out. I think one of the problems is that we're getting too involved in discussions on what sort of a structure we should have without first actually having the political will ... . So I think the Bangladeshi position is that first the countries have to accept the concept and once they accept it, then I'm sure we can find some sort of an adjustment.[69]

Given the legal obligations that States already have towards Convention refugees, and the fact that some 10 million refugees today, not to mention other displaced people numbering some 43.3 million in total,[70] have no durable solution in sight, why would States be willing to commit to, and realize protection for, people displaced by climate change?[71]

Perhaps the most compelling answer is that an instrument would provide a basis for calling for shared responsibility. For example, an individual State might perceive a need to respond to potential arrivals of people displaced by climate change, but be unwilling to unilaterally create legal avenues for their protection. Were it to elicit the support of other States in adopting a treaty, its humanitarian impulse could be coupled with mutual self-interest, in that it could call on other States to share the responsibility of caring for such people.[72] This is illustrated by the response of the Australian Labor Party, which (in Opposition) had proposed the creation of a Pacific Rim coalition to accept climate change 'refugees', and to lobby the United Nations to 'ensure appropriate recognition of climate change refugees in existing conventions, or through the establishment of a new convention on climate change refugees.'[73] When a Greens Senator proposed the extension of protection visas to 'climate refugees' in June 2007,[74] the Labor party was quick to note that without a collaborative approach with other countries, assuming such an obligation would be a unilateral act and therefore inconsistent with its idea of international action.[75] Indeed, this is one of the strongest

---

[69] Interview with Saber Chowdhury MP (n 54).

[70] UNHCR, *2009 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (UNHCR, Geneva, 2010) 1.

[71] UNHCR, among others, argues that there is a risk that if the Refugee Convention is opened up for renegotiation, we could see a reduction in protection overall: see quotes in Grant, Randerson and Vidal (n 14). However, this could be avoided by creating a Protocol rather than renegotiating the existing treaty text.

[72] That said, some of the States that host the largest numbers of refugees are not party to the Refugee Convention or Protocol.

[73] Australian Labor Party, *Our Drowning Neighbours: Labor's Policy Discussion Paper on Climate Change in the Pacific* (ALP, 2006) 10.

[74] See Migration (Climate Refugees) Amendment Bill 2007.

[75] See debates following Second Reading Speech in Parliament of Australia, *Senate: Official Hansard* (9 August 2007) 95ff. For the Labor government's present position with respect to climate change-related displacement from the Pacific, see Senate Foreign Affairs, Defence and Trade References Committee, *Economic Challenges facing Papua New Guinea and the Island States of the Southwest Pacific* (Commonwealth of Australia, Canberra, November 2009) paras 6.60–6.62. On 21 November

Hosted by The Berkeley Electronic Press

incentives for States to ratify such a treaty: it provides a basis on which they may take the moral high-ground, agitate for multilateral action, but also shift the 'burden' away from themselves alone on to the international community as a whole.

However, even if a treaty text could be agreed upon, its ratification, implementation and enforcement could not easily be compelled. As with the present refugee regime, problems of implementation—and durable solutions—stem predominantly from a lack of political will, rather than an absence of law. Despite the 147 States parties to the Refugee Convention and/or Protocol, the plethora of soft law relating to refugees, and an international agency (UNHCR) with a strong field as well as institutional presence, the displacement of millions remains unresolved.

In other words, a treaty per se does not 'solve' the problem. This is not an argument against the development of the law per se, but it highlights one of the key obstacles in achieving treaty-based solutions (at least in the short- to medium-term), as well as the limits of a treaty even if negotiated.

All these points relate back to the question how best to protect and promote the human rights of affected communities. While international human rights law principles should inform any decisions relating to movement, a protection-like response may not necessarily respond to communities' human rights concerns, especially those relating to cultural integrity, self-determination and statehood.[76] It may also obscure other human rights that need attention.

Together, these concerns suggest that the focus on a multilateral treaty to extend States' international protection obligations may not presently be the most appropriate mechanism for achieving outcomes for populations severely affected by the impacts of climate change. There is a risk that legally defining a 'climate refugee' category may lead to a hardening of the concept, simultaneously defining groups 'in' or 'out' of protection needs. Focusing attention on culturally-sensitive outcomes for people in particular contexts, which respond to the nature, timing and location of predicted movement within, from and to particular States, and their own views about how they want to be perceived,[77] may ultimately better facilitate a human rights approach to the phenomenon.

