

## Climate Change and Global Displacement: Towards an Ethical Response

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In November 2017, the Guardian newspaper in the United Kingdom, the leading liberal national daily in Britain, published a front page story with a headline declaring that climate change “will create the world’s biggest refugee crisis.”<sup>1</sup> The story was in response to a report published by the Environmental Justice Foundation (EJF), called *Beyond Borders: Our Changing Climate – Its Role in Conflict and Displacement* (Environmental Justice Foundation 2017a). According to the EJF, since 2008, an average of 21.7 million people have been displaced every year because of weather-related events, and they predicted that 1.4 billion could be displaced by 2060, rising to two billion by 2100. The report was accompanied by a short film, in which a number of experts were interviewed.<sup>2</sup> Brigadier General Stephen A. Cheney, retired from the US Marine Corps, said: “If Europe thinks they have a problem with migration today ... wait 20 years. See what happens when climate change drives people out of Africa – the Sahel especially – and we’re talking not just one or two million, but 10 or 20. They are not going to south Africa, they are going across the Mediterranean.” And Sir David King, former chief scientific adviser to the UK government, said: “What we are talking about here is an existential threat to our civilisation in the longer term. In the short term, it carries all sorts of risks as well and it requires a human response on

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<sup>1</sup> Guardian, November 2, 2017: <https://www.theguardian.com/environment/2017/nov/02/climate-change-will-create-worlds-biggest-refugee-crisis> (accessed May 6, 2018).

<sup>2</sup> *Beyond Borders: Our Changing Climate – its role in conflict and displacement* - <https://ejfoundation.org/archive> (accessed May 8, 2018).

a scale that has never been achieved before.” These quotations were reproduced in the Guardian report.

In making the connection between climate-displacement and conflict, especially in the context of the numbers of climate-displaced being in the billions by the end of the century, and asserting that those billions would be heading for Europe and other locations in the Global North, the EJF were placing the question firmly in the context of international security. However, their overall concern was *human* security, the protection of those they identified as climate refugees. The EJF’s executive director, Steve Trent, says in the report: “...we urgently need the development of a new legally binding, multilateral agreement to provide a framework for the necessary response to climate migration. We need this instrument to give definition and status to climate refugees; to define rights and obligations and to coordinate and combine our actions so that they are effective” (Environmental Justice Foundation 2017a, p. 5). People rendered homeless by extreme climate change impacts is “one of the clearest examples of a legal and policy void across international frameworks” (Environmental Justice Foundation 2017a, p. 41). This protection gap is widely acknowledged in the academic and policy literature, and here the EJF take a specific position on how to address it, a new international treaty with the same kind of status and force as the 1951 Refugee Convention and 1967 Protocol<sup>3</sup>, creating a specific set of rights for ‘climate refugees’, and of obligations upon the international community to protect those rights.

When we ask why the EJF connects this argument to the issue of international security, the answer is that in this form it is more likely to get the attention of governments and policy makers, who, as we shall see, are otherwise extremely reluctant to put the issue of the climate displaced on any agenda. But it may also have the tendency to push the debate towards

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<sup>3</sup> Convention and Protocol Relating to the Status of Refugees – see <http://www.unhcr.org/uk/1951-refugee-convention.html> (accessed July 30, 2018).

border protection rather than a concern for the rights of the climate displaced. Jane McAdam comments that “alarmist” projections about the numbers of people displaced by climate change have “fuelled the idea that climate-related displacement is a threat to international security” (McAdam 2012, p. 4). This, she says, is both unfortunate and ironic, as those who use these notions are doing so to highlight the seriousness of climate change as an issue, but “their focus on mass movement also leverages an anti-immigration-security agenda” (McAdam 2012, p. 4). She observes that: “A number of developed States have already ‘flipped’ the security discourse away from the human security of the displaced, towards an insular self-protection response” (McAdam 2012, pp. 4-5). When the movement of people – in any context – is described as an “existential threat to our civilization”, it is all too easy to see the direction in which the debate will go. In section 1 of this chapter, I look at the different positions taken – for example between the ‘maximalists’ and the ‘minimalists’; section 2 examines the limitations of international law relating to refugees in relation to climate displacement; in section 3 I look at the idea of the ‘climate refugee’ and at proposals for a distinct legal instrument to protect them; section 4 explores the background and content of the ‘soft law’ approach; and in section 5 I draw the arguments together with critical conclusions.

## **1. The Landscape**

When entering into the debate about climate displacement, therefore, we have to be aware that it has a specific landscape. McAdam makes a contrast between what she calls the maximalist and minimalist/sceptical approaches (McAdam 2012, p.25). She says: “...the maximalist, or alarmist, approach has gained considerable attention. It is typified by organizations and scholars from an environmental studies background who see climate change-related movement as part of a bigger discourse that highlights the dangers of climate

change generally. Emphasizing that very large numbers of people will be displaced (and sometimes linking this with security concerns) is a way of demonstrating just how destructive climate change will be” (McAdam 2012, p. 26). Against this is posed the minimalist/sceptical position, which McAdam identifies with. However, this ‘sceptical’ position is not one that necessarily arrives at a lower estimate of the numbers displaced – although it does reject the high-end projections in the billions – rather, it is sceptical about how accurately we can predict future numbers. Wilkinson et. al. comment: “Predictions of future numbers should be handled with care...”, and “...none of the existing estimates are considered very reliable” (Wilkinson et. al. 2016, p. 4). They warn that environmental activists have a tendency to “predict vast population flows in an effort to galvanise international cooperation on climate change” (Wilkinson et. al. 2016, p. 4). However, this means the more sceptical position tends to lose the argument when it comes to media and policy attention.

