

# MORE THAN HOT AIR: REFLECTIONS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS

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POSTSCRIPT

## I INTRODUCTION

The two areas of human rights and climate change are inextricably linked. They are both dependent upon the international cooperation of states and are part of the domain of the common concern of humankind.<sup>1</sup> As such, the protection of human rights and of the climate depends upon multilateral action on the part of the international community, particularly in circumstances where human rights are violated due to the adverse impacts of climate change. A key argument in this article is that there should be a focus on addressing the causes of climate change by developing international environmental law, because climate change forms a fundamental threat to the welfare of both humankind and the environment. This form of protection is likely to lead to more effective prevention of human rights

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<sup>1</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107, preamble para 1 (entered into force 21 March 1994) ('UNFCCC'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 183<sup>rd</sup> plen mtg, [preamble paras 1, 2], UN Doc A/810 (1948) ('UDHR').

violations that occur as a consequence of climate change, rather than relying solely upon the present legal framework for international human rights law.

This article commences with a brief summary of the relationship between climate change and human rights and then examines whether there currently exists any adequate legal means of protection against violation of the human rights occurring as a result of the adverse impacts of climate change. The second part of this article considers whether there are effective mechanisms available to deal with these violations of human rights at international law and the third part examines the predicament of people who are, and might in the future be displaced by climate change.

This article is timely not only because of the importance attached to the fundamental human rights of individuals, but also due to the fact that the principal existing international legal regime regulating climate change – established under the *Kyoto Protocol* to the *United Nations Framework Convention on Climate Change* ('UNFCCC')<sup>2</sup> – is due to be renegotiated at the Conference of Parties of the UNFCCC (COP15) in Copenhagen late this year. Indeed, a series of meetings leading up to the COP15 Meeting have already begun, and recent sessions in Bonn in June and August 2009 have highlighted how complex and difficult this process will be. It is certainly too early to have the confidence to predict how the international legal regime will develop at Copenhagen, and in the period thereafter.

Many state governments have been focusing on the economic and security aspects of climate change, without paying sufficient attention to the social and human rights implications.<sup>3</sup> However, a report issued by the Office of the United Nations Commissioner for Human Rights ('UNHCHR') in early 2009 has raised this relationship at the highest levels, by focusing on 'The Relationship between Climate Change and Human Rights' (the '*UNHCHR Report*'). The *UNHCHR Report* set out to establish some of the key issues that characterise the relationship between human rights and climate change. It is apparent from the

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<sup>2</sup> *Kyoto Protocol to the Framework Convention on Climate Change* opened for signature 11 December 1997, 37 ILM 22 (1998) (entered into force 16 February 2005) ('*Kyoto Protocol*').

<sup>3</sup> John Von Doussa, 'Human Rights and Climate Change: A Tragedy in the Making' (2008) 31(3) *UNSW Law Journal Forum* 953, 953: 'although climate change will clearly have direct and indirect human rights impacts, the focus of governments seems to have been largely on economic, trade and security impacts of climate change, with the social and human rights implications receiving little consideration in policy debates.'

conclusions of the *UNHCHR Report* that the implications of this relationship are very serious. Many fundamental human rights will be affected by changes in the earth's climate – some of the main impacts on human rights are listed in the *UNHCHR Report*. They are highlighted in summary form below.

### A *The Right to Life*<sup>4</sup>

Predictions by the United Nations Intergovernmental Panel on Climate Change ('IPCC') indicate that an increase in weather threats, such as heatwaves, floods, storms fires and droughts, will inevitably lead to an increase in human deaths.<sup>5</sup> These weather-related disasters are more likely to have an effect on the right to life of those in the developing countries, but will also have an impact upon other related human rights, such as the right to adequate food, due to the increase of people suffering from hunger.<sup>6</sup>

### B *The Right to Adequate Food*<sup>7</sup>

It is likely that, in those locations in the mid to high latitudes of the world, food production will increase; however, it is predicted that food production will, conversely, decrease at lower latitudes, so that in many poorer regions, additional people will suffer from hunger due to the effects of climate change. This is likely to be particularly the case in

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<sup>4</sup> *UDHR*, GA Res 217A (III), UN GAOR, 183<sup>rd</sup> plen mtg, [art 2], UN Doc A/810 (1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 6 (entered into force 2 September 1990).

<sup>5</sup> Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, [9], General Assembly A/HRC/10/61 (2009) ('*UNHCHR Report*').

<sup>6</sup> *Ibid* 9.

<sup>7</sup> *UDHR*, GA Res 217A (III), UN GAOR, 183<sup>rd</sup> plen mtg, [art 2], UN Doc A/810 (1948); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 11 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 24(c) (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61<sup>st</sup> sess, 76<sup>th</sup> plen mtg, [art 25(f), art 28 para 1], UN Doc A/Res/61/106 (2006); *Convention on Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, 1249 UNTS 13, art 14 para 2 (h) (entered into force 3 September 1981); *International Convention on Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195, art 5(e) (entered into force 4 January 1969).

areas such as sub-Saharan Africa.<sup>8</sup>

In addition to the problems of ensuring adequate food production, mitigation actions that seek to reduce the emissions of greenhouse gases might also have other impacts on the right to food. For example, agro-fuel production carried out to mitigate the impacts of climate change could affect the right to food in areas where arable land is scarce, because these fuels may be produced in priority to food, thus leading to an increase in the price of food due to a shortage in production.<sup>9</sup>

### C *The Right to Water*<sup>10</sup>

There will be a loss of safe drinking water due to less snow cover and reductions in glaciers. The shortages resulting from these losses from the water supplies of mountain ranges are predicted to affect more than one sixth of the world's population.<sup>11</sup>

### D *The Right to Health*<sup>12</sup>

There are likely to be serious adverse affects on the health of people

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<sup>8</sup> *UNHCHR Report*, above n 5, 10.

<sup>9</sup> Ibid 22. 'Agro-fuels' or biofuels are used to replace fossil fuels for transport and contain ethanol derived from suitable plants.

<sup>10</sup> *General Comments no. 15 the Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, Comm on Economic, Social and Cultural Rights, 29<sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/2002/11 (2002); *Convention on the Elimination of all forms of Discrimination against Women* adopted 18 December 1979, 1249 UNTS 13, art 14 para 2(h) (entered into force 3 September 1981); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61<sup>st</sup> sess, 76<sup>th</sup> plen mtg, [art 28 para 2(a)], UN Doc A/Res/61/106 (2006); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 24 para 2 (c) (entered into force 2 September 1990).