C GOVERNMENT ADVOCACY FOR INTERNATIONAL RESPONSES

Different governments have taken different approaches as to how the issue of climate change-related movement should be addressed at the international level. The government of Kiribati is keen to secure international agreements in which other States recognize that climate change has contributed to their predicament and

---

2009, a spokesperson for the then Climate Change Minister, Penny Wong, was reported as acknowledging that permanent migration may eventually be the only option for some people, which will need to be dealt with by governments in the region: A Morton, 'Land of the Rising Sea', *Sydney Morning Herald* (21 November 2009) http://www.smh.com.au/environment/land-of-the-rising-sea-20091120-iqub.html (accessed 27 November 2009).

[76] On which, see J McAdam, '"Disappearing States', Statelessness and the Boundaries of International Law' in McAdam (ed) (n 7).

[77] See McAdam and Loughry (n 28).

Bepress Legal Repository

acknowledge 'relocation' as part of their obligations to assist (in a compensatory way).[78]

By contrast, the governments of Tuvalu and the Federated States of Micronesia have resisted the inclusion of 'relocation' in international agreements because of a fear that if they do, industrialized States may simply think that they can 'solve' problems like rising sea levels by relocating affected populations, instead of by reducing carbon emissions, something which would not bode well for the world as a whole.[79] In December 2009, the Tuvaluan Prime Minister reiterated that his government rejected resettlement: 'While Tuvalu faces an uncertain future because of climate change, it is our view that Tuvaluans will remain in Tuvalu. We will fight to keep our country, our culture and our way of living. We are not considering any migration scheme. We believe if the right actions are taken to address climate change, Tuvalu will survive.'[80]

In September 2010, the Bangladeshi Prime Minister, Sheikh Hasina, warned that the mass movement of up to 30 million people in Bangladesh could lead to 'formidable social and even cross-border problems'. She proposed a joint South Asian initiative to mobilize international support under the UNFCCC Protocol to ensure the social, cultural and economic rehabilitation of climate change-induced displaced people.[81]

In this respect, it is interesting to note that in the last round of the pre-Copenhagen UNFCCC climate change talks in early November 2009, the final draft treaty text included two sections referring to human movement on which agreement had previously been unachievable. They called upon States to implement as part of their adaptation measures '[a]ctivities related to national, regional and international migration and displacement or planned relocation of persons affected by climate change, while acknowledging the need to identify modalities of inter-state cooperation to respond to the needs of affected populations who either cross an international frontier as a result of, or find themselves abroad and are unable to return owing to, the effects of climate change'.[82] They also called on States to 'jointly undertake action under the Convention to enhance adaptation at the international level', including through'[a]ctivities related to migration and displacement or planned relocation of persons affected by climate change, while acknowledging the need to

---

[78] Interview with President Anote Tong (n 29). See also the remarks of the Bangladeshi finance minister, Abul Maal Abdul Muhith, who prior to the 2009 Copenhagen climate conference stated: 'We are asking our development partners to honour the natural right of persons to migrate. We can't accommodate all these people': cited in J Vidal, 'Migration is the Only Escape from Rising Tides of Climate Change in Bangladesh', *The Guardian* (4 December 2009) http://www.guardian.co.uk/environment/2009/dec/04/bangladesh-climate-refugees/print (accessed 8 December 2009).

[79] Interview with Kiribati Solicitor-General David Lambourne (n 55).

[80] 'Prime Minister Apisai Ielemia Says Climate Change Threatens Tuvalu's Survival' (European Parliament Press Release, 10 December 2009) http://www.europarl.europa.eu/news/expert/infopress_page/028-66101-341-12-50-903-20091207IPR66100-07-12-2009-2009-false/default_en.htm (accessed 13 December 2009), quoting the Tuvaluan Prime Minister's comments to the Development Committee on 10 December 2009. See similar comments made by the government of Nauru when it was proposed that its population relocate to Australia in the 1960s, in McAdam (n 75) 124–26.

[81] 'PM Warns of Climate Refugee Crisis' (n 46).