Part of the caution on the sceptical side of the debate is based on the difficulty in connecting human mobility to climate change. While there is no doubt that there has been and will continue to be a connection here, that connection is complex. The United Nations High Commissioner for Human Rights reports that “... human mobility in the context of climate change is often multi-causal: environmental change interacts with a wide range of other factors to influence a decision to move and the degree to which this decision is voluntary” (Human Rights Council 2018, p. 7). And Sarah Opitz Stapleton et. al. comment: “...directly attributing human mobility to climate change is extremely difficult. People move for a variety of reasons, and even where hazards contribute to this decision, it is the underlying socioeconomic, cultural, political and environmental processes that either enable or constrain people’s ability to cope where they are or result in their moving” (Stapleton et. al. 2017, p. 7). However, “... while the precise relationship between hazard and mobility is not easily

tracked, it is clear that climate is influencing patterns of migration and displacement”

(Stapleton et. al. 2017, p. 7).

And so whatever the difficulties in terms of predicting numbers and causal attribution, there is an urgent ethical question here, and a clear normative gap in international protection. The minimalist/sceptical position tends to emerge from legal scholars, and the focus here is largely on the questions: (1) what rights do people displaced by climate change have?; and (2) who is responsible for protecting those rights? From a political theory perspective we can be more ambitious, and ask: (1) what rights *should* people displaced by climate change have?; and (2) who *should* be responsible for meeting those rights? In thinking through those questions, we can step outside of the maximalist/sceptical argument, because our response does not rest on having a precise prediction for a particular point in time, nor does it rest on us being able to prove an empirically rigorous connection between climate change and displacement in specific cases. We can take as starting presumptions, first, that a significant number of people are being and will be displaced by climate-related events; and, second, that while such displacement is multi-causal, climate change is a significant causal factor alongside others such as poverty and other forms of vulnerability. It is important to note that the sceptical side of the debate does not deny the urgency of these issues –self-identified sceptics such as McAdam have devoted their academic expertise to this question in terms of carefully researched articles and books. However, it is among the maximalists that we find people prepared to think significantly outside of the current rights regime in terms of protection, and on the other side the scepticism is not simply to do with the accuracy of predicted numbers, it is also to do with how far we can get in reforming the international system. As we have seen, the EJF argues for a new international treaty related to climate refugees, with rights and obligations, and, as we shall see, sceptics tend to argue that the best

we can do here will consist of 'soft law' arrangements or guiding principles applied at a regional level.

It is this correlation between two kinds of maximalism and minimalism that I want to move away from in this chapter. I recognise the force of the sceptics' concerns about alarmist predictions and about the complexities of displacement and migration when it comes to the role of the environment; and I recognise that these complexities impact on what kind of international protection can actually work here. But I also believe that the significance of climate-related displacement and the impact it has on people's lives is such that it calls for international protection in terms of rights and obligations, and that the soft-law, regional, guiding principles approaches concede too much when it comes to moral responsibility towards the displaced. In a sense the arguments on the sceptical side recognise the severity of the protection gap and the strength of the moral responsibility of the international community, but their scepticism about the political will to do anything about this means that by the time they reach a proposed framework, the *international* sense of that responsibility has been weakened to such an extent that we no longer have an international framework at all.

We might ask why it is important to keep that dimension of international responsibility in the discussion and proposals to address the issue, but the answer is very simple: we are looking at displacement and migration in the context of climate change. Of course, people have moved in response to environmental disasters and pressures throughout the history of human migration, and there is still room to ask whether a specific environmental disaster can be attributed to climate change and which cannot, and even when it can be, to what extent it can be *directly* attributed. But whatever the space for disagreement here, the fact of climate change makes a significant difference to how climate-related displacement should be addressed. Boano et. al. observe that two factors distinguish what is happening now and will happen in the future from the past. "First, the global scale of environmental change and thus

the potential impacts it will have, such as forced migration, are new phenomena... . Second, human agency is unarguably at the centre of environmental change and the potential to respond to it” (Boano, et. al. 2008, p. 5). That human agency is the contribution the developed world has made to global warming which is having and will continue to have serious impacts on people in the developing world. We know full well that those persons upon whom the impacts of climate change will fall most heavily – and that includes the necessity of migration – are those who have contributed the least to causing it. There is inevitably a question of global and international justice involved in responding to the impacts of climate change, and the need for an ethical dimension to the discussion.