<sup>11</sup> *UNHCHR Report*, above n 5, 11.

<sup>12</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 12 (entered into force 3 January 1976); *Convention on Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, 1249 UNTS 13, arts 12, 14 (entered into force 3 September 1981); *International Convention on Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195, art 59(e)(iv) (entered into force 4 January 1969); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 24 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61<sup>st</sup> sess, 76<sup>th</sup> plen mtg, [arts 16 para 4, 22 para 2, 25], UN Doc A/Res/61/106 (2006); *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, adopted 18 December 1990, 30 ILM 1517 (1991), arts 43 para 1(e) para 1 (c), 70 (entered into force 1 July 2003).

throughout the world as a result of climate change. For example, there will be increases in malnutrition, in the spread of diseases and also increased injury, due to the consequences of more frequent severe weather events.<sup>13</sup> It is likely that these increases in adverse health effects will be more serious in the regions of sub-Saharan Africa, South Asia and the Middle East.<sup>14</sup>

### E *The Right to Adequate Housing*<sup>15</sup>

Global warming will impact on the right to adequate housing, since in some areas such as the Arctic region, low-lying islands and mega-deltas, many people will lose their homes and may need to be relocated. Storm events and sea-level rise will directly lead to a loss of housing and the potential for the loss of livelihoods will result in an increase in those populations in urban areas and in slums, some of which are particularly vulnerable to severe climate events.<sup>16</sup>

Indeed, whole countries may eventually become uninhabitable. There have already been various discussions between the Governments of Tuvalu and Australia/New Zealand canvassing options to address the 'disappearance' of that country as a result of rising sea levels. We have now entered a phase of 'environmental refugees', a concept for which existing international law regulation is not well-equipped to deal with.

### F *The Right to Self-Determination*<sup>17</sup>

The adverse effects of sea-level rise and serious weather events could lead to indigenous peoples being forced to leave their traditional homelands or being placed in a situation where they are no longer able to rely upon their traditional and essential sources of livelihood.<sup>18</sup>

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<sup>13</sup> *UNHCHR Report*, above n 5, 12.

<sup>14</sup> *Ibid.*

<sup>15</sup> *UDHR*, GA Res 217A (III), UN GAOR, 183<sup>rd</sup> plen mtg, [art 25], UN Doc A/810 (1948); *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, art 11, (entered into force 3 January 1976).

<sup>16</sup> *UNHCHR Report*, above n 5, 13.

<sup>17</sup> *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, art 1 para 1, (entered into force 3 January 1976).

<sup>18</sup> *UNHCHR Report*, above n 5, 14.

## II ACTION TO PREVENT FUTURE VIOLATIONS OF THESE HUMAN RIGHTS

The aim of the international community should be to prevent these impacts on human rights as far as is possible. In order to achieve this aim, there will need to be greater cooperation amongst states to take more drastic action to reduce greenhouse gas emissions. As noted, the levels required to be reduced are in the process of negotiation, but the signs are not positive. Clearly the levels agreed to under the *Kyoto Protocol* are inadequate:

Whilst there is much debate surrounding the level at which greenhouse gases can be considered dangerous the 2007 IPCC Fourth Assessment Report indicates that global emissions need to be reduced by somewhere in the order of 80 to 90 per cent by 2050 in order to stabilise atmospheric concentrations at 450ppm CO<sub>2</sub>-e. Since that report was released there have been many 'system wide' changes that have accelerated beyond IPCC expectations (including the worst ever loss of arctic sea ice in the northern summer of 2007). This suggests that the earth system is moving towards a "tipping point" for the occurrence of irreversible catastrophic impacts such as the total disappearance of the arctic sea ice, and the destabilisation of the Greenland and Antarctica ice sheets.<sup>19</sup>

There are reporting obligations under provisions of the *UNFCCC* and the *Kyoto Protocol*, including of matters such as inventories of greenhouse gases and of methodologies for the verification of this information. However, these international agreements provide for preliminary reductions of greenhouse gases by the international community and, in fact, in some cases as for Australia, an increase in emissions was ultimately permitted at the conclusion of the negotiations in Kyoto.<sup>20</sup> Clearly, the international negotiations leading to COP15 and beyond need to ensure that there are much greater reductions of greenhouse gas emissions in the future in order to contain climate change.

Compliance institutions have been established to support the environmental protection provisions of the *Kyoto Protocol*,<sup>21</sup> to monitor

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<sup>19</sup> Wayne Gumley, 'Beyond Bali: The Future of Climate Change Law' in Wayne Gumley and Trevor Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2009) 295, 296.

<sup>20</sup> *Kyoto Protocol*, above n 2, Annex B. Australia's target is to limit its greenhouse gas emissions to 8 per cent above its 1990 emissions during the first commitment period 2008-2012.

<sup>21</sup> *Ibid* arts 16, 18.

the carbon market and also to check the transparency of the accounting methods used by the parties to the treaty.<sup>22</sup> These compliance mechanisms should also be applied to future international agreements on emission reductions, particularly to the next international agreement currently in the process of negotiation, which is likely to account for greenhouse gas emission reductions after the first commitment period that concludes in 2012.<sup>23</sup>

However, the utility of these mechanisms is limited by the fact that they are established to assist states to meet their agreed levels of greenhouse gas emissions and obligations under the current regime – the *Kyoto Protocol* – rather than providing any means of redress for states or individuals who are adversely impacted by the effects of climate change. Moreover, many states are already having considerable difficulty in meeting their existing emission reduction requirements and it is as yet unclear how (and whether) they will agree (or be persuaded in some way) to commit to even greater reduction targets and any other more onerous obligations.

Other options for the international community to consider are to ensure financial and technological support for mitigation and adaptation programs, particularly in developing countries where large populations and their environment are threatened by the impact of sea-level rise and increased weather threats.

### III LEGAL PROTECTION OF HUMAN RIGHTS

The legal protection and enforcement of human rights becomes a key question when considering the impacts of climate change on these human rights – to what extent are they likely to be protected?

According to *UNHCHR Report*:

The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change – related harm often cannot clearly be attributed to acts or omissions of specific States. Yet, addressing that harm remains a critical human rights concern and obligation under international law. Hence, legal

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<sup>22</sup> UNFCCC, *An Introduction to the Kyoto Protocol Compliance Mechanism* (2008) 1 <[http://unfccc.int/kyoto\\_protocol/compliance/introduction/items/3024txt.php](http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024txt.php)> at 21 February 2008.