[82] See Negotiating text, UN doc FCCC/AWGLCA/2009/14 (20 November 2009) para 12(c) (page 38) http://maindb.unfccc.int/library/view_pdf.pl?url=http://unfccc.int/resource/docs/2009/awglca7/eng/14.pdf (accessed 14 December 2009).

Digital Commons Repository

Hosted by The Berkeley Electronic Press

identify modalities of interstate cooperation to respond to the needs of affected populations who either cross an international frontier as a result of, or find themselves abroad and are unable to return owing to, the effects of climate change'.[83]

Though important statements of principle that identify the need for international cooperation in responding to any movement relating to climate change impacts, they fell short of articulating the precise measures through which such cooperation would be facilitated.[84] They were ultimately omitted from the final text agreed at Copenhagen.[85]

Interestingly, however, a more diluted reference to migration was back in the June 2010 text. The relevant paragraph invites (rather than obliges) States parties to enhance adaption action under the Copenhagen Adaptation Framework ('taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances'), by undertaking '[m]easures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation, where appropriate'.[86] It must be stressed that this is *not* an agreement by States to 'protect' people displaced by climate change. Rather, the provision references human movement within the much broader context of enhancing national action on adaptation; no guidance or mechanism (let alone obligation) is proposed in relation to how to translate enhanced 'understanding, coordination and cooperation' into *international* strategies.

D MIGRATION OPTIONS

Against this backdrop, some governments have turned their attention to planned migration options.

(a) Kiribati and Tuvalu

In Kiribati and Tuvalu, the development of labour, education and family migration pathways—as opposed to international protection-like responses—are considered to be better attuned to (a) the desires of people in those countries; (b) the likely patterns of climate change on the environment (slow and gradual) and patterns of movement

---

[83] *Ibid*, para 13(b) (page 56).

[84] Cooperation may take the means of fiscal as well as practical burden-sharing, as well as comprehensive approaches: see A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, Oxford, 2009) 138–71. However, scholars such as Fitzpatrick have lamented the prevalence of fiscal burden-sharing (as opposed to others) as a 'questionable substitute': see J Fitzpatrick, 'Temporary Protection of Refugee: Elements of a Formalized Regime' (2000) 94 *American Journal of International Law* 279, 291, cited in Hurwitz, 163.

[85] Copenhagen Accord (adopted 18 December 2009) http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf (accessed 19 January 2010); C Lawton, 'What about Climate Refugees? Efforts to Help the Displaced Bog Down in Copenhagen', *Spiegel Online* (17 December 2009) http://www.spiegel.de/international/europe/0,1518,druck-667256,00.html (accessed 19 January 2010).

[86] See Negotiating text, UN doc FCCC/AWGLCA/2010/6 (17 May 2010) para 4(f) (page 17) http://maindb.unfccc.int/library/view_pdf.pl?url=http://unfccc.int/resource/docs/2010/awglca10/eng/06.pdf (accessed 30 June 2010).

http://law.bepress.com/unswwps-flrps10/art61

(pre-emptive and gradual, rather than in response to a sudden catastrophic event); and (c) the history of movement in the region.[87]

The long-term strategy of the government of Kiribati is to secure 'merits-based migration' options to neighbouring countries Australia and New Zealand, so that those who wish to move have an early opportunity to do so.[88] In this way, the President hopes that 'pockets' of i-Kiribati communities will build up abroad and i-Kiribati culture and traditions will be kept alive. This would enable the gradual, transitional resettlement of i-Kiribati in other countries, so that if and when the whole population has to move, there would be existing communities and extended family networks which those left behind could join. The President makes it clear, however, that his government would be lobbying neighbouring States like Australia and New Zealand for migration opportunities *even if* the climate change threat did not exist, given the other underlying pressures at home. However, the spectre of climate change makes those negotiations all the more pressing.