## **2. The Limitations of the Refugee Protection Regime**

According to a United Nations Human Rights Council report published in 2018, the best data indicates that sudden onset climate and weather-related disasters have displaced an average of 22.5 million people a year since 2008. To this needs to be added those who leave their homes due to slow-onset climate changes, such as sea-level rise, salinization, drought, and desertification (Human Rights Council 2018, p. 4). The report estimates that between 1979 and 2008, 1.6 billion people were affected by drought and slow-onset environmental degradation – although it is not clear that this number were displaced (Human Rights Council 2018, p. 40, n. 327; see original data in Laczko and Aghazarm eds. 2009)). The report’s key concern is slow-onset displacement, and this is one area where predictions can be fraught. For example, looking at sea-level rise as it will impact Bangladesh – with predictions of 10-15 centimetres by 2020 and 2050, and one metre by 2100 – the report suggests that anywhere between 1.5 million and 17 million could have to leave their homes by the end of the century (Human Rights Council (2018), p. 27). Stapleton et. al. say of sudden-onset climate-related hazards, that:

“Such hazards newly displaced over 24 million people in 2016 and overall have displaced 32 times more people than other geophysical hazards such as earthquakes, and three times as many as those fleeing conflict” (Stapleton et al 2016, p. 9).

McAdam, citing Kalin, identifies five different kinds of movement in this context (McAdam 2012, pp. 18-19):

1. Increased hydro-meteorological disasters – flooding, hurricanes, cyclones, etc. – predominantly internal and across relatively short distances.
2. Planned evacuations from areas at high risk of disasters – likely to be permanent internal displacement.
3. Environmental degradation and slow-onset disasters – desertification, increased salinity, recurrent flooding – not necessarily causes of displacement, but prompt people to consider migration as an adaptation strategy: in the longer term when such areas become uninhabitable, such movements become forced displacement and permanent.
4. Small island territories at risk of disappearing – rising sea levels – permanent relocation to another country will be necessary.
5. Risk of conflict over essential resources. Conflict is likely to be social rather than armed, and displacement would be protracted.

Of these cases, only the fifth offers scope for protection obligations under current international law, but only then if the displacement is across a national border and, in addition, if there is the required element of persecution. If the displacement is internal there might be some protection through the United Nation’s Guiding Principles on Internal Displacement, but these principles are not binding and the degree of support and protection will depend on the internal politics of the state affected. For all the other cases, including the fifth case in the absence of persecution, there are no international protection obligations in place.

The Human Rights Council report observes that: “There is no universal legal definition or agreed terminology that describes people who move in the context of climate change”

(Human Rights Council 2018, p. 8). One of the key issues is that a significant amount of movement in response to climate effects is anticipatory: “...much movement – and indeed most movement related to environmental factors – is not entirely forced or voluntary, but rather falls somewhere on a continuum between the two, with multiple factors contributing to whether a person moves, where they move, and how” (Human Rights Council 2018, p. 7).

Under those circumstances: “There is no ... affirmative international right to enter a country or stay...” under the 1951 Refugee Convention (Human Rights Council 2018, p. 5).

The UN Refugee Convention offers protection for those threatened by persecution on five grounds – race, religion, nationality, membership of a particular social group, and political opinion. The Cartagena Declaration on Refugees, adopted by the Organisation of American States in 1984 in Latin America<sup>4</sup>, and the Organisation of African Unity Convention adopted in Africa in 1969<sup>5</sup>, are both more generous in their definition of who counts as a refugee, and so offer scope for including those displaced by climate change. However, there is a prevailing view among the states that signed up to this agreements that environmental disasters do not give rise to protection obligations (Human Rights Council 2018, p. 23). Jane McAdam observes that: “The international protection regime is predicated on the idea of forced exile...”.

Migration as such “does not enliven international legal duties...” (McAdam 2012, p. 6). This is especially problematic when it comes to slow-onset impacts of climate change: “... although people may have no prospect of a sustainable livelihood if they remain in their home, they are

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<sup>4</sup> See Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, [https://www.oas.org/dil/1984\\_cartagena\\_declaration\\_on\\_refugees.pdf](https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf) (accessed July 30, 2018)

<sup>5</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, [http://www.achpr.org/files/instruments/refugee-convention/achpr\\_instr\\_conv\\_refug\\_eng.pdf](http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf) (accessed July 30, 2018).

not – yet – facing imminent harm. While pre-emptive movement in such circumstances may be a rational human response, neither international law nor most national laws facilitate this” (McAdam 2012, p. 6). When we come to climate change agreements themselves, there is no protection for those displaced by climate events (Human Rights Council 2018, p. 25). All this leads Stapleton et. al. to observe: “At the global level, the conceptual framework and organisational architecture around migration and displacement are embedded within an international response machinery developed over seven decades. But this machinery has not yet managed to integrate the complexity of 21<sup>st</sup>-century mobility into its politics or institutions” (Stapleton et al 2016, p. 8). Not only that: “The subjective and restrictive privileging of refugees – and the wider tendency towards category thinking more broadly – is deeply entrenched in the policies and discourses of displacement and migration, and will be very hard to dislodge” (Stapleton et al 2016, p. 27). In other words, we have a displacement protection framework devised in the middle of the 20<sup>th</sup> century in a specific context, which does not provide protection for, amongst others, the climate displaced. However, the consensus on the minimalist/sceptical side of the debate is that the climate displaced are not refugees, and we should not seek to expand the idea of the refugee to include them.

