

Climate change and displacement: protecting ‘climate refugees’ within a framework of justice and human rights

Sumudu Atapattu

Director, Research Centers and International Programs, University of Wisconsin Law School, Executive Director, Human Rights Program, UW-Madison, Affiliated Faculty, Raoul Wallenberg Institute for Human Rights, Sweden, and Lead Counsel for Human Rights, Center for International Sustainable Development Law, Montreal, Canada

One of the far-reaching consequences of climate change relates to the forced displacement of people. Climate-induced migration is a very complex issue. The New York Declaration for Refugees and Migrants noted the varied reasons for migration as being armed conflict, poverty, food insecurity, persecution, terrorism, human rights violations, climate change and natural disasters. Despite the recognition in the very first IPCC report in 1990 that the greatest single impact of climate change could be on human migration, it took climate negotiators over two decades to include displacement in climate documents. This article discusses complexity, scale and displacement scenarios, paying particular attention to the plight of small island states and to the climate-conflict-displacement nexus. It analyses the legal regime applicable to political refugees under international law and the current legal lacuna with regard to climate refugees. It surveys recent developments including the Global Compact on Migration, and the Task Force on Climate Displacement. This article argues that while current human rights law provides some protection, it is insufficient, and that the international community should take urgent action to design a legal regime to protect the rights of climate displacees. This is especially true of inhabitants of small island states who will be forced to move because their states are ‘disappearing’. The article argues that major emitters owe a legal duty to help climate displacees and especially the inhabitants of small island states.

Keywords: *climate refugees, small island states, Task Force on Climate Displacement, Nansen Initiative, Sendai Framework on Disaster Risk Reduction, Geneva Convention on Refugees, dignity rights*

If climate change makes our country uninhabitable ... we will march with our wet feet into your living rooms.

Atiq Rahman at COP1 in Berlin, 1995¹

1. See Marissa S Knodel, ‘Wet Feet Marching: Climate Justice and Sustainable Development for Climate Displaced Nations in the South Pacific’ (2012) 14 Vermont Journal of Environmental Law 127 at 128.

1 INTRODUCTION

One of the far-reaching consequences of climate change relates to the forced displacement of people.² Climate-induced migration is a very complex issue.³ The New York Declaration for Refugees and Migrants noted the varied reasons for migration as being armed conflict, poverty, food insecurity, persecution, terrorism, human rights violations, climate change and natural disasters.⁴ While human mobility overall has increased in recent years, more troubling are the numbers of refugees and forcibly displaced persons – there are approximately 65 million forcibly displaced persons, including over 21 million refugees, three million asylum seekers and over 40 million internally displaced persons.⁵ One of the consequences of climate change is the increased incidence of disasters and severe weather events. In 2018 alone, 17 million more people were displaced due to disasters.⁶ While it is challenging – because of its complexity – to determine the exact numbers of those who will in the future be displaced by climate change, some believe that this number may be as high as 1.5 billion people by 2050.⁷ The International Organization for Migration acknowledges that there are no reliable estimates: future forecasts vary from 25 million to 1 billion environmental migrants by 2050 – with 200 million being the most widely cited estimate.⁸ Even the lower range of this estimate is bound to cause disruptions to the global order – and the overall number will likely increase if the inhabitants of small island states are added. At some point in the future, many of these people will be forced to move to safe places due to increased severe weather events as well as sea level rise. At the same time that climate change makes migration more probable, millions of people may be *unable* to move away from vulnerable zones for economic, political and social reasons.⁹ It is

2. Cf Dimitra Manou et al. (eds), *Climate Change, Migration and Human Rights: Law and Policy Perspectives* (Routledge 2017) who believe that climate-induced migration of millions of people is one of the most disputed impacts of climate change.

3. See Foresight, ‘Migration and Global Environmental Change: Future Challenges and Opportunities’, The Government Office for Science, London (2011); Benoit Mayer and François Crepeau, ‘Introduction’, in Benoit Mayer and François Crepeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar 2017); Manou et al., supra (n 2); Benoit Mayer, *The Concept of Climate Migration* (Edward Elgar 2016); Simon Behrman and Avidan Kent, ‘Climate Refugees’: *Beyond the Legal Impasse?* (Routledge 2018); Simon Behrman and Avidan Kent, *Facilitating the Resettlement and Rights of Climate Refugees* (Routledge 2018).

4. New York Declaration for Refugees and Migrants (2016), <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1>.

5. Ibid.

6. <<https://rwi.lu.se/2019/06/global-platform-disaster-risk-reduction/>>.

7. See IOM, Migration, Climate Change and the Environment, Policy Brief (2009), <https://www.iom.int/sites/default/files/our_work/ICP/IDM/iom_policybrief_may09_en.pdf> and Izzie Ramirez, ‘Climate Change Will Create 1.5 Billion Migrants by 2050 and We Have No Idea Where They’ll Go’ (Sept 12, 2019), referring to a report by the UN University, <https://www.vice.com/en_us/article/59n9qa/climate-change-will-create-15-billion-migrants-by-2050-and-we-have-no-idea-where-theyll-go>.

8. See IOM, *ibid.*, and Foresight, ‘Environmental Migrants: Up to 1 Billion by 2050’, <<https://www.climateforesight.eu/migrations/environmental-migrants-up-to-1-billion-by-2050/>>. The World Bank estimates that 143 million people will be internally displaced by 2050 if no action is taken. See *Groundswell: Preparing for Internal Climate Migration* (2018), <<https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell—preparing-for-internal-climate-migration>>.

9. Foresight report, executive summary, supra (n 3).

just as necessary, therefore, to address these ‘trapped populations’¹⁰ as it is to address the numbers and struggles of climate refugees.

Despite the recognition in the very first IPCC report in 1990 that the greatest single impact of climate change could be on human migration,¹¹ it took climate negotiators over two decades to include displacement in climate documents. Indeed, the first time that displacement associated with climate change was mentioned in climate documents was at COP16 in Cancun. The state parties, stressing that adaptation must be addressed with the same priority as mitigation, invited all parties to undertake, inter alia, ‘measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels’.¹² COP16 was also the first time that reference was made to human rights in connection with climate change: ‘Parties should, in all climate change related actions, fully respect human rights’.¹³

At COP21, the parties requested the Executive Committee on Loss and Damage to establish a task force on displacement associated with climate change and to ‘develop recommendations for integrated approaches to avert, minimize and address displacement related to adverse impacts of climate change’.¹⁴ Moreover, the Paris Agreement recognized the need to protect, inter alia, ‘migrants’,¹⁵ in addition to recognizing that states should respect their human rights obligations when taking action to address climate change.¹⁶ Climate negotiators have been extremely adept, however, at ignoring the elephant in the room.¹⁷ The reasons for inaction seem to be political, and to be driven by the fear that the main emitters could be compelled to open their doors to climate refugees. Notwithstanding this political inaction, the justice principles discussed in section 5 of this article do – as will be argued below – require the main emitters to correct past wrongs and provide relief to victims.

This article proceeds in six parts. Section 2 discusses complexity, scale and displacement scenarios, paying particular attention to the plight of small island states and to the climate-conflict-displacement nexus. Section 3 analyses the legal regime applicable under international law to political refugees and the current legal lacuna with regard

10. The Foresight report notes that ‘planned and well-managed migration’ can be one important solution for this group of people.

11. IPCC (1990) *1st Assessment Report: Summary for Policy Makers*, <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>>. See Elizabeth Ferris, ‘Governance and Climate Change-Induced Mobility: International and Legal Frameworks’, in Manou et al. (eds), *Climate Change, Migration and Human Rights*, supra (n 2) p. 11, who points out that despite this recognition by the IPCC, ‘there is little evidence on who, when, where, why, how or how many people will move’.

12. Report of the Conference of the Parties on its sixteenth session, held in Cancun, FCCC/CP/2010/7/Add.1, 15 March 2011, <<https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>>.

13. *Ibid.*, para 8.

14. Decision CP/12, see UNFCCC, Decisions adopted by the Conference of Parties (December 2015), FCCC/CP/2015/10/Add.1, <<https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2>>.

15. Preamble, Paris Agreement. It is not clear whether ‘migrants’ here means just labor migrants or all those who are displaced as a result of climate change generally.

16. Preamble, Paris Agreement.

17. See Ferris, supra (n 11), 12.

to climate refugees. Section 4 surveys recent developments including the Global Compact on Migration, the Task Force on Climate Displacement, the Sendai Framework for Disaster Risk Reduction, and the Nansen Initiative and the Platform for Disaster Displacement. Section 5 discusses the role of human rights, and of the dignity and universality principles, the justice framework, the just transition framework, and the concept of migration with dignity. The article concludes by arguing that a rights and justice approach, together with the common but differentiated responsibility principle, should form part of the legal framework governing climate refugees.

Drawing on my previous work on this topic¹⁸ I argue that while current human rights law provides some protection to climate displacees, it is insufficient. I argue that the international community should take urgent action to design a legal regime to protect the rights of this category of people, who are forced to migrate due to no fault of their own. This is especially true of inhabitants of small island states who will be forced to move because their states are ‘disappearing’. I argue that major emitters owe a legal duty to help climate displacees and especially the inhabitants of small island states. Moral and ethical responsibility aside, the legal basis for this argument is based on: (a) the common but differentiated responsibility principle, which recognizes the greater responsibility of industrialized countries in relation to climate change;¹⁹ (b) the collective responsibility of the international community that underlies the legal regime governing refugees; (c) the legal recognition of the inherent dignity of human beings irrespective of their nationality; (d) the principle of international cooperation that underlies the international legal system and forms one of the founding purposes of the UN;²⁰ and (e) principles of distributive, procedural and corrective justice,²¹ especially in relation to small island states and their inhabitants. This article specifically addresses the issue of forcible displacement across borders even though reference will be made to other forms of displacement to put the discussion in context.