By contrast, Tuvalu is seeking to focus its efforts on adaptation so that people can remain at home. However, officials also noted the general trend towards securing additional migration pathways for Tuvaluans.[89]

Given that most climate impacts in the Pacific will be slow-onset, interim migration measures that permit temporary and circular movement, on the understanding that a permanent migration outcome will ultimately be possible once relocation is imperative, may appeal to affected and receiving countries alike.[90] In this way, a small but sustained migration response may enable communities to remain living in their homes for longer, with certain members of the household working temporarily abroad to generate income that is fed back into the home community (and to assist with adaptation), new diaspora communities forming, and receiving States adapting over time. It is important that any such migration is reinforced by local adaptation mechanisms, since the migration of skilled workers may further deplete local human

[87] See eg J Connell, 'Paradise Left? Pacific Island Voyagers in the Modern World', in JT Fawcett and BV Cariño (eds), *Pacific Bridges: The New Immigration from Asia and the Pacific Islands* (Center for Migration Studies, New York, 1987); MD Lieber (ed), *Exiles and Migrants in Oceania* (University of Hawaii, Honolulu, 1977); SR Fischer, *A History of the Pacific Islands* (Basingstoke, Palgrave, 2002). For further discussion of this the climate change context, see J McAdam, 'Refusing "Refuge" in the Pacific: (De)constructing Climate-Induced Displacement in International Law', in E Piguet, A Pécoud and P de Guchteneire (eds), *Migration, Environment and Climate Change* (UNESCO/Cambridge University Press, Paris/Cambridge, forthcoming).

[88] Interview with President Anote Tong (n 29); see also L Goering, 'Kiribati Officials Plan for "Practical and Rational" Exodus from Atolls' *Reuters AlertNet* (9 December 2009) http://www.alertnet.org/db/an_art/60714/2009/11/9-181804-1.htm (accessed 13 December 2009), referring to remarks by i-Kiribati officials at Copenhagen.

[89] Interviews with Church leader in Tuvalu (identity withheld by request) (26 May 2009); The Rt Hon Sir Kamuta Latasi, Speaker of Parliament (Tuvalu, 27 May 2009); Tito Isala, Secretary Supernumerary, Office of the Prime Minister (Tuvalu, 22 May 2009), although the latter two suggested that this was partly part of an on-going historical process of migration from Tuvalu. Other officials described migration as being an option at the back of the government's mind, with adaption at the forefront: Kelesoma Saloa, Prime Minister's Private Secretary (Tuvalu, 25 May 2009); Enele Sopoaga, Secretary for Foreign Affairs (Tuvalu, 25 May 2009).

[90] It may also be more palatable for governments to absorb some migrants in traditional labour categories, rather than to acknowledge the drivers behind the movement. Part of the challenge is to 'sell' the solution domestically, both within the country of origin and the host country.

Boston College Law School Repository

Hosted by The Berkeley Electronic Press

resources (although may make a significant economic contribution through remittances, thereby increasing family resilience for those who remain).[91]

Such an approach builds on the historical migration patterns between Pacific countries and New Zealand, and these might constructively be developed as part of broader bilateral partnerships[92] and regional cooperation agreements.[93] Whereas New Zealand has long had special concessionary schemes for citizenship or permanent residence,[94] to promote economic development in Pacific island States, Australia has insisted upon a 'non-discriminatory' policy that does not (formally) privilege any national group.[95] Strategically, Australia and New Zealand would benefit from a more cooperative approach to migration, especially since many Pacific islanders view movement to New Zealand as the first step towards ultimately reaching Australia: once they obtain New Zealand citizenship,[96] they can freely travel to and work in Australia.[97]

(b) Bangladesh

International migration is just one of a number of strategies being pursued by the Bangladeshi government.[98] Adaptation remains the predominant focus. Indeed, as IOM has observed, though 'narratives of mass displacement are understandable in highlighting the potential long-term risks of failing to curb CO2 emissions globally, they should be approached with considerable caution as they risk undermining the case for investment and adaptation measures in vulnerable coastal regions to deal with very real existing vulnerabilities.'[99] At the same time, there has been an unfortunate tendency not to view migration itself as a legitimate adaptation strategy.