### **3. Climate Refugees?**

So in what ways do the climate displaced fail to make the grade as refugees? McAdam is clear that the term ‘climate refugee’ is “both legally and conceptually flawed” (McAdam 2012, p. 39). However, there have been attempts to define the ‘climate refugee’. For example the Environmental Justice Foundation define climate refugees as “... persons or groups of persons who, for reasons of sudden or progressive climate-related change in the environment that adversely effects their lives or living conditions, are obliged to leave their habitual homes

either temporarily or permanently, and who move either within their country or abroad” (Environmental Justice Foundation 2017a, p. 6). The term ‘environmental refugee’ was first ‘officially’ used by Essam El-Hinnawi in 1985 in a United Nations Environment Paper, but he was not arguing for an extension of the Refugee Convention, but rather using the term to highlight the impacts of pollution and unchecked development on populations. His definition was: “...those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life” (El-Hinnawi, E. 1985 p. 4. Taken from Boano et. al. 2008, p. 7).

But McAdam is sceptical that the term ‘refugee’ should be used at all. “While the concept of ‘environmental’ or ‘climate change’ refugee may provide a useful advocacy tool to generate attention and mobilize civil society around the dangers of global warming, it can also contribute to misunderstandings about the likely patterns, timescale, and nature of climate-related movement” (McAdam 2012, p. 40). There are a number of obstacles that “make it very difficult to argue that people displaced by the impact of climate change are refugees within the meaning of the Refugee Convention” (McAdam 2012, p. 42). Firstly, much of the movement in response to climate change will be internal, and a person must cross an international border to qualify as a refugee. Second, characterizing climate change as ‘persecution’ is extremely problematic, and adverse climate impacts “... do not meet the threshold of ‘persecution’ as this is currently understood in international and domestic law” (McAdam 2012, p. 43). An element of persecution is required, and that element has to be linked to one of the five Convention grounds listed in section 2. Part of the challenge is to do with causation. While it is clear that the developed nations have been the major causes of global warming, to establish legal liability “it is not enough to simply show that ‘industrialized countries’ have largely caused climate change through their historical and

present carbon emissions” (McAdam 2012, p. 92). It would have to be shown that the conduct was illegal at the time it was carried out, or otherwise wrongful. During the crucial period in history, such emissions were not unlawful and their long term effects were not known (McAdam 2012, p. 92).

However, while this works as a critique of the proposal to include the climate displaced within the 1951 Refugee Convention, many of those arguing for the concept of the climate refugee are not seeking to pursue that option. The EJF explicitly reject it. “EJF believes that refugee law is not a suitable avenue through which to pursue responses to climate-induced displacement. It is vital that existing instruments are not amended or opened up to renegotiation” (Environmental Justice Foundation 2017a, p. 41). Instead, what is needed is a distinct set of legally binding rights and responsibilities based around a distinct understanding of the climate refugee. This conception of the climate refugee, then, need not be parasitic in any way upon the concept of the refugee in the 1951 Convention, except that international protection is appropriate. In a separate briefing paper, they argue that refugee law is of very little use in relation to climate displacement, mostly for the reasons McAdam identifies above, and observe that amending existing international refugee law by widening its interpretation risks undermining existing refugee protection. (Environmental Justice Foundation 2017b, p. 7). Frank Biermann and Ingrid Boas put forward the most thorough case for a binding treaty obligation to protect climate refugees. They identify the need for “systems of global governance that will cope with the global impacts of climate change...” (Biermann and Boas 2010, p. 60). We cannot assume, they argue, that the system of global governance now in place will be able to do this – rather, we need ‘global adaptation governance’, which will affect most areas of world politics. One of the most crucial areas where this is needed is for “...systems of global governance for the recognition, protection and resettlement of climate refugees ... as a major building block of the emerging global

governance architecture on adaptation to climate change” (Biermann and Boas 2010, p. 61). The problem is that the current legal refugee regime offers “marginal protection, with no specific mandate, to climate refugees” (Biermann and Boas 2010, p. 74).

The concept of the ‘climate refugee’ is crucial here for two reasons. First, there is a need for a global governance regime that will protect displaced people whether or not they cross a national boundary – reserving the term ‘refugee’ for those who do cross such a boundary is difficult to defend. Second, “... we see no convincing reason to reserve the stronger term ‘refugee’ for a category of people that stood at the centre of attention after 1945, and to invent less appropriate terms ... for new categories of people who are forced to leave their homes now, with similar grim consequences. The term refugee has strong moral connotations of societal protection in most world cultures and religions. By using this term, the protection of climate refugees will receive the legitimacy and urgency it deserves” (Biermann and Boas 2010, pp. 66-67). However, they offer a restrictive notion of the climate refugee in the sense of cause: “... we propose to restrict the notion of climate refugees to the victims of three direct, largely undisputed climate change impacts: sea level rise, extreme weather events, and drought and water scarcity” (Biermann and Boas 2010, p. 64). They do not distinguish between internal and trans-border movement, nor between temporary and permanent migration. And so climate refugees are “... people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity” (Biermann and Boas 2010, p. 67).