<sup>23</sup> See Bali Action Plan, UNFCCC, *Report of the Conference of the Parties on its Thirteenth Session, held in Bali from 3 to 15 December 2007* (2007) [3] <<http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>> at 30 September 2009.

protection remains relevant as a safeguard against climate change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change.<sup>24</sup>

The concern is that, in spite of the development of a more extensive legal regime and treaty system covering human rights issues, numerous violations of human rights continue to occur on a daily basis in many respects.<sup>25</sup> For example, one need only refer to the genocide in Darfur as a clear and current situation where fundamental human rights are being ignored and blatantly abused. One of the key problems is that the human rights legal system generally has a very limited capability to enforce the human rights obligations.<sup>26</sup> Donoho defines 'enforcement' in this context as,

[to] describe *authoritative* mechanisms that are designed and expected to *compel* direct consequences, such as changes in governmental policy, payment of civil compensation, or imposition of criminal penalties, *under threat of meaningful sanction*.<sup>27</sup>

It is often difficult to effectively enforce these human rights at international law and even in circumstances where human rights organisations may be able to intervene to assist in relieving the human rights concerns of the Darfur people, the underlying causes of the human rights violations would not be resolved, because these organisations are not equipped to remedy the causes of climate change. There may still be a failure to address the threat of climate change if the international environmental legal obligations of states to reduce greenhouse gas emissions are not substantially strengthened.

Another problem is that the effects of action to mitigate climate change are not always focused on environmentally sustainable outcomes. One of the dilemmas is that a hasty decision to take action to mitigate the effects of climate change may lead to other adverse consequences, as occurred in the case of the movement by governments and industry towards increasing the production of agro-fuels. Some of the adverse consequences of the rapid production of these fuels include impacts on 'land use, deforestation, water consumption, eviction and displacement of small farmers, and effects on food prices and food security.'<sup>28</sup>

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<sup>24</sup> UNHCHR Report, above n 5, 30.

<sup>25</sup> Douglas Donoho, 'Human Rights Enforcement in the Twenty-First Century' (2006) 35(1) *Georgia Journal of International and Comparative Law* 1, 3.

<sup>26</sup> Ibid 5.

<sup>27</sup> Ibid 11.

<sup>28</sup> Mairon G Bastos Lima, 'Biofuel Governance and International Legal Principles: Is it



Also, the use of these fuels may not always contribute to a lessening of greenhouse gas emissions, as is illustrated in circumstances where agro-fuels are developed in areas that are naturally rich in carbon (as, for example, in forested areas), the release of greenhouse gases into the atmosphere may not justify the emissions saved by use in transport of these fuels.<sup>29</sup> The effects of the production of agro-fuels have thus resulted in adverse consequences for the human rights of individuals, due to the impacts of rising food prices, evictions of people from land, displacement of indigenous people and insecure working conditions. This problem is not easily resolved, because of the inter-state issues involved as countries may rely upon bilateral agreements on the production of agro-fuel. Without further development of environmental law in this area, there is little to prevent abuses of human rights as a potential outcome of the production of these fuels.

Lima points out that if environmental governance principles are correctly followed the problems associated with increased agro-fuel production could be alleviated.<sup>30</sup> In order to resolve these issues, Lima argues that biofuels should be regulated by an agreed legal framework on biofuels that is in compliance with the sustainability principles in the *Declaration of the United Nations Conference on Environment and Development* ('Rio Declaration'),<sup>31</sup> as well as the general principles on good governance.<sup>32</sup> A possible solution to this problem would be to develop a protocol to the UNFCCC on the production of agro-fuels that would take into account environmental sustainability and governance standards.

A further impediment to the development of international environmental principles is the continued reliance by many states upon the doctrine of sovereignty to protect their own interests. Moreover, whilst there is undoubtedly a substantial body of existing human rights instruments, there is also the danger of 'treaty fatigue', as the development of new conventions may, perversely, dilute the perceived importance of others that have been concluded previously. The reliance by states upon the doctrine of sovereignty is discussed in the next section. This will be followed by a consideration of action that may be taken by appropriate UN institutions.

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Equitable and Sustainable?' (2009) 10 *Melbourne Journal of International Law* 470, 471.

<sup>29</sup> Ibid 473.

<sup>30</sup> Ibid 470.

<sup>31</sup> *Rio Declaration on Environment and Development*, 31 ILM 874, UN GAOR, UN Doc A/CONF.151/26 (Volume 1) (1992).

<sup>32</sup> Bastos Lima, above n 28, 490.

#### IV SOVEREIGNTY

The traditional international legal concept of 'sovereignty', which stems from the development of the 'nation state' that arose from the 1648 Treaty of Westphalia, impedes the development of binding legal human rights obligations and the development of an institutional authority capable of enforcing these rights. The early concept of sovereignty empowered a state to have exclusive jurisdiction and independence over the people and the environment within its boundaries to the exclusion of other states. In an oft-cited decision in the *Island of Palmas Case*, the eminent Austrian jurist, Judge Huber, expressed it so:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure settling most questions that concern international relations.<sup>33</sup>

States often assert that they rely upon the principle of sovereignty to have the freedom of action to organise their internal affairs as far as human rights are concerned. Article 2(7) of the *Charter of the United Nations*<sup>34</sup> reinforces this fundamental international law principle of 'non-interference' when it states:

Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.<sup>35</sup>

The development of minimum (global) human rights standards naturally challenges the exclusive powers of states to impose a system of legal regulation within their own territory. The agreement to undertake international legal human rights obligations under a binding treaty depends upon state consent to be bound, although where these rights are also found within the customary principles of international law, then *all* states are bound.<sup>36</sup> Even though there is increasing

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<sup>33</sup> *Island of Palmas Case (Netherlands v. United States)* Permanent Court of Arbitration, 1928 2 RIAA 829.

<sup>34</sup> *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS 16; 59 Stat 1031 (entered into force 24 October 1945) ('*UN Charter*').

<sup>35</sup> *Ibid* art 2(7).

<sup>36</sup> *Statute of the International Court of Justice*, opened for signature 26 June 1945, 59 Stat

international cooperation to try to resolve the problems of climate change, individual states generally retain a discretion as to whether they will agree to be bound by environmental and human rights obligations under international agreements.