The Bangladeshi government's 2009 Climate Change Strategy and Action plan sets out three long-term action points to address internal and cross-border migration:

> A1. Development of a monitoring mechanism of internal and external migration
> A2. Development of a protocol to provide adequate support for their re-settlement and rehabilitation

---

[91] M Pelling and JI Uitto, 'Small Island Developing States: Natural Disaster Vulnerability' (2001) 3 *Environmental Hazards* 49.
[92] Such as New Zealand's five year Strengthened Cooperation Programme with Niue from 2004 to 2009.
[93] Such as the Niue Declaration on Climate Change, Annex B to Forum Communiqué, 39th Pacific Islands Forum, Alofi, Niue (19–20 August 2008) Doc PIFS(08)6.
[94] The 2002 Pacific Access Category, sometimes mistakenly described as a 'climate refugee' visa, is the most recent example; http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/ (accessed 10 October 2010).
[95] *Ibid*, v; Interview with Sir Kamuta Latasi (n 88), referring to Tuvalu's discussions in the mid-1990s with then Australian Prime Minister, Paul Keating. This is perhaps a reaction to its White Australia policy history and prior exploitation of Pacific labour through 'blackbirding' (forced recruitment).
[96] For people who obtained permanent residence post-21 April 2005, the waiting period is five years: http://www.dia.govt.nz/diawebsite.nsf/wpg_url/services-citizenship-general-requirements-for-a-grant-of-new-zealand-citizenship?opendocument#six (accessed 20 October 2010).
[97] 1973 Trans-Tasman Travel Arrangement; see also the Special Category Visa (SCV) for New Zealand citizens since 1994. See generally http://www.immi.gov.au/media/fact-sheets/17nz.htm (accessed 20 October 2010).
[98] For detailed analysis and further references, see McAdam and Saul (n 24).
[99] IOM (n 1) 11.

bepress Legal Repository

> A3. Building of capacity through education and training to facilitate their re-settlement in new environment.[100]

The last of these points is reminiscent of the President of Kiribati's notion of 'migration with dignity'. Indeed, elsewhere in the Plan, it is noted that because of existing population pressure on an already densely populated Bangladesh, 'migration must be considered as a valid option for the country. Preparations in the meantime will be made to convert this population into trained and useful citizens for any country.'[101]

This is reflected in the remarks of a member of the All Parliamentary Committee on Climate Change, who explained that rather than seeking refugee-like protection options for the displaced, Bangladesh would prefer to identify and expand labour migration opportunities:

> I think the Bangladesh position is it [migration] has to be managed and should ideally be a win–win, so an individual who's displaced ... isn't actually the individual who's migrating to another country, let's say the UK or USA. ... You can't look at it as a simple one-for-one where someone is displaced and that very person goes out. I don't think it's going to work that way.[102]

In other words, climate change-related movement is likely to have a domino effect. Those who move abroad may not necessarily be the ones most acutely or directly affected by climate change impacts, but move as an indirect result—as cities become overpopulated, resources are increasingly strained and life becomes increasingly intolerable. Thus, highly skilled, professional or business migration from Bangladesh is likely to increase as internal rural–urban movement places acute pressure on the infrastructure of cities like Dhaka and 'pushes' the relatively wealthy—eligible for education and work visas—to move abroad. As one interviewee explained,[103] this is not inappropriate: to relocate a poor farmer to a capital city in an industrialized country would not serve either well, yet to enhance migration options for the educated and well-resourced may in turn open up greater opportunities for those moving within Bangladesh. In this way, 'climate change migration' per se across international borders is likely to be an invisible phenomenon.

International migration is a central pillar of Bangladesh's long-term economic growth strategy and there are objectives to strengthen it.[104] Bangladesh already has considerable international labour migration to the Gulf States, Malaysia and North Africa, where some 5.5 million Bangladeshis work.[105] Kinship and community networks are very important, since earlier migrants often 'act as conduits to channel

---

[100] Government of the People's Republic of Bangladesh, *Bangladesh Climate Change Strategy and Action Plan* (Dhaka, September 2009)59.
[101] *Ibid*, 17.
[102] Interview with Saber Chowdhury MP (n 54).
[103] Interview with Sultana Kamal, ASK (n 52).
[104] IOM (n 1) 44, referring to Government of Bangladesh, *Second National Strategy for Accelerated Poverty Reduction* (2009, rev draft).
[105] IOM (n 1) 44, referring to *Bangladesh Economic Review 2008*; SR Rashid, 'Migration for Livelihood: Social Protection Issues of Rural Bangladeshis', in CR Abrar and J Seeley (eds), *Social Protection and Livelihoods: Marginalised Migrant Workers of India and Bangladesh* (The University Press Limited, Dhaka, 2009) 163.