Their preferred strategy is not the distinct treaty as proposed by EJF, but a Protocol on Recognition, Protection and Resettlement of Climate Refugees added to the United Nations Framework Convention on Climate Change (Biermann and Boas 2010, p. 75). Rather than a new agency, the Protocol would be upheld by a network of agencies implementing strategies

under the authority of parties to the Protocol – these would probably include the World Bank, the United Nations Environmental Programme, the United Nations Development Programme, and the UNHCR. Their activities would require funding from the international community, in the form, perhaps, of a Climate Refugee Protection and Resettlement Fund (Biermann and Boas 2010, p. 81). There would be five principles underpinning the new Protocol:

1. **The Principle of Planned Re-location and Resettlement:** Even though there may be singular events, the magnitude and frequency of these can be predicted such that we can foresee when populations need to leave a region suffering from this risk. And so “...at the core of a regime on climate refugees is not programs of emergency response and disaster relief, but instead, planned and voluntary resettlement over longer periods of time” (Biermann and Boas 2010, p. 75).
2. **The Principle of Resettlement Instead of Temporary Asylum:** In the long term most climate refugees will not be able to return home – especially in relation to sea-level rise. Therefore we need “... an institutional design that conceives of (most) climate refugees as permanent immigrants to the regions or countries that accept them” (Biermann and Boas 2010, p. 75).
3. **The Principle of Collective Rights for Local Populations:** The Geneva Convention is designed for individual persecution. We need to think of climate refugees in terms of collectives.
4. **The Principle of International Assistance for Domestic Measures:** As the majority of climate refugees will be internal, the new regime has to focus less on protecting people who are outside of their home state, and more on supporting the domestic government to protect people within their own territory. “The governance challenge of protecting and resettling climate refugees is thus essentially about international assistance and funding

for the domestic support and resettlement programs of affected countries that have requested such support” (Biermann and Boas 2010, p. 75).

5. The Principle of International Burden-sharing: As the developed states bear most responsibility for global warming, they have most moral responsibility for supporting the displaced. Some of the principles from existing climate agreements would seem appropriate here. “These could include: the principle of common but differentiated responsibilities (which suggests that richer countries have to bear higher costs for the protection of climate refugees); the principle of reimbursement of full incremental costs of affected countries incurred through resettlement of climate refugees; and the principle of double-weighted decision-making procedures, which would give both developing and industrialized countries equal clout in a new institution on climate refugees” (Biermann and Boas 2010, p. 75).

However, Jane McAdam argues that advocacy for a new treaty or protocol as proposed by the EJF and Biermann and Boas is misplaced (McAdam 2012, pp. 187-188). She provides five grounds for thinking this. First, there is the difficulty in identifying climate change as the primary cause of movement, given the multi-causal nature of displacement. Second, such a treaty “would privilege those displaced by climate change over other forced migrants (such as those escaping poverty), perhaps without an adequate (legal and/or moral) rationale as to why.” (McAdam 2012, pp. 187-188). Third, “it may premise protection on individual status determination, which is unsuited to mass displacement scenarios” (McAdam 2012, p188). Fourth, defining ‘climate refugees’ may “harden the category and exclude some people from much-needed assistance” (McAdam 2012, p.188). And fifth, “there seems to be little political appetite for a new international agreement on protection” (McAdam 2012, p188).

Looking at these objections in the context of Biermann and Boas’ proposal, they do address the first in restricting their definition of ‘climate refugee’ to specific climate events, but in

doing so are in danger of falling into the fourth challenge of hardening the category. They specifically address the third objection by prioritising the collective over individual identification. The second objection, that we lack a moral/legal rationale for prioritising the climate displaced over other categories of forced migration, goes to the heart of the whole forced displacement issue, and is a question that I will return to in the conclusion. The key element of the sceptical challenge to proposing a new treaty for the climate displacement is the fifth objection that McAdam identifies, the lack of political will among states. But before we move on to look at the evidence for that reluctance and consider how we should respond to it, there is another key challenge that McAdam and others have identified, and that is how a new international protection regime would deal with slow-onset movement caused by climate degradation. McAdam observes: “The refugee and complementary protection paradigm, which premises protection needs on imminent danger, does not capture the need for safety from longer-term processes of climate change that may ultimately render a person’s home uninhabitable” (McAdam 2012, p. 194). And: “Though refugee law is itself built on predictions about the future, the timeframes involved in predicting the slow-onset impacts of climate change, and especially the role adaptation and resilience may play in mitigating against them, would likely be considered by States to be too uncertain for them to assume binding obligations towards affected populations” (McAdam 2012, p.195). This is the key question addressed by the Human Rights Council in its 2018 report. That report observes that the concept of *non-refoulement*, central to the 1951 Refugee Convention, has application in human rights law in general, as migrants cannot be forced to return to life-threatening conditions, or serious violations of their human rights, or to cruel, inhuman or degrading treatment. So far national courts have not found the impacts of climate change reach the threshold needed to trigger this *non-refoulement* requirement, “but this possibility has not been foreclosed” (Human Rights Council 2018, p. 22). They reference the New Zealand

Immigration and Protection Tribunal's acknowledgement that natural disasters, including those caused by climate change could "provide a context in which a claim for recognition as a protected person ... may be properly grounded, a proposition endorsed by the New Zealand Supreme Court (Human Rights Council 2018, p. 22).