A common myth concerning forcible displacement is that these displaced people will flock to countries in the Global North in search of a better life; yet, in reality, the countries that host the greatest number of refugees and displaced persons are, in fact, in the Global South – Turkey, Pakistan and Lebanon were the top three hosts of refugees in 2015.²² These countries are already struggling to cope with the day-to-day functioning of their own populations, let alone with several millions of additional refugees. This fact alone raises the further question of the responsibility of the international community, especially in the context of responding to the urgent needs and escalating numbers of climate refugees.

18. See Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2016), Chapters 6 and 9; ‘A New Category of Refugees? “Climate Refugees” and a Gaping Hole in International Law’, in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 34.

19. See Article 3 of the UNFCCC and Principle 7 of the Rio Declaration on Environment and Development (1992), A/CONF.151/26 (Vol. I), <<https://www.un.org/documents/ga/conf/151/aconf15126-1annex1.htm>>.

20. See Article 1(3), UN Charter.

21. See section 5 for a discussion of the justice framework.

22. See World Atlas, Countries with the Largest Refugee Populations, <<https://www.worldatlas.com/articles/countries-hosting-the-largest-number-of-refugees-in-the-world.html>>.

2 COMPLEXITY, SCALE AND DISPLACEMENT SCENARIOS: IDENTIFYING IMPORTANT CHALLENGES

2.1 Challenge 1: the scale and characterization of the problem

Because climate change is not the only driver of migration and displacement, it is difficult to find accurate numbers of people who will be forced to move as a result of climate change. Migration is often portrayed both as a coping mechanism and as an adaptation strategy.²³ While at the individual level this may be so, climate change is predicted to give rise to forced displacement on a scale hitherto unseen, and portraying migration as an adaptation strategy also ignores the plight of ‘trapped populations’ and of indigenous peoples whose culture is intimately tied to the land that they inhabit.

Various terms have been used to describe those forced to move due to adverse consequences associated with climate change.²⁴ Without a settled or agreed term to describe such displaced people, it would be difficult to design either a legal framework or to adopt a governance structure.²⁵ The term chosen, moreover, will have justice-based implications: the UNFCCC refers to ‘displacement related to the adverse impacts of climate change’,²⁶ while the term ‘human mobility’²⁷ is increasingly gaining ground as a catch-all phrase to address all movement – voluntary, forced, internal and cross-border – unhelpfully blurring the various different categories of people who are forced to move as well as the reasons why they move. There is a vast – and ethically significant – distinction, for example, between a person from a small island state moving because his/her home is no longer habitable and somebody who is moving to another country to take up a lucrative job. Thinking of displacement in terms of ‘human mobility’ obscures the underlying hardships and the associated trauma when people are forced to move. It is essential, therefore, to attend to such underlying factors – and to reflect them when framing legal responses.

2.2 Challenge 2: facing the climate-conflict-migration nexus

Violence/conflict is a significant push factor driving forced migration,²⁸ but is not always adequately highlighted in the existing categories of factors that drive

23. See Foresight report, *supra* (n 3), 10, which notes that migration can represent a ‘transformational’ adaptation to environmental change and can be a very effective way to build long-term resilience.

24. These include: climate refugees (the most popular), climate migration, climate displacement, forcible climate displacement, and forced, voluntary and circular movement. See *IOM Outlook on Migration, Environment and Climate Change* (2014), <https://publications.iom.int/system/files/pdf/mccc_outlook.pdf>.

25. See Ollie Brown, Human Development Office Occasional Paper (2007) 7, United Nations Development Programme, <<https://www.unitar.org/ny/sites/unitar.org/ny/files/humandevopmentreport07-08%20fightingclimate%20change.pdf>>, who points out that ‘which definition becomes generally accepted will have very real implications for the obligations of the international community under international law’.

26. See *supra* (n 15).

27. See Global Compact for Safe, Orderly and Regular Migration (2018), available at: <https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf>, discussed in section 4, *infra*.

28. See New York Declaration, *supra* (n 4), Article 1.

displacement. Existing frameworks on migration define five categories of factors that affect migration flows: (a) economic drivers; (b) political drivers; (c) demographic drivers; (d) social drivers; and (e) environmental drivers.²⁹ Often these factors interact with one another and the climate-conflict-migration nexus could be a combination of several of these drivers. It is essential, however, to see the role of conflict itself in this nexus: with increased scarcity of food and water and reduced agricultural yield due to climate change, conflicts over these resources are expected to increase. Such scarcity and conflict will, in turn, drive people into other areas in search of food and water, which is likely, in turn, to create or exacerbate conflicts in the new area. Such resource conflicts can give rise, therefore, to a vicious cycle of migration, conflicts and poverty – which will be compounded by the adverse consequences of climate change.³⁰ Syria, for example, demonstrates the realities of conflict and forced migration, with climate change acting as a threat multiplier – and its sometimes underappreciated implications for political instabilities and social unrest: ‘Recent studies of the Syrian uprising have shown that growing water scarcity and frequent droughts, coupled with poor water management, led to multiyear crop failures, economic deterioration and consequently mass migration of rural families to urban areas’.³¹ Climate change has exacerbated this situation by increasing water scarcity and severe weather events, yet despite these very real patterns, in Syria and elsewhere, the complex relationship between climate change, conflict and forced migration remains understudied.³²

2.3 Challenge 3: small island developing states and their inhabitants

The special situation of small island developing states (SIDS) and their people needs particular attention, as they pose unique and complex questions of international law relating to sovereignty and territory (including maritime territory), nationality, identity, self-determination and continued existence as a sovereign nation – in addition to humanitarian concerns.³³ Sea level rise due to melting glaciers and thermal expansion, both associated with warmer temperatures, poses a direct challenge to these low-lying island nations, many of which are barely above sea level. Moreover, severe weather events associated with climate change are already creating hazardous conditions for the inhabitants of these islands, and some scholars believe that these islands could become uninhabitable long before the islands themselves disappear,³⁴ thereby depriving these nations of the critical component of a ‘population’ (which is required

29. See Andrew Geddes et al., ‘Migration, Environmental Change, and the “Challenges of Governance”’ (2012) 30 *Environment and Planning C: Government and Policy* 951 at 955.

30. See Guy J Abel et al., ‘Climate, Conflict and Forced Migration’ (2019) 54 *Global Environmental Change* 239, who point out that the complex relationship between climate change, conflict and forced migration needs more empirical study.

31. *Ibid.* The experience of Haiti illustrates the complex nature of migration and the role played by an oppressive government. Not only have Haitians been fleeing political oppression, they have also been driven by massive degradation of resources.

32. *Supra* (n 30).

33. See Michael B Gerrard and Gregory E Wanier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013); Atapattu, *supra* (n 18), Chapter 9; Alexandra Torres Campurbi, *Statehood Under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill 2016).

34. See Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press 2010) 131.

for statehood).³⁵ Tuvalu, for example, is facing a shortage of fresh water³⁶ and Tuvaluans may be forced to move if this situation continues or worsens. The inhabitants of SIDS are facing the prospect of losing everything they have, including their state, which is the legal protector of their rights under international law. Without the protection of the state, who will ensure their rights? Will these populations become stateless? Will the states themselves legally ‘disappear’ when their land territory disappears or population dwindles? Statehood is, of course, a legal fiction, but the implications of such exigencies and possibilities mean that the legal community should adopt novel principles and frameworks to accommodate SIDS that might lose one or more attributes of statehood, yet need to continue to exist as states.³⁷

3 THE LEGAL LANDSCAPE: THE CONSTRUCTION OF ‘REFUGEES’

In addition to the challenges just enumerated, there is a further characteristic of the legal landscape that presents a challenge: the construction of refugees – and the limitations of the legal regime for their protection. Here again, climate change operates as a significant factor – and, as will be discussed, is not yet recognized as a legally cognizable basis for refugee status, a fact presenting a significant challenge to achieving climate justice.

3.1 Political refugees

Traditional (or political) refugees – those who seek refuge in another state when subjected to persecution by their own state – is the best-known category of people who are forced to move. This category of refugee, as is well known, has well-established protective mechanisms addressing their status. The Geneva Convention Relating to the Status of Refugees of 1951³⁸ was adopted in the aftermath of the Second World War to deal with the influx of millions of refugees in Europe. The operative part of its definition of refugees is *a well-founded fear of being persecuted* on grounds enumerated in the Convention. Environmental factors, however, do not fall within this definition.

In certain instances, people fleeing a conflict situation exacerbated by climate change might be able to satisfy the relevant criteria for recognized refugee status, but this will be the exception rather than the rule.³⁹ Some may be able, in some circumstances, to leverage the principle of non-refoulement – the cornerstone of the

35. See Christopher R Rossi, ‘The *Nomos* of Climate Change and the Sociological Refugee in a Sinking Century’ (2018) 50 *Geo Wash. Int’l L. Rev* 613.

36. *Ibid.*

37. See Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era’ (2011) 2 *Climate Law* 345, who proposed the concept of nations ex situ in relation to SIDS.

38. Geneva Convention Relating to the Status of Refugees, 1951. Initially confined to refugees during World War II, the Convention was extended by Protocol in 1967 to encompass all political refugees.