Moreover, the implementation of these international agreements depends upon the willingness of the states who are parties to comply with their international obligations and with the effectiveness of the supervisory authorities established under these treaty regimes.<sup>37</sup>

The concept of the common concern of humankind may be perceived as operating in conflict with the unilateral discretion that states assert is a characteristic of the traditional concept of sovereignty. The common concern draws the attention of the international community to the source of the concern, in this particular case, the threat of climate change, and this concept focuses on the need for international cooperative action to address it.<sup>38</sup>

According to the *UNHCHR Report*, states do have obligations to protect human rights, particularly in circumstances where submergence of low lying islands will lead to an impact on a number of human rights of these peoples. The *UNHCHR Report* indicates that:

States have a duty to take positive action, individually and jointly, to address and avert this threat. Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples.<sup>39</sup>

However, the problem for the adversely affected states is that there may not be adequate procedures to enforce claims of human rights violations that are likely to occur as a consequence of the impacts of climate change. It may be possible for a state to seek action to be taken by the United Nations Security Council, the Human Rights Council, or to consider seeking other legal avenues such as an action in the courts or an appropriate method of dispute resolution. These avenues will briefly be considered in the following sections. This will be followed by a consideration of the potential extent of State responsibility for

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1031, (entered into force 24 October 1945) art 38(1)(b); *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Federal Republic of Germany v The Netherlands)* (Judgment) [1969] ICJ Rep 3.

<sup>37</sup> Donoho, above n 25, 17.

<sup>38</sup> Laura Horn, 'The Implications of the Concept of Common Concern of Humankind on a Human Right to a Healthy Environment' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 233, 249.

<sup>39</sup> *UNHCHR Report*, above n 5, 15.

persons displaced by the effects of climate change.

## V UNITED NATIONS SECURITY COUNCIL

There have been several significant studies that have shown that the impacts of climate change could threaten world peace.<sup>40</sup> For example, one estimate is that the combined effects of climate change and other economic, social and political problems, could lead to a heightened risk of conflict in 46 countries, particularly in the areas prone to the adverse impacts of climate change in sub-Saharan Africa, Asia and Latin America.<sup>41</sup> Internal conflicts may also be caused by climate change and lead to violations of human rights. As an example, it is widely regarded that:

Increased incidence of drought in Sudan has been said to be one of the factors that brought pastoralists and nomads into conflict in Dafur.<sup>42</sup>

The relationship between human security and a safe and habitable environment is vital, particularly in relation to access to natural resources. If this intricate inter-relationship is significantly affected by climate change, the lives and/or livelihoods of those reliant on the natural environment may be jeopardized, or even destroyed.

Moreover, there is another equally significant, but perhaps not yet fully understood, link to be drawn between climate change and its effects on the environment and human conflict. Access to natural resources – or the lack of access – can itself be the trigger for conflict. For example, one of the underlying tensions between Israel and Syria is the issue of access to water. In both the Democratic Republic of Congo and Haiti, the United Nations Environment Programme ('UNEP') has reported that environmental damage has been a major cause of political unrest and conflict.<sup>43</sup> It has been estimated that approximately five million people were killed in armed conflicts during the 1990s relating to the

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<sup>40</sup> Ibid 21.

<sup>41</sup> Ibid 21.

<sup>42</sup> Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> ed, 2007) 1456 cited in an extract from Margaret Beckett, 'Climate Change: the Gathering Storm' (Speech delivered at the Annual Winston Churchill Memorial Lecture, New York, 16 April 2007).

<sup>43</sup> Alister Doyle, *UN Aims to Study Link Between Environment, Wars* (2004) Planet Ark World Environment News, 14 January 2004 <[http://www.planetark.com/avantgo/dailynewsstory.cfm?\\_newsid=23429](http://www.planetark.com/avantgo/dailynewsstory.cfm?_newsid=23429)> at 27 March 2007.

exploitation of natural resources,<sup>44</sup> and that one quarter of the 50 active armed conflicts in 2001 were largely 'motivated' by resources.<sup>45</sup>

In 1990, a research team at the University of Toronto concluded that, in countries as diverse as Haiti, Pakistan, the Philippines and South Africa, 'severe environmental stress multiplied the pain caused by such problems as ethnic strife and poverty'.<sup>46</sup> In terms of quantifying the effects of environmental degradation, a water expert has recently predicted that, in regions initially experiencing low-level conflict, the risk of escalation to full-scale civil war approximately *doubled* immediately following a year of abnormally low rainfall.<sup>47</sup>

In 2004, the United Nations High-Level Panel on Threats, Challenges, and Change concluded that:

[p]overty, infectious diseases, environmental degradation and war feed one another in a deadly cycle ... Environmental stress, caused by large populations and shortages of land and other natural resources, can contribute to civil violence.<sup>48</sup>

In addition, environmental degradation leads to increasing numbers of refugees. In a report issued in 2008, the United Nations High Commission for Refugees found that the number of civilians who were either refugees outside their country or internally displaced, as a result of conflict or persecution, was 37.4 million, an increase of approximately 3 million on the previous year.<sup>49</sup> In an interview following the release of that report, the United Nations High Commissioner for Refugees, António Guterres, concluded that climate change led to the dislocation of people 'by provoking conflicts over

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<sup>44</sup> Rudy S Salo, 'When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Global Illegal Timber Trade' (2003) 16 *Georgetown International Environmental Law Review* 127, 142.

<sup>45</sup> David R Francis, 'Fueling the Fire: "Resource Wars" Spurred by Assets of Developing Nations' (2002) *Christian Science Monitor* A3.

<sup>46</sup> Thomas Homer-Dixon, 'Terror in the Weather Forecast', *The New York Times* (New York), 24 April 2007, <<http://www.nytimes.com/2007/04/24/opinion/24homer-dixon.html>> at 24 April 2007. The author led the research team.

<sup>47</sup> Professor Charles Vörösmarty, 'Drought as a Contributor to Civil War: Results from a Global Spatial Analysis' (speech delivered at seminar titled 'Climate-Security Connections: An Empirical Approach to Risk Assessment', Washington DC, USA, 6 March 2007).

<sup>48</sup> High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, [22], UN Doc A/59/565 (2004).