And so there is a recognition in the courts that the impact of climate change can endanger human rights, but the need for a severe or imminent threat acts as a threshold here. The Human Rights Council observes that this "... poses a challenge in the context of slow onset processes, with people often moving before the impacts reach that threshold." There is the need to evolve the understanding and interpretation of protection to allow *non-refoulement* to be extended to these cases. "If not, the consequences of slow onset effects combined with the conditions in the State of origin will have to be grave enough to threaten life or result in serious violations of human rights, including inhuman and degrading treatment. Once impacts reach this level, however, the scope and scale of movement may be such that broader-reaching solutions will be necessary" (Human Rights Council 2018) p. 22). My interpretation of this passage is that it is a carefully measured way of saying that if the protection of *non-refoulement* is not extended in the way proposed here, we will all pay a much more catastrophic price further down the climate change road.

#### **4. The 'Soft Law' Approach**

The sceptical position favours a soft law/guiding principles approach, rather than seeking the extension of the international protection of *non-refoulement* in the form of treaties or protocols which create new rights and obligations. McAdam says that this soft law option – something along the lines of the Guiding Principles on Internal Displacement – has the advantage of being flexible and allowing states to come up with their own frameworks for

supporting the climate displaced. “Based on existing refugee and human rights law principles, such an instrument would not require States to assume new obligations, but would clarify how those obligations might apply in the climate change displacement context” (McAdam 2012, p. 238). But even here, we must proceed softly, as it were, as states may still be hostile to such an approach, fearing ‘creeping obligations’ (McAdam 2012, p. 239). Angela Williams asks the question whether: “the phenomenon of climate change has now created a new and independent category of refugee which requires specific and autonomous recognition by the international system?” (Williams 2008, p. 514). But she, with McAdam, sees the lack of political will as the key factor: “...taking into consideration the unwillingness of states to compromise their sovereignty, and acknowledging the reluctance of the United States to agree to the most basic commitments via the Kyoto Protocol, it would seem unlikely that a new global agreement could be reached specifically in relation to climate change displacement” Williams 2008, p. 517). The way forward lies with regional cooperation and bilateral agreement that builds on existing geopolitical and economic relationships based on soft law.

Commenting on the period 2010-2013, McAdam identifies “the most concerted attempts so far by the international community to develop new normative frameworks on climate change and human movement...”, but says: “What has become manifestly clear is that states want to retain control over these developments, both in terms of how the issue is represented and how responses are shaped. They are reluctant to assume formal obligations or to ‘delegate’ responsibility to international organizations” (McAdam 2014, p. 12). The starting point for her is the Nansen Conference, convened in Norway in 2011, with the aim to arrive at the Nansen Principles.<sup>6</sup> These principles were a broad set of recommendations to guide future development in this area, rather than a set of principles for action. For example, Principle IX

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<sup>6</sup> The Nansen Conference, <http://www.unhcr.org/4ea969729.pdf>.

acknowledges the normative gap regarding the protection of people displaced across international borders due to sudden-onset disasters and suggests that the UNHCR and states work towards a new guiding framework or instrument. In response the UNHCR called a Ministerial Meeting in 2011 to address key questions, including whether it would be useful for the UNHCR, states and other relevant actors to develop a global guiding framework or instrument to apply to situations of displacement across borders other than those covered by the 1951 Refugee Convention. It is worth noting the open nature of this question, and the UNHCR also asked whether this should be limited to displacement relating to climate change and natural disasters, allowing the possibility that it could be much broader. However, McAdam comments that there was a “deliberate lack of willingness by a majority of governments, whether for reasons of sovereignty, competing priorities or the lead role of UNHCR in the process, to engage with displacement linked to disasters or climate change” (McAdam 2014, p. 18). With only five states expressing support – Norway, Switzerland, Costa Rica, Germany and Mexico – the UNHCR dropped explicit campaigning on this issue. However, it was taken forward by Norway and Switzerland in the form of the Nansen Initiative on Disaster-Induced Cross-border Displacement, established in 2012 as a state-owned consultative process outside of the United Nations, aiming at ‘bottom-up’ cooperation between states in order to reach a consensus on the key principles regarding the protection of people displaced across borders by natural disasters.<sup>7</sup> This was an explicitly soft-law approach, looking at the development of a non-binding protection agenda, with the focus on natural disasters in general, not just climate related, and on cross-border displacement. The Initiative ran from 2012 to 2015, ending with the Nansen Initiative Protection Agenda, which concluded that rather than a new binding international convention on cross-border disaster

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<sup>7</sup> Nansen Initiative on Disaster-Induced Cross-Border Displacement, <https://www.nanseninitiative.org/global-consultations>.

displacement, the way forward was to focus on the integration of effective practices by states into their own normative frameworks in accordance with their own specific situations and challenges. The task was then taken up by the Platform on Disaster Displacement.<sup>8</sup> This includes both sudden-onset and slow-onset disasters, and so includes environmental degradation such as sea level rise, desertification and increased salinization related to climate change. However, the Platform explicitly rejects the use of the term ‘climate refugee’.

More recently we have seen the New York Declaration on Refugees and Migrants, with the aim of developing two global compacts, one on refugees and the other on migration. The latter has included discussion on climate change displacement, and climate change dimensions have been integrated into the preparation of both compacts (Human Rights Council 2018, p. 48). Stapleton et. al. comment that the Global Compacts do “offer scope for climate informed action”, but it “remains to be seen what impact (if any) the Compacts will have on national policies” (Stapleton et al 2017, p.8).