39. The grave human rights and environmental rights violations of the Ogoni people in Nigeria caused by the military government in developing oil in Ogoniland may provide an example of persecution resulting from environmental damage. See F Coomons, ‘The Ogoni Case before the African Commission on Human and Peoples’ Rights’ (2003) 52 *International and Comparative Law Quarterly* 749, <<http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>>.

refugee framework – which prohibits states from returning a person to a place if their life or freedom would be threatened.⁴⁰ This principle could potentially be used in relation to climate refugees where it is dangerous, for example, to send people back to their place of origin due to the adverse consequences of climate change. Inhabitants of small island states and those living on coastal or flood prone areas could arguably fall within this category.

Even if such innovations within the limits of the current refugee protection regime were possible, climate and environmental refugees would face the important legal lacuna presented by other well-known limitations of international legal protection. While international human rights law recognizes ‘the right to seek and to enjoy in other countries asylum from persecution’,⁴¹ there is no corresponding duty on states to *accord* asylum, which is governed by the national law of states. Thus, refugees face additional challenges: in addition to satisfying the criteria of qualifying for the status of a refugee under the Geneva Convention, those seeking asylum must also satisfy the criteria established under the national law of an individual nation state, criteria that could be even more stringent than those under the Geneva Convention.⁴² Indeed, states are becoming increasingly paranoid about national security and the protection of their borders – and it remains to be seen how members of the international community will cope with a large influx of climate refugees in the numbers that are being predicted currently. In short, it seems that neither national and international law nor institutions are equipped to deal with such numbers.⁴³

3.2 Climate refugees

Climate refugees face further problems in obtaining legal protection. ‘Climate refugees’ is not a legal term; nor is there a legal regime governing climate-displaced persons. The term ‘climate refugees’ simply describes those who are forced to migrate because of the adverse consequences associated with climate change. As noted above, there is not even consensus on what to call the category of climate-displaced people. However, although various terms have been used by scholars and activists, ‘climate refugees’ currently remains the most popular term in use.⁴⁴ It should also be noted that the ‘climate refugee’ falls within the larger category of ‘environmental refugees’⁴⁵ – even though that category is also currently unprotected under international law.

40. This is referred to as ‘complementary protection’ which precludes the non-refoulement of people who would be at the risk of persecution, torture, or cruel or inhuman treatment or punishment. Article 33(1), Geneva Convention on Refugees. See Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) and the UNHCR explanation, <<https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>>.

41. Article 14, UDHR (1948), available at: <<https://www.un.org/en/universal-declaration-human-rights/>>.

42. See McAdam, *supra* (n 34), 1.

43. *Ibid*, 32.

44. See Manou et al., *supra* (n 2), who note that climate migration has many faces.

45. Climate refugees is a sub-set of environmental refugees. The term ‘environmental refugees’ was first coined by El-Hinnawi of UNEP to recognize those who are forced to move due to environmental factors. See Norman Myers, ‘Environmental Refugees: A Growing Phenomenon of the 21st Century’, *The Royal Society* (2001), published online at: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1692964/pdf/12028796.pdf>> (2002) 357, 609–13.

The related complexities do not end there. Many believe that most climate-related displacement will be internal.⁴⁶ As such, legal frameworks need to protect displaced people both within and outside their home country. The displacement scenarios are multiple, moreover: the UN Office of the High Commissioner for Human Rights (OHCHR) in its report on climate change and human rights identified four displacement scenarios: (a) weather-related disasters (sudden events); (b) gradual environmental deterioration and slow onset disasters;⁴⁷ (c) increased disaster risks and relocation of people from high-risk zones; and (d) social upheaval and violence attributable to climate change-related factors.⁴⁸ It is heartening to see such clear recognition of the under-appreciated nexus noted above between climate change, conflict and displacement. Climate change is a threat multiplier and that those who are already in vulnerable situations are affected disproportionately. This makes full, legal responsiveness to climate refugees urgent and ethically important.

Climate-induced displacement could take many forms.⁴⁹ However, the most challenging situation to address is permanent displacement across borders.⁵⁰ While those who are displaced internally due to climate-related events have some protection under the Guiding Principles on Internal Displacement, which provides a useful framework,⁵¹ when people affected by sudden-onset disasters cross the border into neighbouring states the situation becomes more problematic.

46. See World Bank report, *supra* (n 8); and McAdam, *supra* (n 34), 19. Cf Benoît Mayer, 'Environmental Migration: Prospects for a Regional Governance in the Asia-Pacific Region' (2013) 16 *Asia Pacific Journal of Environmental Law* 77 at 78, who claims that 'all environmentally induced migrants will be displaced within the borders of their own state' (emphasis added). This, however, is over-simplistic. The protection gap exists with regard to those who cross an international border. If all environmental refugees remain within national borders, then there is no need to design a global (or regional) governance regime to govern them as their own state is responsible for them.

47. Slow onset events such as sea level rise or desertification do not fall within 'disasters'.

48. OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009), A/HRC/10/61, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>>.

49. See Report of the Special Rapporteur on the Human Rights of Migrants, A/67/299, 13 August 2012, available at: <http://oppenheimer.mcgill.ca/IMG/pdf/Report_of_Special_Rapporteur_to_General_Assembly_-_A-67-299_English.pdf>, para 46.

50. A useful typology of possible scenarios is offered by Kalin to understand climate-induced migration: (a) sudden-onset disasters; (b) slow-onset environmental degradation leading to decreased economic opportunities – deteriorating conditions may make certain places uninhabitable, and in this situation population movement will result in forced displacement and become permanent; (c) small island states – in extreme cases these countries will disappear altogether and the population will become permanently displaced; (d) some areas may be designated as high risk zones and people may be evacuated with or without their consent if such areas are too dangerous for people to live in; and (e) unrest and conflict associated with diminishing resources can give rise to displacement. See Walter Kalin, 'Conceptualising Climate-Induced Displacement', in J McAdam (ed.), *Climate Change and Displacement: Multi-disciplinary Perspectives* (Hart Publishing 2010) 87.

51. The UN Guiding Principles on Internal Displacement define internally displaced persons as: '[p]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or

This scenario is not covered by either the Organization of African Unity (OAU) Convention on Refugees⁵² or by the Cartagena Declaration,⁵³ which have expanded the definition of refugee to include those who are fleeing events seriously disturbing public order. An important and troubling normative gap thus persists with regard to climate refugees – a gap implicating a series of related and challenging issues:

Once a person crosses a border, a protection gap opens up before them. In a somewhat perverse aspect of international law, there are clear rights in both soft and hard law to leave one's country, but no corresponding right to enter another. The lack of a right to enter a country is only one of the pieces that are currently missing in international law and many other issues have to be addressed.⁵⁴

This legal gap is not a marginal issue. Between 2008 and 2014, approximately 157 million people were displaced as a result of weather-related events alone. While only a portion of that number could be directly or indirectly attributed to climate change,

the fact is that increasing numbers of people on a very large scale are having to move as a result of factors associated with climate change. Given the predictions of how the effects of climate change are likely to exacerbate further and at a faster pace than it [sic] has up until now, the need to fill this legal gap is urgent.⁵⁵

3.3 Planned relocation

One response to some of these challenges, and one closely resembling the 'migration with dignity framework' discussed in section 5 of this article, is planned relocation. Planned relocation offers people a chance to relocate as part of adaptation plans as long as such relocation is done with the participation of those who are going to be relocated after having provided them with all necessary information.⁵⁶ Coastal communities, those living in low-lying areas and disaster prone areas, and inhabitants of

human-made disasters, and who have not crossed an internationally recognized State border'. Guiding principles are available at: <<https://www.unhcr.org/en-us/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>>.

52. Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, available at: <http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf>.

53. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted November 1984, available at: <http://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf>.

54. See Simon Behrman and Avidan Kent, 'Overcoming the Legal Impasse? Setting the Scene', in Simon Behrman and Avidan Kent (eds), *'Climate Refugees': Beyond the Legal Impasse?* (Routledge 2018) 4.

55. *Ibid*, 4 (footnotes omitted). See Jolanda van der Vliet, "'Climate Refugees': A Legal Mapping Exercise", in Simon Behrman and Avidan Kent (eds), *'Climate Refugees': Beyond the Legal Impasse?* (Routledge 2018) 16, for different approaches to protecting climate refugees: (a) rights-based approach; (b) security approach; (c) responsibility approach; and (d) the humanitarian approach. See Carmen Gonzalez, 'Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses' (2019) 36 *Wis. Int'l L. J.* 366 at 385, who discusses another approach: the migration management approach which planned relocation is part of. She argues that this approach 'places the burden of climate change adaptation on the world's most vulnerable populations'.

small island states are some of those groups who will need to move as part of planned relocation programmes.

There are already several examples of planned relocation associated with climate change. The Carteret Islands in Papua New Guinea⁵⁷ and the Isle de Jean Charles in Louisiana⁵⁸ are examples of relocations that are already taking place, while the people of Kivalina,⁵⁹ Shishmarof and Newtok in Alaska are awaiting relocation.⁶⁰ With regard to the inhabitants of small island states, planned relocation is possibly the only option.⁶¹ However, planned relocation raises other questions: Should people be relocated en masse? Where is land available to move states to? Can states even be moved? Will these entities remain as states? What about their maritime boundaries? International law has never faced the prospect of the physical disappearance of states and, therefore, has no rules to govern that situation.⁶² Thus, the search for legal solutions must continue. In the meantime, it is worth briefly surveying some of the most recent developments.