<sup>49</sup> United Nations High Commission for Refugees, *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (2008) <<http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>> at 20 June 2008.

increasingly scarce resources, such as water' and, due to its impact on the environment, 'was a trigger of extreme poverty and conflict'.<sup>50</sup>

In these senses, environmental degradation caused by climate change can be both a cause and a consequence of armed conflict. In addition, the problems associated with environmental damage are magnified since, inevitably, during the course of conflict there are additional 'knock-on' effects as further environmental destruction, with resultant human casualties, will take place as a result of the actions of the combatants.<sup>51</sup>

Moreover, the very nature of armed conflict and its adverse effects on the livelihood of communities and destruction of the natural environment fuels a spiralling vicious cycle of poverty and further violence, thus leaving desperate individuals, who are often children, with no choice but to themselves become active participants in the conflict. It is usually the case that extreme circumstances – hunger, poverty, abandonment, the death of parents and family, disease and the lack of even basic medical services or the threat of violence or property confiscation – will, for example, leave a child (or his/her parents) little choice but to offer his/her services to a 'cause'.<sup>52</sup> This contributes to the tragically high number of 'child soldiers' now engaged in armed conflict, particularly those of a non-international nature.<sup>53</sup>

While there is, of course, much more work to be done to accurately

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<sup>50</sup> Julian Borger, 'Conflicts fuelled by climate change causing new refugee crisis, warns UN', *The Guardian* (London), 17 June 2008, 15.

<sup>51</sup> See Stephanie Nebehay, *Dirty Water Provokes Hepatitis Outbreak in Darfur* (2004) Planet Ark World Environment News 11 August 2004 <<http://www.planetark.com/dailynewsstory.cfm/newsid/26523/newsDate/11-Aug-2004/story.htm>> at 27 March 2007, who describes how the refugee camps that have been set up in Darfur as a result of the conflict in that region are struggling with additional problems from the lack of safe drinking water.

<sup>52</sup> Steven Freeland, 'Mere Children or Weapons of War – Child Soldiers and International Law' (2008) 29 *University of La Verne Law Review* 19, 27-8.

<sup>53</sup> In a report released in November 2004, the Non Governmental Organisation Coalition to Stop the Use of Child Soldiers found that children were 'fighting in almost every major conflict, in both government and opposition forces'. In addition to an estimated 300,000 children who engage in actual military conflict, another 500,000 are 'conscripted' into paramilitary organisations, guerilla groups and civil militias in over 85 countries. As well as serving as fighting troops on the front line, they serve in other "indirect" roles, such as 'sex slaves, porters, cooks, spies, and perform[ing] life-threatening tasks such as planting land mines': Steven Freeland, 'Child Soldiers and International Crimes – How Should International Law be Applied?' (2005) 3 *New Zealand Journal of Public and International Law* 303, 304.

determine the nature and extent of the link between climate change, environmental degradation, poverty and political and social conflict – research that would involve the integration and comparison of environmental data with conflict data – the logic of some form of connection appears to be undeniable. This was recognized by the United Nations Security Council, which in January 1992 concluded that:

[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and *ecological* fields have become threats to international peace and security. The United Nations membership as a whole needs to give the highest priority to the solution of these matters.<sup>54</sup>

This highlights yet another important feature of the relationship between deliberate environmental destruction and human security. Environmental degradation can give rise to social upheaval and tensions, thus representing a threat to national security.<sup>55</sup> Indeed, this is one of the reasons why combatants in a conflict may seek to ‘target’ the environment. Many states now view environmental concerns, including resource conservation and sustainable development ‘in strategic terms’.<sup>56</sup> One commentator has suggested that the world is ‘only one international environmental disaster that implicates environmental security away from’<sup>57</sup> the development of customary rules that may permit the legal use of ‘environmental armed force’<sup>58</sup>, as a legitimate exercise of the right of self-defence, in order to avert environmental destruction.

It is possible that the United Nations Security Council may be requested to take some action in the event that these conflicts pose a

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<sup>54</sup> United Nations Security Council, ‘Note by the President of the Security Council’ (31 January 1992) Presidential Statement S/23500 in Catherine Tinker ‘Environmental Security’ in *The United Nations: Not a Matter for the Security Council* (1992) 59 *Tennessee Law Review* 787, 787 (emphasis added).

<sup>55</sup> Jutta Brunneé, ‘Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law’ (1995) 18 *Fordham International Law Journal* 1742, 1742.

<sup>56</sup> Rymn James Parsons, ‘The Fight to Save the Planet: U.S. Armed Forces, “Greenkeeping”, and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict’ (1998) 10 *Georgetown International Environmental Law Review* 441, 444.

<sup>57</sup> Michael K. Murphy, ‘Note: Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation’ (1999) 39 *Virginia Journal of International Law Association* 1181, 1219.

<sup>58</sup> *Ibid* 1214,

threat to world peace.<sup>59</sup> The Members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of peace and security'.<sup>60</sup> The United Nations Security Council may take action to seek a peaceful settlement of the dispute,<sup>61</sup> or if it determines 'the existence of any threat to the peace, breach of the peace or act of aggression'<sup>62</sup> it may seek the implementation of sanctions<sup>63</sup> or take necessary military action.<sup>64</sup>

These powers are broad and, perhaps may raise the possibility of the Security Council acting *ultra vires*. However, it seems that, for all practical purposes, once it has been determined by the United Nations Security Council that there does, indeed, exist a threat to international peace and security, there is no tangible form of 'judicial review'.<sup>65</sup> Thus, if the United Nations Security Council were to deem it appropriate to authorise some form of action under its Chapter VII powers in relation to environmental concerns (whether related to the effects of climate change or otherwise), this would be binding on *all* states.<sup>66</sup> Of course, the mere fact that the United Nations Security Council might decide to act in this way does not guarantee that such actions, even if fully implemented, may be effective in relation to the environmental impact that is being addressed.

It may also be possible for the United Nations Security Council to intervene in the affairs of a sovereign state where there is an international responsibility to protect people in the face of serious harm. It is quite conceivable that these circumstances could arise in the advent of negative impacts of climate change. This possibility is heightened by the evolution of a 'Responsibility to Protect' ('R2P')

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<sup>59</sup> Luke T Lee, 'Opinion: The Refugee Convention and Internally Displaced Persons (2001) 13 *International Journal of Refugee Law* 363, 365.

<sup>60</sup> *UN Charter*, above n 34, art 24.

<sup>61</sup> *Ibid* arts 33-38.

<sup>62</sup> *Ibid* art 39.

<sup>63</sup> *Ibid* art 41.

<sup>64</sup> *Ibid* art 42.

<sup>65</sup> Compare the decision of the International Court of Justice in *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, (Preliminary Objections, Judgment), [1998] ICJ Rep 9 with that of the International Criminal Tribunal for the Former Yugoslavia Decision in Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Duško Tadić*, Case No. IT-94-1, Appeals Chamber, 2 October 1995.