We can see, then, that the impetus is towards soft law/guiding principles, with the focus on regional cooperation and bilateral agreement. Boano et. al. offer an arrangement between Tuvalu and New Zealand as a “model of how international agreement and positive policies offer a way forward” (Boano et al 2008, p. 28). They are here referring to the Pacific Access Category programme between New Zealand and island nation-states such as Tuvalu, which, they say, “provides a model of international cooperation, global environmental responsibility and sharing of the burden of climate change-induced relocation” (Boano et al 2008, p. 29). They observe, however, that the New Zealand government is careful to keep this programme as low-key as possible, and to identify it as a labour migration arrangement rather than a protection programme for climate displaced persons. But Angela Williams says this is

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<sup>8</sup> The Platform on Disaster Displacement, <http://disasterdisplacement.org>.

because it *is* a labour migration programme: “... it may be argued that the environmental significance of the PAC has been exaggerated and that the agreement represents little more than an economically oriented immigration move to bolster New Zealand’s workforce” (Williams 2000, p. 515). It is hard to resist that interpretation when we look at the details of the PAC.<sup>9</sup> It is open to an annual quota of residents of Tuvalu, Fiji and Tonga, is limited in number, restricted to people aged between 18 and 45 who can meet a minimum level of English-language ability, and who have an acceptable offer of employment.

There have been suggestions that the new government of New Zealand would create what have been described as ‘climate change refugee visas’<sup>10</sup>. The Labour-led coalition’s Climate Change Minister, James Shaw of the Green Party, said “an experimental humanitarian visa category” could be implemented for people from the Pacific region displaced by sea-level rise. However, that proposal has receded into a longer-term possibility, with the focus now on development assistance for adaptation and mitigation aimed at averting displacement.<sup>11</sup> Issues of migration will be examined after 2024. A New Zealand government discussion paper states: “It is recommended that further discussion of immigration options, including any humanitarian visa category, for instance, be addressed in this longer-term approach. Once a clearer picture of Pacific needs and priorities emerges, there might be scope to increase the climate change focus of existing policies or consider expanding labour mobility opportunities, alongside a risk assessment.”<sup>12</sup> The possibility of New Zealand establishing a ‘climate change refugee visa’ has receded a considerable distance.

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<sup>9</sup> Pacific Access Category, <http://disasterdisplacement.org>.

<sup>10</sup> “New Zealand considers creating climate change refugee visas”, *Guardian*, October 31, 2017, <https://www.theguardian.com/world/2017/oct/31/new-zealand-considers-creating-climate-change-refugee-visas>, accessed May 25, 2018.

<sup>11</sup> “NZ signals long-term Pacific climate change strategy,” <https://www.radionz.co.nz/news/pacific/357672/nz-signals-long-term-pacific-climate-change-strategy>, accessed May 25, 2018.

<sup>12</sup> See Office of the Minister of Foreign Affairs (2018), “Pacific climate-change related displacement and migration: a New Zealand action plan”, <https://www.mfat.govt.nz/assets/Uploads/Redacted-Cabinet-Paper-Pacific-climate-migration-2-May-2018.pdf>, accessed May 25, 2018.

## 5. Conclusions

I want to conclude with two criticisms of this direction of travel, and a critical observation of the nature of the debate. The first criticism relates to the nature of soft law and the status of guiding principles. As opposed to international law, treaties and agreements with enforceable rights and obligations, soft law is made up of 'rules' that have no binding force. Guzman and Meyer identify the following problems with soft law: first, it is not law; second, it is a residual category defined in opposition to clearer categories; and third, it can only be hortatory, seeking to encourage and persuade. They comment: "... soft law is best understood as a continuum, or spectrum, running between fully binding treaties and fully political positions. Viewed in this way, soft law is something that dims in importance as the commitments of states get weaker, eventually disappearing altogether" (Guzman and Meyer 2010, p. 173).

The second criticism is that this approach shapes a response to climate displacement that is predominantly 'humanitarian'. In relation to refugees, Joseph Carens argues the duty to admit can be based on humanitarian concern, causal connection and the normative presuppositions of the state system (Carens 2013, pp. 195-196). The humanitarian concern is that there is a duty to admit refugees "simply because they have an urgent need for a safe place to live and we are in a position to provide it" (Carens 2013, p. 195). Causal connection means there is an obligation to admit "because the actions of our own state have contributed in some way to the fact that refugees are no longer safe in their home country" (Carens 2013, p. 195). These causal connections can generate moral duties, and Carens comments that: "We should already be starting to think about environmental refugees – people forced to flee their homes because of global warming and the resulting changes in the physical environment." Rich countries have a duty to admit because they bear a major responsibility for environmental impacts. (Carens

2013, p. 195). The state-system argument is more complex: it is based on the normative presuppositions of the modern state system, a system that organizes the world into sovereign states with exclusive authority over their territory. These normative presumptions are that:

- All human beings are assigned to one state at birth.
- Because the state system assigns people to states, there is a collective responsibility to make provision to correct for failures in that system.
- And: "...states have a duty to admit refugees that derives from their own claim to exercise power legitimately in a world divided into states" (Carens 2013, p. 196).