4 RECENT DEVELOPMENTS

4.1 Task Force on Climate Displacement

Pursuant to the decision taken at COP21, the Executive Committee on Warsaw International Mechanism (WIM) on Loss and Damage established a task force on climate

56. Procedural environmental rights include access to information, participation in decision-making and access to justice. See Human Rights Council, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox (called 'mapping report'), A/HRC/25/53, 30 December 2013.

57. See Behrman and Kent, *supra* (n 54) at 1.

58. While the community received a Federal grant to relocate, it now looks like the state has bought land to relocate them so the Federal money is being returned. See Julie Dermansky, 'Isle de Jean Charles Tribe Turns Down Funds to Relocate First US "Climate Refugees" as Louisiana Buys Land Anyway', 11 January 2019, <<https://www.desmogblog.com/2019/01/11/isle-de-jean-charles-tribe-turns-down-funds-relocate-climate-refugees-louisiana>>.

59. See Christine Shearer, 'Kivalina, A Climate Change Story', excerpts at: <<https://truthout.org/articles/kivalina-a-climate-change-story/>>, Kivalina filed legal action against 20 oil, coal and electric utility corporations in the District Court for the Northern District of California alleging responsibility for the damage suffered by the residents of Kivalina as a result of the large quantities of carbon dioxide these corporations emit. *Native Village of Kivalina v ExxonMobil Corp.* (2010) 696 F.3d 849, available at: <<http://cdn.ca9.uscourts.gov/datastore/opinions/2012/09/25/09-17490.pdf>>.

60. See Sumudu Atapattu, 'Climate Change: Disappearing States, Migration and Challenges for International Law' (2014) 4(1) *Washington Journal of Environmental Law & Policy* 7.

61. See Gonzalez, *supra* (n 55), at 387 who cautions against the dangers of top-down governmental decision-making and the importance of providing relevant information to community members so that they have a sense of control over the destination and provide their free, prior and informed consent. It must be pointed out that the free, prior and informed consent is currently required only of indigenous communities, especially in the event of relocation from their traditional land. See UN Declaration on the Rights of Indigenous Peoples (2007), available at: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

62. See Alejandra Torres Camprubi, *Statehood Under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill 2016).

displacement in March 2017. Its mandate is to develop recommendations for integrated approaches to avert, minimize and address climate displacement.⁶³ A stakeholder meeting was held in May 2018. At the stakeholder meeting, the participants highlighted both the legal and policy gaps, as well as institutional and coordination gaps. They noted that mobility is both trans-disciplinary and multi-causal, and that policy coherence is a cross-cutting challenge.⁶⁴ The 2016 New York Declaration for Refugees and Migrants, which recognized climate change as a driver of migration, was considered to be ‘a turning point for the international governance of migration and displacement’.⁶⁵ The participants pointed out that gaps existed with regard both to internally displaced persons (IDPs) and those displaced across borders. There were strong calls for human-rights-based approaches and safeguards ‘with specific attention to the rights of women, youth and indigenous groups, to be mainstreamed throughout all actions to avert, minimize and address displacement related to climate change ...’.⁶⁶ The need to create collective rather than individual legal pathways to address cross-border displacement was thought to be necessary, as well as the need to highlight the importance of international human rights law. The participants recommended the establishment of a UNFCCC focal point for human rights to catalyse and facilitate action with relevant entities, including the OHCHR, the Human Rights Council and Special Procedures.⁶⁷

The Task Force stakeholder meeting report noted that international law and policies lack protection provisions regarding persons displaced or migrating across international borders in climate change and disaster contexts (admission, standards during stay and on return) and that there is insufficient implementation of existing standards for internal displacement.⁶⁸ It recommended building on existing normative structures and frameworks to include protection provisions for those affected by climate displacement; promoting the implementation of the New York Declaration for Refugees and Migrants; and measures to facilitate the inclusion of human mobility in the context of climate change in the two Global Compacts, in order to address adverse drivers and risk factors.⁶⁹

The Task Force also identified several gaps related to international law, implementation, funding, and data collection and analysis, and presented its report at COP24.⁷⁰ In its report, the Task Force recognized that large-scale movement of people associated with climate change affects regions across the world, and that the countries and communities most vulnerable to climate change – including SIDS and least developed countries – need support.⁷¹ The report further recognized displacement in both

63. See *supra* (n 14).

64. Task Force on Displacement Stakeholder Meeting, ‘Recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change’ (2018), Switzerland, report available at: <<https://environmentalmigration.iom.int/sites/default/files/05092018%20TFD%20Stakeholder%20Meeting%20Report%20%28FINAL%29.pdf>> (hereinafter, ‘Stakeholder meeting’).

65. *Ibid.*, 10.

66. *Ibid.*, 16.

67. *Ibid.* The example of Somalia was given to highlight the multi-causality of root causes behind refugee flows, including the instances where there is a nexus between climate change, disaster, conflict and violence, in which event the Refugees Convention may be applicable.

68. Task Force report, *supra* (n 64).

69. *Ibid.*

70. Report is available here: <https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf>.

71. *Ibid.*

sudden and slow onset events as a development, humanitarian and human rights challenge.⁷² In the context of displacement, the Task Force recognized the need to protect human rights and to *take into account* principles such as non-discrimination, participation and inclusion, gender, loss of non-economic losses such as cultural heritage and social capital, and the need to consult widely with the communities affected by climate change.⁷³ As is the case with the Paris Agreement, however, the report's formulation ('to take into account') dilutes existing human rights principles: states have to fulfil these obligations, not simply take them into account.

4.2 Global Compact for Safe, Orderly and Regular Migration

The latest effort in relation to human mobility is the Global Compact for Safe, Orderly and Regular Migration (GCM),⁷⁴ which was adopted by the UN General Assembly in December 2018. It is people-centred, gender responsive and child sensitive, and is based on several cross-cutting and interdependent guiding principles: international cooperation, national sovereignty, rule of law and due process, sustainable development and human rights. One of the objectives of the Compact is to minimize the adverse drivers and structural factors that compel people to leave their countries, including deteriorating environments and climate change.⁷⁵ The Compact seeks to develop adaptation and resilience strategies in response to sudden and slow-onset disasters, adverse effects of climate change and environmental degradation, while recognizing that adaptation in the country of origin is a priority.⁷⁶ The Global Compact fosters international cooperation and acknowledges that no state can address migration alone.⁷⁷ Although it acknowledges that refugees and migrants are entitled to the same universal human rights and fundamental freedoms, the GCM continues to bifurcate the legal protection accorded to them: those who are forced to move as a result of adverse consequences of climate change seem to fall within the category of migrants with a lesser level of protection. The main objective of the approach seems to be to minimize the drivers of migration, thereby continuing to exert pressure on home states to look after their people, regardless of whether they are able to do so and regardless of their role in creating the problem. It is also unfortunate that the document continues to refer to 'natural' disasters. After all, there is nothing 'natural' about climate-induced disasters. By lumping all migrants under one category, the GCM ignores the complexity of climate displacement and the need to address the underlying causes in their specificity.

4.3 The Sendai Framework for Disaster Risk Reduction, 2015–2030

Adopted as the successor to the Hyogo Framework for Action, the Sendai Framework is a voluntary, non-binding document that recognizes that states have the primary

72. Task Force report, *supra* (n 64).

73. *Ibid.*

74. UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195 (January 11, 2019), available at: <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195>.

75. *Ibid.*

76. *Ibid.*

77. *Ibid.*

responsibility to reduce disaster risk but that this should be shared with other stakeholders, including the private sector. The Framework's objective is the substantial reduction of disaster risk and losses in lives, livelihoods and the health of communities.⁷⁸ It recognizes that climate change is one of the drivers of disaster risk and that there should be 'a broader and a more people-centred preventive approach to disaster risk'.⁷⁹ The Framework is based on four priorities: understanding disaster risk; strengthening disaster risk governance to manage disaster risk; investing in disaster risk reduction for resilience and enhancing disaster preparedness to mount an effective response; and to 'Build Back Better' in recovery, rehabilitation and reconstruction.⁸⁰ Human rights underlie the Framework: 'managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development'.⁸¹ The Framework also recognizes that a multi-hazard approach is required and that disaster risk reduction is essential to achieve sustainable development.⁸²

4.4 The Nansen Initiative and the Platform for Disaster Displacement

The Nansen Initiative, based upon a pledge made by the governments of Switzerland and Norway, recognizes that forced displacement related to disasters is a reality and among the biggest humanitarian challenges facing the international community.⁸³ The Initiative has since been absorbed into the Platform on Disaster Displacement.⁸⁴ The Platform is a 'State-led process working towards better protection for people displaced across borders in the context of disasters and climate change'.⁸⁵ It recognizes that disaster displacement is one of the biggest humanitarian challenges of the twenty-first century and that international law does not provide a right of admission and stay for those fleeing to another country.⁸⁶

While this framework excludes those who are displaced due to slow onset events such as sea level rise, it avoids the need to establish the causal link between disasters and climate change. It is, therefore, an important first step in recognizing that those who are displaced across borders due to disasters need legal protection. The agenda recognizes that such protection can take two forms: states can admit such persons at least temporarily or they can refrain from returning home those who have fled to their

78. Sendai Framework, Article 16, <https://www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf>.

79. Ibid, Article 7.

80. Ibid, Article 20.

81. Ibid, Article 19(c).

82. Ibid, Article 19(h).

83. <<https://www.nanseninitiative.org/>>.

84. <<https://disasterdisplacement.org/the-platform/the-context>>. See Rosemary Lyster, *Climate Justice and Disaster Law* (Cambridge University Press 2015).