<sup>66</sup> See *Charter of the United Nations* article 25, which, although expressly referring to the 'Members of the United Nations', is generally regarded as applying to all states.



concept, which originated from a 2001 *Report by the International Commission on Intervention and State Sovereignty*<sup>67</sup> and was later formalised in the 2005 World Summit Outcome General Assembly Resolution as follows:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>68</sup>

However, there is much debate as to the precise scope of the R2P concept, and how it might be translated into 'action'. Read at its broadest, it could give rise to real tension between traditional notions of sovereignty and the right to intervene. The terms of R2P even contemplate the use of military action in certain circumstances. Whilst this may only be as a last resort, this highlights the difficulties associated with its implementation in practice. There is much discussion still to be had regarding what R2P does – and does not – involve and those who believe that this is truly a new beginning in the conduct of international relations may very well be disappointed – however, only time will tell.

## VI HUMAN RIGHTS COUNCIL

It may be possible for states that are adversely affected by the impacts of climate change to approach the relatively new Human Rights Council, which is a subsidiary of the United Nations General

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<sup>67</sup> International Commission on Intervention and State Sovereignty (ICISS), *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (December 2001). The Commission members were Gareth Evans (Australia), Mohamed Sahnoun (Algeria) Gisele Cote-Harper (Canada), Lee Hamilton (United States), Michael Ignatieff (Canada), Vladimir Lukin (Russia), Klaus Naumann (Germany), Cyril Ramaphosa (South Africa), Fidel V Ramos (Philippines), Cornelio Summaruga (Switzerland) Eduardo Stein Barillus (Guatemala) and Ramesh Thakur (India).

<sup>68</sup> Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2007) 841 referring to GA Res 60/1.

Assembly,<sup>69</sup> about the violations of human rights that have/will occur as a result of the failure of those states that are high greenhouse gas emitters to take action to ensure that their reductions are at a level that 'would prevent dangerous anthropogenic interference with the climate system.'<sup>70</sup> In theory it might be possible that a recommendation of the Human Rights Council could presage a resolution by the United Nations General Assembly to request states to take action to prevent climate change, in order to comply with their obligations to avoid abuses of human rights.

The Human Rights Council was established in 2006<sup>71</sup> to replace the Commission on Human Rights, which had been criticised because of its failure to perform its functions and its increasing lack of credibility as a protector of human rights.<sup>72</sup> Membership of the Human Rights Council is based upon a geographical distribution and the contribution of the candidates to the promotion of human rights should be taken into account when they are elected. The total membership for the Council currently comprises 47 states and the functions of the Council include that it shall

- (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- (d) Promote the full implementation of human rights obligations undertaken by States and follow-up the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;
- (f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.<sup>73</sup>

This range of functions would provide sufficient flexibility for the Human Rights Council to take a range of actions to attempt to prevent serious human rights violations occurring as a result of the adverse impacts of climate change. It could, for example, call upon countries to act in a way so as to address the specific human rights violations that are being threatened (such calls would not be binding but may have

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<sup>69</sup> Rhona Smith, *Textbook on International Human Rights* (3<sup>rd</sup> ed, 2007) 58.

<sup>70</sup> UNFCCC, above n 1, art 2.

<sup>71</sup> *Resolution on the Human Rights Council*, GA Res 60/251, UN GAOR, 60<sup>th</sup> sess, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006).

<sup>72</sup> Smith, above n 68, 58; See also Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> ed, 2007) 791-799.

<sup>73</sup> *Resolution on the Human Rights Council*, GA Res 60/251, UN GAOR, 60<sup>th</sup> sess, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006).

considerable political weight).

Yet, at least thus far, the Human Rights Council has not focused on climate change related issues, although it has passed resolutions (which have been largely ineffective) in relation to some fundamental human rights that are impacted upon by the effects of climate change.<sup>74</sup> Instead, it has concentrated much of its efforts reacting to conflicts, particularly the Israeli–Palestinian conflict.

Arguably, the recent reforms to the Human Rights Council have not overcome all of the past problems that were experienced by the ineffective operation of the Commission on Human Rights. Indeed, despite some positive initial indications, it appears that the new body continues to operate with many of the destructive political characteristics that plagued its predecessor, so it is possible that political self-interest will prevent the Human Rights Council from supporting those countries that suffer severe impacts of climate change affecting the human rights of their people.<sup>75</sup>

## VII. AVENUES FOR POSSIBLE INTERNATIONAL LEGAL ACTION

States may resolve a dispute concerning the breach of an obligation in the *UNFCCC* or the *Kyoto Protocol* by conciliation or mediation, or, if these processes are unsuccessful, they may consider an action before the International Court of Justice ('ICJ'). A state may have standing before the ICJ<sup>76</sup> where the legal rights of a state have been infringed by another state that has accepted the jurisdiction of that Court. Indeed, the ICJ had previously established an Environmental Chamber (although it now no longer is operative) and has also heard a number of important cases that involved environmental issues and regulation.<sup>77</sup>

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<sup>74</sup> See, eg, Human Rights Council Resolution 6/8 on human rights and equitable Access to safe drinking water and sanitation (28 September 2007); Human Rights Council Resolution 6/8 on adequate housing as a component of the right to an adequate standard of living (14 December 2007); Human Rights Council Resolution 7/14 on the right to food (27 March 2008).

<sup>75</sup> Claire Callejon, 'Developments at the Human Rights Council in 2007: A Reflection of its Ambivalence' (2008) 8 *Human Rights Law Review* 323, 342: 'Compared to the former Commission, institutions of the Council do not appear to have been reinforced in a way that would allow this body to protect and promote human rights in a more effective way.'

<sup>76</sup> *Statute of the International Court of Justice*, art 34(1) (1945).

<sup>77</sup> A Chamber for Environmental Matters, comprising of seven judges elected for three year periods, had been established within the International Court of Justice, pursuant

However, there are a number of difficulties that would be encountered by states choosing to bring a climate change action before the ICJ, particularly as the responsibility for emission reductions falls upon a large number of states and it would be difficult to establish which state or states are responsible for the damage. In addition, the obligations under the *UNFCCC* are worded in broad and general language, so that it would be difficult to determine a breach of specific duties to an individual state.<sup>78</sup>

Another problem is whether damages would be an adequate remedy in circumstances where, for example, there have been serious human rights problems, such as a lack of fresh water, or where people are unable to remain in their homeland due to the severe impacts of climate change.