With Carens, my argument is that the duty to admit the climate displaced does not derive from a humanitarian concern, but from one based on causal connections that generate moral duties. However, given the complexities of causality in relation to global warming, some version of the third rationale will also help here. There is a collective, international, responsibility to ensure that the climate-displaced receive proper protection, given that, if they are displaced across international borders, their home state is not able to provide that protection; and if they are internally displaced, their home state may not be able to meet the costs of that protection and has the moral right to expect international support. Here we return to Biermann and Boas' Principle of International Burden-Sharing, with common but differentiated responsibilities and the principle of reimbursement, as the most appropriate expression of an ethical response.

Certainly in the face of sudden-onset environmental disasters, humanitarian action to protect those affected looks entirely appropriate, and the humanitarian response has an international dimension, in that while regional actors are best placed to provide that support in the immediate term, in the longer term they can expect support from the international community. However, climate change has that causal element which changes the shape of the

moral landscape. While regional actors may still be best placed to respond even in the longer term, they have the right to expect other actors to take a shared responsibility, especially the developed states as the major agents causing global warming. And so while the soft law/guiding principles approach ends up identifying responses which are primarily regional, based on best-placed actor responses, and humanitarian in their moral justification, the moral responsibility for the protection of the climate-displaced goes deeply beyond the regional and the humanitarian – it has a strong element of causal responsibility best addressed through international obligations to protect. The soft law approach advocated by the minimalist arguments have the effect of, in the end, letting the developed nations off the climate change hook.

My critical observation is this. There has been much theoretical and political debate about the proper scope of the definition of the refugee. This focus on the boundaries of the definition of the refugee often overlooks the fact that by defining the inside, we at the same time define the outside. When we create the category of the refugee we at the same time create the category of the not-refugee. And so the question, who is *not* a refugee, becomes extremely important – because what we are doing when we answer *this* question is saying that those who meet *this* category do not have the same international protections as the refugee. On the face of it this might look innocent enough and the debate about definitions can stop here, because the concept of the not-refugee takes in every person in the world who does not meet the definition, including the well protected. However, what is meant by the category of the not-refugee is something much more precise. It identifies people who, through no fault of their own, must leave their homes, but who do not meet the refugee criteria – for example, they have not crossed an international border, or persecution is absent. And so it includes the internally displaced, the economically displaced, and those displaced by climate change and other natural disasters. The point here is to realise that in identifying the category of the

refugee and the rights and obligations that attach to it, we have left a vast amount of work not done. We cannot be saying *is* that those who are not-refugees, because they are not refugees, have *no* rights at all. Such a position would be morally and politically catastrophic.

That is, of course, not what is being said, and we can see from the extensive literature on the climate displaced that many people, both maximalist and minimalist, are prepared to argue that our moral and political concerns cannot end at the border of the refugee definition.

However, as far as the international community goes, and a significant part of the academic debate, the conclusion *has* been that these not-refugees have no rights at all. There are no international legal protections in place for them. In relation to the internally displaced we can debate the extent to which the UNHCR's Guiding Principles have been effective, but in relation to the climate displaced we cannot even debate that – the best we can do at the international level seems to be a set of guiding exhortations, and this does seem to me to be a moral and political catastrophe.

Finally, I want to return to McAdam's objection that, in arguing for international protection for the climate displaced, any treaty or protocol "would privilege those displaced by climate change over other forced migrants (such as those escaping poverty), perhaps without an adequate (legal and/or moral) rationale as to why" (McAdam 2012, pp. 187-188). This is a radical objection, but it challenges not just the argument for international protection for the climate displaced, but the whole global displacement regime, including the Refugee Convention. The point is that this system is riddled with issues of priority that lack a moral or legal rationale, such as the distinction between the refugee and the internally displaced person. Elsewhere McAdam comments, in relation to the creation of the soft-law/guiding principles approach: "The question remains ... whether it is appropriate to create guiding principles focusing solely on climate change-related movement, or whether the scope should be broader, based on the *needs* and *rights* of the displaced irrespective of the cause" (McAdam

2012, p. 240). This, she says, would shift attention away from a ‘single cause’ approach, and acknowledge the connected socio-economic causes of displacement.

But this constitutes a radical shift in perspective, away from causes of displacement, to the impacts, and to the needs and rights of the displaced, and there is nothing to prevent this shift applying all the way back to the concept of the refugee. In other words, McAdam’s suggestion here makes all the distinctions between refugees, internally displaced, economically displaced and climate displaced collapse. In response to the charge that we are prioritising the climate-displaced at the exclusion of others in having this discussion at all, what we can legitimately say is that in defining the climate refugee, we are making no comment on what rights and protections the other displaced persons should have – we are simply dealing with one question at a time. If the objection then is, as McAdam points out, that all these questions are connected, then the reply has to be that they are connected in such a radical way that it throws into sharp focus what Stapleton et. al. earlier referred to as the “... subjective and restrictive privileging of refugees ...” in international law, policy and political theory (Stapleton et. al. 2016, p. 27), and that *every* aspect of forced displacement has to be flipped around in this way. And this, surely, is the whole point behind the idea of the climate refugee.

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