85. <<https://disasterdisplacement.org/what-we-do>>.

86. Ibid. It further noted: 'Scientists warn that climate change is projected to increase displacement in the future, both internally and across borders. Displacement has devastating effects on people and communities. It creates complex humanitarian and development challenges that urgently call for partnerships and action', <<https://disasterdisplacement.org/the-platform/the-context>>.

territory as a result of disasters.⁸⁷ The Platform notes that ‘international law does not address whether and under what circumstances disaster displaced persons shall be admitted to another country, what rights they have during their stay, and under what conditions they may be returned or find another lasting solution’.⁸⁸ The Platform also recognizes that such persons may need to be admitted to another country to escape risk to their life and health or to access humanitarian assistance and protection that may not be available in their country of origin and that even without such immediate needs, states sometimes admit such persons as an act of international solidarity.⁸⁹ Moreover, cross-border displacement could be reduced if IDPs receive adequate protection and assistance following disasters: ‘In particular, a lack of durable solutions is one reason why internally displaced persons may subsequently move abroad’.⁹⁰

It is apparent from the foregoing analysis that despite gaps, flaw and oversights, there is a growing – as yet inadequate – awareness of the pressing urgency, complexity and nuances of climate migration. What then are some existing and emerging conceptual frameworks for addressing the challenges involved? How might these frameworks assist in addressing the problems thus far identified?

5 EXISTING AND EMERGING CONCEPTUAL FRAMEWORKS

In this section, I reflect on four existing and emerging frameworks, before drawing my final conclusions in the final section of this article.

5.1 Human rights, dignity rights and universality

From the right to basic amenities such as food, water and shelter to the right to life, and from the freedom of movement to the right to privacy and family life, forcible displacement associated with climate change can undermine most of the protected rights of human beings.⁹¹ The UN has identified several causes of displacement all of which cause intense human suffering and untold misery: armed conflict and internal strife; forced relocation; communal violence; natural disasters; ecological disasters; and the systematic violation of human rights.⁹² Furthermore, certain groups such as women can be more vulnerable to these risks and can be disproportionately more impacted than are other groups.⁹³ Similarly, the right to culture of indigenous peoples can be violated as a result of displacement as indigenous communities

87. *Agenda for the Protection of Cross-border Displaced Persons in the Context of Disasters and Climate Change, Vol 1, 7*, available at: <<https://disasterdisplacement.org/the-platform/our-response>>.

88. *Ibid*, 8.

89. *Ibid*.

90. *Ibid*, 9.

91. See Sumudu Atapattu, *supra* (n 18), Chapter 6; UN OHCHR Report, *supra* (n 48).

92. Comprehensive Study Prepared by Francis M Deng, Representative of the Secretary-General on the Human Rights Issues Related to Internally Displaced Persons, UN Doc. E/CN.4/1993/35 (1993), referred to in M Stavropoulou, ‘The Right Not to be Displaced’ (1994) 9 *American University Journal of International Law and Policy* 689 at 699.

93. See C Nellemann, R Verma and L Hislop, *Women at the Frontline of Climate Change: Gender Risks and Hopes* (UNEP), Birkeland Trykkeri AS, Norway (2011).

have an intimate relationship with their traditional ancestral land. Children are another vulnerable group – they are entitled to a nationality at birth⁹⁴ and to the protection of family as the most fundamental unit in society.⁹⁵ Both of these rights are at the risk of being violated due to forcible displacement associated with climate change.⁹⁶

As already noted, an especially vulnerable group is the inhabitants of SIDS.⁹⁷ In addition to being affected by the violation of the rights already enumerated here, inhabitants of SIDS will, in the event that their territories get submerged, be deprived of their right to self-determination and their right to a nationality, and all the rights that flow from nationality.⁹⁸ Similarly, populations displaced due to extreme weather events can be exposed to danger, and their rights to life, liberty and health can be affected. Displacement caused by climate change is unprecedented. It is, as noted above, also complex and multi-factoral; it can complicate the traditional lines between political refugees and ‘climate refugees’, and between voluntary and forced displacement, especially since it is difficult ‘to disentangle the multiple causes for human movement’.⁹⁹ In the case of severe weather events and disasters, losing one’s life possessions, not to mention loved ones, is a very traumatic experience and there is an urgent need to address the mental health challenges that people face, in addition to providing access to basic services.¹⁰⁰

Despite this landscape of rights violations and traumatic experiences, currently, there is no legal protection afforded to ‘climate refugees’ who cross international borders. The OHCHR has noted that such people have no right of entry to another state’s territory, but that they are, nevertheless, entitled to basic human rights there.¹⁰¹ However, if people have no right to seek refugee status, it is not clear how they can enter another country, except illegally. Secondly, if they enter illegally, it seems unlikely that they will be entitled to *any* rights in the would-be host country. Despite, however, the harsh realities of such legal lacunae, when faced with danger, whether from advancing armies or rising seas, people will move to the nearest safest place. If that is to another country, then cross-border movement *will* take place – and, accordingly, the gaps in the current legal regime amount to a serious (and predictable) failure of justice.

94. Article 7, Convention on the Rights of the Child, available at: <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

95. *Ibid.*

96. The horrific stories of children being separated from their parents and being put in cages in freezing conditions by ICE at the US-Mexican border, need no further explanation. Several migrant children have died in US custody. Many of these families are fleeing war and violence in their home countries. Contrary to what is portrayed, they are not economic migrants seeking a better life in the Global North. Even economic migrants deserve a chance to present their case, without being subjected to inhuman treatment.

97. See Knodel, *supra* (n 1).

98. See Atapattu, *supra* (n 18), Chapter 9; T Duong, ‘When Islands Drown: The Plight of “Climate Change Refugees” and Recourse to International Human Rights Law’ (2010) 31 *University of Pennsylvania Journal of International Law* 1239.

99. See McAdam, *supra* (n 34), 2.

100. See Report of the UCL-Lancet Commission on Migration and Health (December 2018), <<https://www.thelancet.com/>>.

101. OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009), A/HRC/10/61, available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>>, paras 57 and 58.

It is possible, at least conceptually, to base a more generic, less fragmented justice-based approach on the principles of international cooperation, collective responsibility of the global community and solidarity that form the basis of international refugee law. Two additional principles can be used in relation to climate displacement: (a) universality of human rights (in particular, their *erga omnes* nature); and (b) the dignity paradigm.

If, as the UN articulates, all rights are universal, interrelated and indivisible,¹⁰² then *all people/s*, no matter who they are or where they come from, should be entitled to enjoy the basic rights recognized under international human rights law. States can continue to be the duty bearer of rights and legitimately withhold certain citizenship rights (such as the right to vote) from displaced people, but such people should be entitled to certain universally applicable rights while they are displaced. This is, arguably, a powerful and especially relevant implication of the universality principle.

Directly related to the notion of the universality of rights are dignity rights. Human rights are traditionally based on the notion of human dignity. Indeed, the very first sentence of the Universal Declaration of Human Rights (UDHR) adopted 70 years ago refers to human dignity: 'Whereas recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.¹⁰³ Article 1 further elaborates on this: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.¹⁰⁴ The Stockholm Declaration on the Human Environment similarly referred to dignity in its near endorsement of a right to a healthy environment:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a *life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.¹⁰⁵

Thus, one can conclude that:

each of us, just by virtue of having been born human, is endowed with human dignity, and bestowed with equal worth. Dignity as such, then, can only be surrendered or yielded. It can neither be traded nor lost through folly nor compounded through wise investment. It cannot be captured or conquered. And it is communal.¹⁰⁶

Dignity provides an important framework to protect the rights of displaced persons (and indeed all those who are disproportionately affected or especially vulnerable to climate change), since it is not dependent on the nationality of the displaced person/s. The UDHR is clear in this respect – dignity is an inherent human endowment

102. Vienna Declaration and Program of Action (1993), available at: <<https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>>.

103. Preamble, UDHR, <<https://www.un.org/en/universal-declaration-human-rights/>>.

104. Article 1, UDHR.

105. Principle 1, Stockholm Declaration on the Human Environment, 1972 (emphasis added).

106. See Erin Daly, *Dignity Rights: Courts, Constitutions and the Worth of the Human Person* (University of Pennsylvania Press 2013); E Daly and JR May, 'Environmental Dignity Rights', in Sandrine Maljean-Dubois (ed), *The Effectiveness of Environmental Law* (Widener University Delaware Law School Legal Studies Research Paper Series No. 17-02, 2017).

and is inalienable as the foundation for human rights. Yet, despite dignity's inclusion in human rights instruments and in many national constitutions, and despite the emergence of a robust body of international jurisprudence on dignity, it 'remains largely invisible in advancing environmental protection at international and domestic levels'.¹⁰⁷ Nevertheless – until such time that a specific framework is adopted to govern climate displacements, universality and dignity coupled with the justice framework, discussed next, can be used to fill the legal void. Additionally, any eventual legal framework should be based on these frameworks and principles.