The cost of litigation before the ICJ is also very high, particularly for a small island state that may not have the resources to fund an action against a high emitting state (such as the United States of America), even though the consequences are very serious, with some of these island nations facing inundation as a result of sea-level rise. A small island nation may lack standing and may not be able to show that its legal rights have been directly infringed, because the climate change damage occurs as a result of a collective failure by a large number of

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to article 26(1) of the Statute of that Court, which provides that '[t]he Court may ... form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of case ...'. The Chamber for Environmental Matters is the only chamber to have been established under that provision and its establishment reflected the Court's 'desire to demonstrate the particular interest that it attaches to environmental issues': International Court of Justice, 'The judges of the International Court of Justice elect the members to the Court's Chambers and Committees', (Press Release, 10 February 2000) <[http://www.icj-cij.org/icjwww/ipresscom/IPress2000/ipresscom200003\\_Committees\\_20000109.htm](http://www.icj-cij.org/icjwww/ipresscom/IPress2000/ipresscom200003_Committees_20000109.htm)> at 15 September 2009. However, despite the fact that the Court has had before it a number of cases dealing with environmental issues since the establishment of the Chamber for Environmental Matters in 1993 - in particular *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* and the ongoing *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* - the parties to those cases have not requested that the Chamber itself hear the case (article 26(3)), but instead have brought the dispute before the full Court. One reason offered for this is that the disputing States might not necessarily agree among themselves that their dispute is an environmental one: Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (2008), 315. As a result, the President of the International Court of Justice announced in October 2006 that, during that year, 'the Court decided not to hold elections for a Bench for the Chamber for Environmental Matters': H E Judge Rosalyn Higgins, President of the International Court of Justice, (Speech to the General Assembly of the United Nations, 26 October 2006) <<http://www.icj-cij.org/presscom/index.php>> at 16 April 2007.

<sup>78</sup> *UNFCCC*, above n 1, arts 3, 4.

states to reduce their greenhouse gas emissions. The lack of standing for NGOs and other interested parties before the ICJ also presents a barrier for those organisations that may be willing to bring an action in the public interest to deter further increases in greenhouse gas emissions from those states with significant amounts of emissions.

A further difficulty is that many of these high emitting states are reluctant to accept the jurisdiction of the ICJ on climate change issues. This reluctance may, in part, be due to the lack of certainty about the development of international environmental law on climate change. Further action should be taken to progress the development of international environmental law and to improve access to climate justice, particularly for states that are severely impacted by climate change (as is the case for many small island states). It may be possible to establish a climate change tribunal that permits more open standing to states, NGOs and interested parties and that could make enforceable determinations on disputes involving climate change, including issues concerning displaced people.<sup>79</sup>

Another possibility is for states to choose to attempt to resolve their disputes through arbitration before the Permanent Court of Arbitration ('PCA'). This Court has developed 'Optional Rules of Arbitration of Disputes Relating to the Environment and/or Natural Resources',<sup>80</sup> where the parties may decide to bring their dispute before a panel of arbitrators who are experts in the area. Rest argues that the PCA can play a significant role to remind states about their responsibilities to protect the environment and assist with the implementation of international environmental law.<sup>81</sup> Another key area that will need to be addressed is how to protect the human rights of people displaced by climate change.

## VIII PEOPLE DISPLACED BY CLIMATE CHANGE

One of the predictions in the future is that many people will become displaced due to the consequences of the adverse impacts of climate

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<sup>79</sup> Laura Horn, 'Is Litigation an Effective Weapon for Pacific Island Nations in the War Against Climate Change?' (2009) 12 *Asia Pacific Journal of Environmental Law* 169, 197.

<sup>80</sup> Permanent Court of Arbitration, *Optional Rules of Arbitration of Disputes Relating to the Environment and/or Natural Resources* <<http://www.pca-cpa.org/upload/files/ENVIRONMENTAL.pdf>> at 26 June 2009.

<sup>81</sup> Alfred Rest, 'Enhanced Implementation of International Environmental Treaties by Judiciary - Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 1, 27.

change. The estimated numbers being suggested are significant — they may range between 50 million<sup>82</sup> and up to about 250 million during the next 50 years.<sup>83</sup> These displaced people have been referred to as ‘climate change refugees’ or as ‘environmental refugees’; however the use of this terminology is criticised,<sup>84</sup> and, in fact, they are more correctly recognised as ‘climate change displaced persons’.<sup>85</sup> One of the principal legal challenges associated with this phenomenon is that people fleeing from climate threats are currently not recognised as refugees, particularly as many are internally displaced persons who remain within the borders of their own home state. As a consequence, they do not fall within the definition of refugees in the *Convention relating to the Status of Refugees*.<sup>86</sup> This Convention indicates in article 1 as follows:

The term ‘refugee’ shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The reasons why these displaced people generally appear to fall outside of this definition are because they are not being persecuted for reasons based upon race, religion, nationality or membership of a particular racial or political group. However, several commentators argue that these people could, in some circumstances, fall within the definition, as in the case of persecution through environmental harm.<sup>87</sup>

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<sup>82</sup> Ilona Millar, ‘There’s No Place Like Home: Human Displacement and Climate Change’ (2007) 14 *Australian International Law Journal* 71, 72.

<sup>83</sup> John Von Doussa, Allison Corkery and Renée Chartres ‘Human Rights and Climate Change’ (2007) 14 *Australian International Law Journal* 161,180; Jane McAdam ‘Climate Change ‘refugees’ and international law’ *Bar News: The Journal of the NSW Bar Association* (Winter 2008) 27, 27; see also Von Doussa, above n 3.

<sup>84</sup> David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2003-2004) *The Georgetown International Environmental Law Review* 209, 217; Aurelie Lopez ‘The Protection of Environmentally-Displaced Persons in International Law’ (2007) 37 *Environmental Law* 365, 388.

<sup>85</sup> Millar, above n 81, 76.

<sup>86</sup> *Convention Relating to the Status of Refugees* 189 UNTS 137, art 1 (entered into force 22 April 1954) amended by *Protocol Relating to the Status of Refugees* 606 UNTS 267, art 1 (entered into force 4 October 1967).

<sup>87</sup> Lopez, above n 83, 378; Millar, above n 81, 83.

The *Convention Relating to the Status of Refugees* also indicates that the term 'refugee' applies to those people who are located outside of their country of nationality and, therefore, the definition cannot apply to people who are internally displaced due to climate change threats.<sup>88</sup>

Thus, there is, at present, no internationally binding legal instrument that specifically protects climate change displaced people, nor is there an institution with powers to assist these people. The United Nations Environment Programme alerted the world to this problem, but no institution has been established to deal with it.<sup>89</sup> Obviously, the human rights instruments can help to protect the rights of these people because, to the extent that their fundamental human rights are violated, they are entitled to assistance, whether at home or overseas.<sup>90</sup> However, whether the protection of these rights can be enforced is questionable, given the problems noted earlier in this article.