Hosted by The Berkeley Electronic Press

later generations of movers to those destinations in an atmosphere of certainty.'[106] This process is said to account for 60 per cent of labour migration from Bangladesh to South East Asia and the Middle East.[107] Such emigrants work predominantly in semi- and low-skilled jobs on temporary contracts, meaning permanent settlement is virtually impossible. Migration is seen as a livelihood diversification and risk management strategy,[108] which may enhance the economic and social status of the migrant and his/her family, and thereby also facilitate marriage or education opportunities.[109]

Of course, international labour migration will not provide a mobility pathway for the poorest Bangladeshis affected by climate change, which is why a range of responses to climate change is essential. As one local NGO stated, 'those who will be affected the most unfortunately are not the skilled, so for them, the ability to move beyond the national boundary would be very difficult.'[110] However, the poor may benefit indirectly through remittances, which bring net wealth to the country, and as the better-resourced people take up opportunities overseas, so the capacity of urban centres to support internal migrants may gradually increase. In addition, there may be some limited opportunities to expand seasonal labour migration into India for the poor. This could provide reciprocal benefits: both by assisting India to meet labour shortages, as well as by opening up opportunities for Indian workers in Bangladesh (since it has been suggested that Bangladesh faces a shortage of skilled nurses which could be filled by Indians).[111] Greater cooperation towards a more mobile and flexible regional labour market could enhance prosperity in both countries.

Finally, aside from concerns expressed already about the inappropriateness of a 'protection'-oriented treaty to address the complexity of movement in Bangladesh, there are some practical factors that could inhibit any calls by the Bangladeshi government for such a response. First, suggestions that climate change will overwhelm and incapacitate the country sit uneasily with the government's perception of itself as a world leader in disaster early-warning responses and management. Secondly, for historical and political reasons, the official line of the Bangladeshi government is that there is no unauthorized migration between Bangladesh and India. Talking up the numbers of people who might be displaced by climate change does not sit well with the government's position that no-one needs to leave Bangladesh. Thirdly, Bangladesh has not ratified the Refugee Convention, which could further undermine any call for an international protection response towards its own citizens—especially since refugees are typically regarded by the government as 'illegal migrants', an economic cost and a threat to security.[112]

---

[106] T Siddiqui and MJU Sikder, 'Rural to Urban Migration for Domestic Work in Bangladesh', in Abrar and Seeley (ed) (n 104) 58.
[107] *Ibid.*, referring to Bureau of Manpower Employment and Training (2006).
[108] Rashid (n 104) 165 and citations there.
[109] *Ibid*, 166.
[110] Interview with Rizwana Hasan, BELA (n 49); see also interview with SM Munjurul Hannan Khan, Ministry of Environment and Forests (n 57).
[111] Interview with Professor Chowdhury R Abrar, Refugee and Migratory Movements Research Unit, University of Dhaka (Dhaka, 14 June 2010).
[112] Interview with Dr Hameeda Hossain (Dhaka, 14 June 2010) ; interview with anonymous international official, UNHCR (Dhaka, 17 June 2010).

Bepress Legal Repository

E CONCLUSION

A treaty is sometimes posited as the answer to climate change-related displacement, but it is dangerous to see it in this way. Any treaty is necessarily an instrument of compromise, and even once achieved, States must demonstrate sufficient political will to ratify, implement and enforce it. While international law provides important benchmarks and standards to regulate State action, they must be supported by political will and action to be fully effective. As Aleinikoff argues, 'there can be no monolithic approach to migration management. Some areas might well benefit from norms adopted by way of an international convention; guiding principles might work best for areas in which a consensus is further away'.[113]

Part of the problem may lie in the disciplinary constraints of international law and international relations. At their very core lies the objective to universalize—to create norms that take the 'particular' to a level of general applicability, that make individual rights 'human rights' at one and the same time. The risk is, of course, that if this is done without sufficient empirical understandings or foresight, we arrive at a level of generality that is too vague, and which cannot be translated into practical, rational policies and normative frameworks. It is clear that legal gaps exist,[114] but they should be first addressed by a dispassionate, careful appraisal of the empirical evidence, rather than motivated by an assumption that existing frameworks should be extended. This is a risk of (prematurely) concentrating the diverse impacts of climate change on human movement into calls for treaties and the like. The local and the particular do not always speak well to an international law or governance agenda, where the 'cascading' effect requires broad, universalizing statements. A related critique might be the legal approach's tendency to create rights-based frameworks, which cannot always respond directly or adroitly to primarily needs-based problems.