5.2 The justice framework

Closely related to the dignity framework is the justice framework.¹⁰⁸ Based on the notions of equity and fairness, this framework recognizes the disproportionate distribution of burdens of polluting activities on low-income communities and racial minorities.¹⁰⁹ Although climate change is a global problem, with every state being, in an important sense, a perpetrator and a victim at the same time, both the level of contribution to the phenomenon and its impacts vary significantly across states and communities. Poor, vulnerable communities in both the global North and South are disproportionately affected by the adverse consequences of climate change. Similarly, certain states and cities are disproportionately affected due to geography, politics and colonial history.¹¹⁰

There exist many forms of injustices, ranging from inter-generational to inter-species injustices.¹¹¹ Among these injustices, environmental justice is probably the best-known framework of critique and resistance. Scholars also refer to climate justice,¹¹² water justice,¹¹³ food justice¹¹⁴ and energy justice¹¹⁵ – even though all these sub-categories can be fitted, arguably, within the environmental justice framework. Some, however, distinguish between environmental justice and climate justice on the ground that climate change is a global issue and that a wider framework is needed to address its consequences.¹¹⁶ Others disagree, on the ground that the

107. Ibid.

108. See Robert Kuehn, 'A Taxonomy of Environmental Justice' (2000) 30 *Environmental Law Reporter* 10681.

109. Ibid.

110. See Carmen Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (2015) 13(1) *Santa Clara Journal of International Law* 151.

111. See Sumudu Atapattu and Andrea Schapper, *Human Rights and the Environment: Key Issues* (Routledge 2019) 8–18.

112. See Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014); Dale Jamieson, 'Two Cheers for Climate Justice' (2015) 82(3) *Social Research* 791, who at times refers to global justice; Knodel, *supra* (n 1).

113. See Farhana Sultana, 'Water Justice: Why It Matters and How to Achieve It' (2018) 43(4) *Journal of Water International* 1.

114. See Alison Hope Alkan, *Cultivating Food Justice: Race, Class, and Sustainability* (The MIT Press 2011).

115. See Raya Salter, Carmen G Gonzalez and Elizabeth Ann Kronk Warner (eds), *Energy Justice: US and International Perspectives*, New Horizons in Environmental and Energy Law series (Edward Elgar 2018).

116. See David Scholsberg and Lisette B Collins, 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice' (2014) 5 *WIREs Climate Change* 359.

environmental justice framework is broad enough to cover climate change.¹¹⁷ Such distinctions are also visible in relevant case law. In the *Leghari* case, for example, the Lahore High Court of Pakistan was confronted with a petition by a farmer who sued the government for its failure to implement its climate policy, including the failure to take adaptation measures.¹¹⁸ The court distinguished between environmental justice (which it thought was more appropriate for mitigation measures) and climate justice (which it thought was more appropriate for adaptation measures as it involved more stakeholders).¹¹⁹ Whatever the precise relationship between climate and environmental justice framings is, however, it is apparent that injustice in such matters is an important critical response emerging from both scholarship and jurisprudence.

Another framework increasingly being used to understand environmental injustice is environmental racism.¹²⁰ This too could be considered a sub-category of the environmental justice frame, which highlights that racial minorities and people of colour are intersectionally more afflicted by environmental injustices than are poor, white communities. Communities of colour – often also the most economically impoverished communities – are therefore often disproportionately affected by polluting activities.¹²¹ How then might the environmental justice (and climate justice) framework (which I take to include environmental racism) be used in relation to climate refugees?

Environmental justice struggles have taken place all over the world for decades and are closely intertwined with struggles for other forms of justice.¹²² Although, as noted, scholars adopt various definitions of environmental justice, all conceptions of environmental justice have one central thread in common – the notion of equity and fairness. Shelton, for example, equates environmental justice with the elephant

117. See Jutta Brunnee, 'Climate Change, Global Environmental Justice and International Environmental Law', in Jonas Ebbeson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009) 318, who believes that there is no compelling reason not to apply the overarching principles of justice internationally. See also Carmen Gonzalez, 'Global Justice in the Anthropocene', in Louis Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017).

118. See Jennifer Huang and Maria Antonia Tigre, 'Trends in Climate Justice Litigation: The Dutch Case and Global Repercussions', in *Climate Justice* (Environmental Law Institute 2016) 571, for a critique of the Urgenda and Leghari cases.

119. *Ashgar Leghari v Federation of Pakistan and others*, Case No: W.P. No 25501/2015, in the Lahore High Court, Lahore Judicial Department.

120. Environmental injustice and racism were the basis of *Mossville Environmental Action Now v United States*, currently pending before the Inter-American Commission of Human Rights. The petitioners alleged that the Mossville residents, who are predominately African-American, are subject to a disproportionate pollution burden, what they refer to as environmental racism, in breach of the American Declaration of the Rights and Duties of Man. They further alleged that the State is responsible for the violation of Mossville residents' rights to life, health and private life guaranteed under the American Declaration. This is the first case that has been brought against the US on the basis of environmental justice and, in particular, environmental racism before an international forum.

121. See Luke W Cole and Sheila Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press 2001), who use the terms 'environmental (in)justice' and 'environmental racism' interchangeably.

122. See Sheila Foster, 'Justice from the Ground Up: Distributive Inequalities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement' (1998) 86 California Law Review 775.

in Aesop's fable where a group of blind men describe an elephant depending on where they touch its body.¹²³ Similarly, environmental justice might mean different things to different people, depending on whether they are victims, regulators or activists and on whether the injustice is local, national or international¹²⁴ – but equity and fairness is a persistent theme – as is the multi-dimensional nature of environmental injustice as a failure of equity and fairness. Environmental problems often exacerbate already existing inequalities¹²⁵ and intensify economic and social disparities that might have their root causes elsewhere. Environmental justice coincides, in short, with the goal of achieving a more just society and some have described environmental justice as being a 'marriage of the movement for social justice with environmentalism', integrating environmental concerns into a broader agenda that emphasizes social, racial and economic justice.¹²⁶ This intersectional complexity reveals that environmental justice cannot, ultimately, be separated from struggles for other forms of justice that often underlie the reasons for environmental problems in the first place. As Sheila Foster points out, focusing on distributive justice concerns alone neglects the social structures and agents that are causing environmental problems.¹²⁷

The need for a multi-dimensional model of environmental justice is clear, and Osofsky adopts a tripartite definition based on geographical scope, duration and severity.¹²⁸ Kuehn, on the other hand, famously provides a four-fold framing, comprising distributive justice, procedural justice, corrective justice, and social justice.¹²⁹ Such framings provide a useful structure, arguably, through which to conceptualize and address climate change injustices, especially the inverse relationship between contribution and consequences and the disproportionate impact on certain states and communities.

Focusing on Kuehn's schematic, in brief, distributive justice requires the fair allocation of benefits and burdens, while procedural justice requires open, informed and inclusive decision-making processes. Corrective justice refers to the obligation to correct past wrongs (either by restitution or by providing compensation) and to punish those responsible. Social justice recognizes that environmental struggles

123. See Dinah Shelton, 'Describing the Elephant: International Justice and Environmental Law', in Jonas Ebbeson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009) 55.

124. See Robert Kuehn, *supra* (n 108) who recognizes the all-encompassing and multi-level nature of environmental justice disputes: 'Disputes at the international level include allegations that governments and multinational corporations are exploiting indigenous peoples and the impoverished conditions of developing nations. At the national level, although an overwhelming number of studies show differences by race and income in exposures to environmental hazards, debate continues about the strength of that evidence and the appropriate political and legal responses to such disparities. At the local level, many people of color and lower-income communities believe they have not been treated fairly regarding the distribution of the environmental benefits and burdens.'

125. See S Humphreys, 'Climate Justice: The Claim of the Past' (2014) 5 *Journal of Human Rights and the Environment* 134.

126. See Kuehn, *supra* (n 108) at 10699.

127. See Foster, *supra* (n 122).

128. See HM Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights' (2005) 24 *Stanford Environmental Law Journal* 71.

129. See Kuehn, *supra* (n 108).

are intertwined with struggles for other forms of justice.¹³⁰ Applying Kuehn's framework to climate displacement would mean that the major emitters should: (a) correct the wrongs caused to the victims of climate change rather than externalizing pollution while benefiting from the activities that led to it; (b) increase the participation of disproportionately affected states and communities in decision-making processes, especially in climate negotiations; (c) facilitate the transition of affected nations to low-carbon economies, provide technology transfer and fund adaptation programmes; and (d) assist climate refugees, either by contributing to a global fund to help them transition to a new location or by facilitating their entry into their territories.

The justice framework in relation to climate change, which relies on allocating responsibility for climate change, can only be discussed briefly here for reasons of space. There are three main existing principles for allocating responsibility: the historic responsibility principle; the equal entitlement principle;¹³¹ and the polluter pays principle.¹³² The common but differentiated responsibilities (CBDR) principle could (and should) be considered to be another principle, even though it was originally adopted as a way of allocating obligations, rather than responsibility.¹³³ Legally, however, there is no reason why the principle of CBDR cannot be applied in relation to responsibility as well.¹³⁴ An exception to the sovereign equality principle, CBDR was first applied in the ozone regime.¹³⁵ Despite being subject to intense debate at the Earth Summit in 1992 it was included in both the Rio Declaration¹³⁶ and the UNFCCC.¹³⁷ The CBDR principle reflects the recognition of several related aspects of justice: (a) the disproportionate contribution of states to environmental degradation; (b) the greater ability of industrialized countries to address these challenges;

130. Ibid. See Carmen Gonzalez, 'Environmental Justice and International Environmental Law', in Shawkat Alam et al. (eds), *Routledge Handbook of International Environmental Law* (Routledge 2012) 79–80.

131. See David Miller, 'Global Justice and Climate Change: How Should Responsibilities be Distributed?', The Tanner Lectures on Human Values, Tsinghua University, Beijing (2008), <https://tannerlectures.utah.edu/_documents/a-to-z/m/Miller_08.pdf> and Dale Jamieson, 'Climate Change, Responsibility and Justice' (2010) *Science and Engineering Ethics* 16(3) 431.

132. See David Schlosberg, 'Climate Justice and Capabilities: A Framework for Adaptation Policy' (2012) 26(4) *Ethics and International Affairs* 445, who identifies three approaches to climate justice: (a) the polluter pays principles (based on historic responsibility); (b) the fair share model (based on equal allocation of emissions); and (c) the rights-based models (development rights, human rights and environmental rights). He advances a 'capabilities approach' to climate justice.

133. For a detailed analysis of the CBDR principle, see Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006).

134. See Sumudu Atapattu, 'Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change', in B Richardson et al. (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar 2009).

135. See Montreal Protocol on Substances that Deplete the Ozone Layer (1987), available at: <<https://ozone.unep.org/treaties/montreal-protocol-substances-deplete-ozone-layer/text>>.

136. Principle 7, Rio Declaration on Environment and Development (1992), available at: <http://www.unesco.org/education/pdf/RIO_E.PDF>.

137. Article 3, UN Framework Convention on Climate Change (1992), available at: <<https://unfccc.int/resource/docs/convkp/conveng.pdf>>. See also, Sumudu Atapattu, 'Climate Change, International Environmental Law Principles, and the North-South Divide' (2017) 26 *Transnational Law & Contemporary Problems* 247.

and (c) the greater responsibility of these countries to help those who are unable to do so,¹³⁸ reflecting all of the principles of accountability mentioned here.

Caney proposes supplementing the polluter pays principle with an ability to pay approach – the application of the distributive justice principle means that the least advantaged nations have a right to emit higher GHG emissions than do the more advantaged nations of the world.¹³⁹ Relying on Shue, Caney points out that ‘it is unfair to make the impoverished shoulder the burden’¹⁴⁰ of dealing with climate change, which, he argues, should rest predominantly upon wealthy *people*, not affluent countries. I do not find Caney’s suggestion entirely persuasive. For a start, such measures can only be taken at the national level, because, practically, it is not clear how wealthy people can be made to share the burden of their disproportionate contribution to climate warming except through the imposition of a tax. Caney’s suggestion also ignores the role of states in reducing emissions. As the IPCC in their 1.5 degree report noted, states have only until 2030 to reduce GHG emissions by 50 per cent and then to go carbon neutral by 2050.¹⁴¹ If this target is not met, it is unclear how many millions of people will be forcibly displaced and how many low-lying states will ‘disappear’. In short, the role and responsibility of the state is too urgent to be sidestepped.

There are other approaches within the justice framework that are useful: Shue distinguishes between luxury emissions and subsistence emissions and advances the notion of ‘compound injustice’.¹⁴² According to Shue, “Compound injustice” occurs when an initial injustice paves the way for a second. As when colonial exploitation weakens the colonized nation to such an extent that the colonizer can impose unequal treaties upon it even after it gains independence.’¹⁴³ Closely aligned with the intersectionality theory where social markers such as poverty, gender and minority status intersect with one another to create greater injustices,¹⁴⁴ the current economic subordination of the Global South¹⁴⁵ is a good example of compound injustice.

Neumayer supports the importance of historical accountability for greenhouse gases to justice-based calculations of responsibility,¹⁴⁶ while Agarwal, Narrain and Sharma rely on the equitable utilization principle:

Some people have used up more than an equitable share of this global resource, and others, less. Through their own industrialization history and current lifestyles that involve very high levels of GHG emissions, industrialized countries have more than used up their share of the absorptive capacity of the atmosphere. In this regard, the global warming

138. See Rajamani, *supra* (n 133).

139. See Simon Caney, ‘Cosmopolitan Justice, Responsibility, and Global Climate Change’ (2005) 18 *Leiden Journal of International Law* 747 at 769.

140. *Ibid.*, 770.

141. See IPCC, Special Report, Global Warming of 1.5°C (2018), available at: <<https://www.ipcc.ch/sr15/>>.

142. See Shue, *supra* (n 112), 4.

143. *Ibid.*

144. Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1 *University of Chicago Legal Forum* 139.

145. Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27(5) *Third World Quarterly* 739 at 747.

146. See Eric Neumayer, ‘In Defense of Historical Accountability for Greenhouse Gas Emissions’ (2000) 33(2) *Ecological Economics* 185 and LSE Research Online (August 2012).

problem is their creation, so it is only right that they should take the initial responsibility of reducing emissions while allowing developing countries to achieve at least a basic level of development.¹⁴⁷

Caney, however, critiques this egalitarian argument on the ground that it will only work if we take a collectivist approach, not an individualist approach, which, according to him, is impossible in this instance¹⁴⁸ – an individualist approach, for him, is essential. Here again, I am unpersuaded by Caney's position: while philosophically it may be appealing to him to suggest that an individualized framework could be normatively preferable, there is no denying that communities are suffering, people are forced to move en masse, and that entire islands are disappearing, due to no fault of their inhabitants. It is also clear that certain states and corporations have enjoyed the benefits of polluting activities while passing on the burden to others including future generations. So why is it unjust to ask these collectivities to compensate those who are unjustly burdened by their past and present activities? It is vital, I would argue, to take the collective dimension of climate responsibility – and suffering – into full account. The failure to do so, I suggest, is a form of non-recognition.

Schlosberg provides a compelling review of various theories of climate justice and points out that non-recognition of people, communities, and conditions is often at the core of injustice.¹⁴⁹ This observation resonates with the situation of climate refugees. There is a fundamental failure of recognition here – one that fails to grasp the true implications of climate change. While the notion of displacement associated with climate change is now generally accepted, as noted above, 'climate refugees' is not a legally recognized category. Indeed, it has taken climate negotiators two decades even to include it in climate documents. Similarly, scholars argue that 'distributive injustices stem from lack of recognition [and that] cultural and political exclusions lead to vulnerability and economic inequality'.¹⁵⁰ According to Fraser, 'recognition is absolutely key to the problem of injustice, both in itself and as it relates to maldistribution'.¹⁵¹ She identifies three types or processes of misrecognition: (a) the general practice of cultural domination; (b) non-recognition or being rendered invisible; and (c) broad disrespect or being stereotyped or maligned in public or cultural representation.¹⁵² While it is noted that 'Recognitional justice requires not just an understanding of unjust distribution and a lack of recognition but, crucially, of the way the two are tied together',¹⁵³ recognition without political participation is meaningless: 'communities require processes that give them some locus of control over their destinies as part of a recognition of identity and place'.¹⁵⁴ Recognition, in other words, needs to be deeper than mere visibility alone.

147. See A Agarwal, S Narain and A Sharma, 'The Global Commons and Environmental Justice – Climate Change' in *Environmental Justice: International Discourses in Political Economy – Energy and Environmental Policy* (2002) 173.

148. See Caney, *supra* (n 139) at 764.

149. See Schlosberg, *supra* (n 132) at 450.

150. *Ibid.*

151. *Ibid.*, at 450, referring to Nancy Fraser.

152. *Ibid.* The situation of indigenous movements is given as an example here.

153. *Ibid.*, 451.

154. *Ibid.*, 452, quoting Neil Adger et al., 'This Must be the Place: Underrepresentation of Identity and Meaning in Climate Change Decision-Making' (2011) 11(2) *Global Environmental Politics* 1.

Schlosberg believes that the capabilities approach to justice can help to address a range of concerns from distribution to vulnerability, and from recognition of peoples, places and their relationships to the rights that are threatened.¹⁵⁵ The approach also offers the flexibility to address local variability. Schlosberg relies on Sen and Nussbaum, who point out that justice should focus on the range of capacities necessary for people to develop free and productive lives they design for themselves.¹⁵⁶ In stark contrast to the individualist approach taken by Caney,¹⁵⁷ Schlosberg advocates a collectivist approach to the question of capabilities and justice-making, relating these clearly to the pressures of climate change: 'Recognition and capabilities are community-level concerns. This is particularly urgent for indigenous communities and island states that stand to lose cultures along with environments'.¹⁵⁸

Schlosberg argues, therefore, that a broad capabilities approach that encompasses recognition provides a suitable normative framework for the development of policies on adaptation responsive to the fact that climate change will create unique patterns of vulnerability and disadvantage and will affect individuals and communities that are already disadvantaged disproportionately.¹⁵⁹ However, Schlosberg's framework does not address accountability for historic emissions, despite the fact that these are responsible for the damage being inflicted on the current generation, and especially on vulnerable groups like climate refugees. In that sense, Schlosberg's framework, while a significant improvement on Caney's, is not sufficiently able to embrace the collective historical aspects of climate injustice.

The Mary Robinson Foundation advances several principles of climate justice and suggests that 'Climate Justice links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable and sharing the burdens and benefits of climate change and its resolution equitably and fairly'.¹⁶⁰ The principles of climate justice proposed by the Foundation require the following: (a) respect and protection of human rights; (b) support of the right to development; (c) the equitable sharing of benefits and burdens; (d) the need to ensure that decisions are participatory, transparent and accountable; (e) the need to highlight gender equality and equity; (f) harnessing the transformative power of education for climate stewardship; and (g) the use of effective partnerships to secure climate justice.¹⁶¹ While many of these principles overlap with the four-fold environmental justice framework discussed above, a crucial aspect missing from these principles is corrective justice.

The International Bar Association has adopted a more extensive rights-based approach to climate justice with the right to a healthy environment at its core:

To ensure that communities, individuals and governments have substantive legal and procedural rights to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of

155. See Schlosberg, *supra* (n 132), 452.

156. *Ibid.*

157. See Caney, *supra* (n 139). He is not alone here. Scholars such as Page and Nussbaum take this view.

158. See Schlosberg, *supra* (n 132), 455.

159. *Ibid.*, 457.