On the other hand, international law retains sufficient flexibility to respond to particular scenarios through bilateral and regional agreements. In my view, this is where attention would best be focused initially. Although national and regional responses may not seem as gratifying for some as securing a universal international treaty on climate-related movement, they may in fact be able to more swiftly and effectively provide targeted outcomes, which respond as particular scenarios in particular geographical areas unfold. Pursuing more bilateral and regional 'economic' migration opportunities would also help address underlying problems relating to scarce resources, overcrowding, rapid urbanization and environmental degradation.

At this stage, it seems more probable that the development of regional soft-law declarations, such as the Niue Declaration on Climate Change,[115] will provide a more effective springboard for developing responses, than will a new international instrument aiming to take into account the interests of all States in a wide variety of

[113] TA Aleinikoff, 'International Legal Norms on Migration: Substance without Architecture' in R Cholewinski, R Perrechoud and E MacDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (The Hague, TMC Asser Press, 2007) 476.

[114] Although as Kälin notes (n 7), perhaps fewer than some believe, given that a lot of movement will be internal.

[115] See n 88. See also A Betts, 'Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants' (2010) 22 *International Journal of Refugee Law* 209.

Bepress Legal Repository

Hosted by The Berkeley Electronic Press

contexts. At the normative level, we already have clear frameworks to guide such actions—the human rights law regime is the most relevant and important.

For these reasons, this article should not be interpreted as rejecting a treaty-based regime altogether, or the underlying basis of such a regime: that States ought to provide assistance to certain people who are unable to remain in their homes. International cooperation on climate-related movement is sorely needed.[116] Rather, the purpose of the article is to caution against squeezing all forms of 'forced' movement into a protection paradigm, since this may not best address the patterns or needs of those who move.[117] Responses would be better be achieved by focusing on States' burden-sharing obligations to each other, and their responsibility to the international community as a whole. Of course, this sidesteps the much larger issue whether the maintenance of a privileged legal status for certain categories of displaced people is ethically and/or legally defensible,[118] a matter that is beyond the scope of this article.

The International Organization for Migration has observed that while 'narratives of mass displacement are understandable in highlighting the potential long-term risks of failing to curb CO2 emissions globally, they should be approached with considerable caution as they risk undermining the case for investment and adaptation measures in vulnerable coastal regions to deal with very real existing vulnerabilities.'[119] From an advocacy perspective, one can appreciated that lobbying for a 'climate refugee' treaty may successfully generate attention and mobilize civil society such that the issue of climate-related movement becomes one that States cannot ignore. Policy itself may be generated because of the lobbying process, and having the maximalist option of a treaty on the table may paradoxically encourage States at least to negotiate more minimalist responses, as a compromise or fallback position. Nevertheless, it is imperative that advocacy is well-informed, because if there is an absence of rigorous analysis and empirical evidence to support claims being made,[120] it will not achieve its ends. Indeed, messy work may lead to a backlash and attempts to discredit the phenomenon of climate change--related movement altogether.

---

[116] The UN High Commissioner for Refugees suggests that: 'A development-oriented approach is now required in response to displacement, emphasizing the inclusion of the most vulnerable and marginalized sections of society in efforts to ensure that they benefit from the livelihoods, services and security to which they are entitled': A Guterres, 'Bracing for the Flood', *The New York Times* (Op-Ed, 10 December 2009) http://www.nytimes.com/2009/12/11/opinion/11iht-edguterres.html?_r=1&emc=eta1 (accessed 14 December 2009).

[117] As the UN High Commissioner for Refugees has noted, given that most displacement is predicted to be internal, primary legal responsibility for ensuring people's rights will lie with the States concerned: *Ibid.*

[118] See eg the recent work of Matthew Price, who argues that limiting asylum to people who face persecution is ethically justifiable: ME Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press, Cambridge, 2009); JC Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 *Journal of Refugee Studies* 349; cf A Shacknove, 'Who is a Refugee?' (1985) 95 *Ethics* 274.

[119] IOM (n 1) 11.

[120] See eg Christian Aid, *Human Tide: The Real Migration Crisis* (May 2007).

bepress Legal Repository

http://law.bepress.com/unswwps-flrps10/art61