160. Mary Robinson Foundation – Climate Justice, Principles of Climate Justice, <<https://www.mrfcj.org/wp-content/uploads/2015/09/Principles-of-Climate-Justice.pdf>>.

161. *Ibid.*

climate change and provide for adaptation to its effects in a manner that respects human rights.¹⁶²

Posner and Weichbach's position that responses to climate change should look forward, not backward, and that justice should not be central to climate agreements,¹⁶³ is widely critiqued.¹⁶⁴ In stark contrast to their position, a joint paper issued by the World Resources Institute and the Mary Robinson Foundation argues that equity and justice *should* inform a new climate agreement premised on the notion that climate change is an issue of injustice and a human tragedy in the making.¹⁶⁵

The various approaches, and their critiques, offer a lively, wide-ranging set of approaches to a justice-based response to climate change, and in particular to the disparities in its creation and implications for vulnerable communities. Thus, I would argue that a justice framework coupled with the CBDR and the polluter pays principle would require states to address a range of responsibilities and obligations, including: (a) acknowledging that the adverse consequences of climate change due to historic emissions are causing mass displacement of people as well as island states becoming submerged; (b) providing compensation to those who are disproportionately affected; (c) reducing their greenhouse gas emissions; (d) providing adaptation assistance including technology transfer and assistance with the transition to a low-carbon economy; (e) relaxing immigration laws to assist with relocation and according basic rights to those displaced, based on dignity. It would also mean that major emitters should (f) share a greater burden based on historic responsibility and contribute to a fund to help the displaced populations, especially the inhabitants of small island states; and (g) work with international organizations to address the legal questions raised by climate refugees and by the submergence of small island developing states.

5.3 The 'just transition' framework

The 'just transition' framework 'became a mobilizing term to promote green jobs as a necessary component of the transition away from fossil fuels'.¹⁶⁶ It seeks to ensure that the transition to a low carbon economy will not lead to unemployment and job

162. See International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report (2014) (hereafter IBA report), 35. Available at: <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=96b93592-3761-4418-8a52-54a81b02c5f1>>.

163. See E Posner and D Weisbach *Climate Change Justice* (Princeton University Press 2010) 5.

164. See Daniel Farber, 'Climate Change Justice by Eric A Posner and David Wesbach: Princeton University Press, 2010' (2012) 110 *Michigan Law Review* 985. See also, J Heyward, 'Climate Change Justice, by Eric A Posner and David Weisbach' (2012) 6(1) *Carbon and Climate Law Review* 92; and E Cameron, T Shine and W Bevins, *Climate Justice: Equity and Justice Informing a New Climate Agreement*, Climate Justice working paper (2013), World Resources Institute & Mary Robinson Foundation, available at: <http://www.wri.org/sites/default/files/climate_justice_equity_and_justice_informing_a_new_climate_agreement.pdf>.

165. Climate Justice working paper, World Resources Institute & Mary Robinson Foundation, p. 3. Available at: <http://www.wri.org/sites/default/files/climate_justice_equity_and_justice_informing_a_new_climate_agreement.pdf>. See also, Atapattu, *supra* (n 18), Chapters 2 and 3.

166. See Darren McCauley and Raphael Heffron, 'Just Transition: Integrating Climate, Energy and Environmental Justice' (2018) 119 *Energy Policy* 1.

losses for those who are currently employed in fossil fuel industries. Even though this approach quickly became mired in debates about ‘jobs versus environment’, it is contended that it has ‘the potential for uniting climate, energy and environmental (CEE) justice to provide a more comprehensive framework for analyzing and ultimately promoting fairness and equity throughout the transition away from fossil fuels’.¹⁶⁷ This framework is, in some ways, closely related to the justice framework discussed above: the proponents of the just transition framework use distributive and procedural justice as components of their framing and approach. ‘Just transition’ itself, for example, is defined as being a ‘fair and equitable process of moving towards a post-carbon society’,¹⁶⁸ which must seek fairness and equity with regard to major global justice concerns. Applying this approach to climate migration would mean treating climate refugees and other climate-displaced people on a par with others who migrate or are displaced, and according them the basic human rights that all people are entitled to by virtue of being human. The approach also means providing refugees with resources and financial support while they are displaced – as well as, with respect to those unable to return to their home countries (especially those who are from SIDS), providing them with a permanent home. The main responsibility to provide these responses should fall on the main contributors to climate change.

5.4 The ‘migrating with dignity’ framework

Discussing displacement in the Pacific, Farquhar stresses that any responses should not only provide the opportunity for Pacific peoples to migrate, but that such a response should ensure ‘migration with dignity’.¹⁶⁹ Farquhar also proposes pre-emptive action, rather than focusing on remedial protection measures once a humanitarian crisis has occurred. Such pre-emptive action will not only help avoid a migration crisis but will also ensure that people are relocated with their participation. The slow onset nature of climate change in relation to SIDS provides an opportunity to take such a forward-facing, anticipatory approach:¹⁷⁰

Pre-emptive, voluntary migration schemes challenge the assumption that migration represents a failure of adaptation and a measure of last resort. In fact, migration can be an important part of an ‘integrated adaptation strategy’ for communities who must adjust to changing environmental conditions. Migration can contribute positively to adaptation by building financial, social and human capital, improving the lives of migrants and their home communities.¹⁷¹

Pre-emptive, planned migration will have a greater chance of success than forced migration, or migration taking place under the pressure of emergency situations. However, as with any migration process, there are challenges.¹⁷² At least with regard

167. Ibid.

168. Ibid, 2.

169. See Harriet Farquhar, “‘Migration with Dignity’: Towards a New Zealand Response to Climate Change Displacement in the Pacific” (2014), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786254>.

170. As President Tong of Kiribati noted, the relocation of the people of Kiribati requires long-term forward planning, referred to in Farquhar, *ibid*, 43.

171. *Ibid*, at 43 (footnotes omitted).

172. *Ibid*.

to SIDS and those communities that have to be relocated because they are living in hazardous areas, planned relocation provides a useful solution.

6 CONCLUSION: THE WAY FORWARD

The analysis in this article suggests that there are signs that climate negotiators seem finally to have woken up to the reality of climate displacement. Establishing a taskforce on the issue and the adoption of the Global Compact on Migration (GCM) are major developments, despite the fact that neither the taskforce nor the GCM goes as far as suggesting that a new framework is needed to govern cross-border climate displacement. Nonetheless, the analysis has also shown that there are several steps that states can take to address climate displacement, now and in the future.

First, since most displacement will likely be internal, the easiest first step is to expand the UN Guiding Principles on Internal Displacement to cover climate-induced displacement. While these are non-binding guidelines (except for Africa which has adopted the Kampala Convention¹⁷³ and the Great Lakes Protocol),¹⁷⁴ they enjoy wide support and will trigger the involvement of the UNHCR and the Red Cross. Second, states should consider expanding the Nansen Initiative to cover slow onset events, notwithstanding their understandable reluctance to do so. Third, states should adopt aggressive mitigation measures to minimize the catastrophic consequences of climate change that give rise to displacement.¹⁷⁵ Given that a certain number of adverse consequences are now locked in, due to the greenhouse gases that we have already emitted, the next best option is to provide adaptation assistance to the most vulnerable nations that are likely to generate large numbers of climate refugees. Movement with dignity should be the guiding principle, with greater responsibility placed on major emitters to assist displaced populations. Fourth, despite the decision to exclude liability and compensation from the climate regime, there is a need to ensure that loss and damage associated with climate change, from both sudden and slow onset events, are compensated.¹⁷⁶ Rather than accept liability, major emitters may prefer to contribute to a fund to help victims of climate change, including climate refugees. This contribution could be extended to major corporations through taxation. Whatever approach is adopted, it is essential to compensate victims for their loss.

It is possible to use the same principles that underlie the legal treatment of political refugees to protect climate refugees. Moreover, because obligations under both the UNFCCC and human rights are universal, universality is a good framework for the protection of the rights of climate-displaced persons. Moreover, the inherent dignity of human beings should form the basis of any legal framework adopted to protect

173. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009), available at: <<https://www.unhcr.org/en-us/about-us/background/4ae9bede9/african-union-convention-protection-assistance-internally-displaced-persons.html>>.

174. Protocol on the Protection and Assistance to Internally Displaced Persons (2006), available at: <<https://www.refworld.org/pdfid/52384fe44.pdf>>.

175. See IPCC, Special Report, *supra* (n 141).

176. The Warsaw International Mechanism on Loss and Damage could be utilized for this. However, the decisions taken at COP21 stress that the loss and damage mechanism does not lead to liability and compensation, see Decision 1/CP.21, FCCC/CP/2015/10/Add.1, available at: <<https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2>>.

climate refugees. With regard to small island states, additional legal questions relating to statehood and nationality must be addressed.

Finally, major emitters have responsibilities under the CBDR principle, the polluter pays principle and the corrective justice principle to assist those who are especially vulnerable to the adverse impacts of climate change. SIDS (and many other states in the Global South) did not benefit from the industrialization that was a major driver of climate change, so why should they bear a disproportionate burden of climate change to the point of potentially ceasing to exist as states? It is now certain that no state will be able to insulate itself from the adverse consequences of climate change. By planning ahead, we will be able to address the unacceptable protection gap relating to climate refugees and to minimize human suffering before we are faced with an unprecedented global humanitarian catastrophe.