The concern is whether there is sufficient protection for the human rights of people who are fleeing the consequences of climate change and that these circumstances should be distinguished from those where there has been a deliberate abuse of their human rights by a state government. It is arguable that the negotiations at Copenhagen in December should include the development of international legal protection for these people and that states have the responsibility to consider these issues in the light of the environmental principles included in the *UNFCCC*.<sup>91</sup> The United Nations *Guiding Principles on Internal Displacement*<sup>92</sup> provide for the protection of people displaced within the borders of their own country in the event of natural or human-made disasters; however these principles are not legally binding and generally offer guidance to governments dealing with these issues within their own borders.<sup>93</sup> It is suggested therefore that a new international agreement should be developed to cover both international and national displacement of people due to the adverse effects of climate change.

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<sup>88</sup> Lopez, above n 83, 386.

<sup>89</sup> McAdam, above n 82, 29.

<sup>90</sup> Lee, above n 58, 364.

<sup>91</sup> *UNFCCC*, above n 1, art 3.

<sup>92</sup> United Nations Office for the Coordination of Human Affairs, *Guiding Principles on Internal Displacement* (2007)  
<[http://www.reliefweb.int/ocha\\_ol/pub/idp\\_gp/idp.html](http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html)> at 29 September 09.

<sup>93</sup> David Hodgkinson and Tess Burton, 'Towards a Convention For Persons Displaced by Climate Change' (Seminar presented at the Grantham Research Institute on Climate Change, the London School of Economics, 6 March 2009).

The actual cause of these movements of displaced people is a global reluctance on the part of states to make adequate reductions of greenhouse gas emissions. These human rights violations are the consequences of a failure by states to adequately develop international environmental law and the law of sustainable development. According to Lopez:

Working on projects of sustainable use of the environment may prevent the multiplication of further, and in some cases irremediable, mass displacement.<sup>94</sup>

Clearly, environmental legal principles should be further developed to address the threat of climate change and to promote sustainable development, in order to prevent the exodus of large numbers of people and further violations of their human rights. The following section examines whether the concept of the common concern of humankind plays a role in linking the areas of climate change and human rights. This is followed by a discussion of whether there should be an international agreement to protect the interests of climate change displaced people.

## IX THE COMMON CONCERN OF HUMANKIND

The concept of the 'common concern of humankind' applies to both the protection from the adverse effects of climate change<sup>95</sup> and to the protection of human rights.<sup>96</sup> It requires that there be a bridge between human rights law and environmental law on these two fundamental concerns. The significance of the concept of common concern of humankind is that the international community collectively has an interest in the global atmosphere and a common responsibility to seek to achieve sustainable development.<sup>97</sup> This common responsibility for States indicates that they should take action to reduce greenhouse gas emissions, in order to ensure that the climate is protected for both present and future generations and to reduce the threat of these predicted human rights violations.<sup>98</sup>

In fact, the whole of the global environment has been considered to be

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<sup>94</sup> Lopez, above n 83, 408.

<sup>95</sup> *UNFCCC*, above n 1, preamble para 1.

<sup>96</sup> Dinah Shelton, 'Common Concern of Humanity' (2009) 39(2) *Environmental Policy and Law* 83, 83.

<sup>97</sup> Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3<sup>rd</sup> ed, 2009) 130.

<sup>98</sup> Horn, above n 38, 244.



the 'common concern of humanity'<sup>99</sup> and the connection between human rights and environmental conservation has been recognised as follows:

Peace, development, environmental conservation and respect for human rights and fundamental freedoms are interdependent.<sup>100</sup>

The *Stockholm Declaration* links respect for human rights to the protection of the environment as follows:

Man [humankind] 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 [she] bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>101</sup>

The *Draft International Covenant on Environment and Development* ('*Draft Covenant*') discusses the implications of common concern of humanity as a concept and regards the global environment as a common concern of humanity, providing as follows:

The global environment is a common concern of humanity. Accordingly, all its elements and processes are governed by the principles of international law, the dictates of public conscience and the fundamental values of humanity.<sup>102</sup>

In this way, the *Draft Covenant* indicates that the common concern of humanity concept avoids the problems that arise from reliance upon traditional notions of state sovereignty, because the environment extends beyond the jurisdiction of individual states, as does the atmosphere. This concept also takes into account the long term future interests of humanity and is thus not restricted by short term considerations. It also provides as follows:

The conclusions that the global environment is a matter of 'common concern' implies that it can no longer be considered as solely within the domestic jurisdiction of States due to its global importance and consequences for all. It also expresses a shift from classical treaty-making notions of reciprocity and material advantage, to action in the

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<sup>99</sup> See IUCN Commission on Environmental Law and International Council of Environmental Law, *Draft International Covenant on Environment and Development* (3<sup>rd</sup> ed 2004) ('*Draft Covenant*') art 3. Note that this is only a draft document and there is no present prospect of it becoming a treaty.

<sup>100</sup> *Ibid* art 4.

<sup>101</sup> *Declaration of the United Nations Conference on the Human Environment (Stockholm)*, [Principle 1], UN Doc A/CONF/48/14/REV.1 (1972).

<sup>102</sup> *Draft Covenant*, above n 98, art 3.

long-term interests of humanity.<sup>103</sup>

The situation where the human rights perspective is viewed as superior to the environmental viewpoint causes some difficulties, particularly as a result of the anthropocentric approach of human rights law. It is preferable to view respect for human rights as coupled together with responsibility for protection of the atmosphere, so that a less human-centred view is adopted. Bosselmann suggested the following guideline as one of a number of guiding principles based upon ecological ethics:

The fundamental norms for social life, in particular human rights, are to be understood in the context of humans' ecological dependence. Individual human rights are not only determined by the interests of others but also by the interests of the natural environment.<sup>104</sup>

This approach would place greater significance upon the protection of the climate and the actions that are necessary to ensure the Earth's climate is maintained for future generations, and could therefore lead to more effective emission reductions by states. The focus should be on the cause of the migration movements of displaced people and emphasise environmental protection, in order to prevent the consequences of large scale migrations of people,<sup>105</sup> even if the environmental damage is considered to be only one of a number of causes in the particular circumstances. The primary goal should be to prevent accelerated sea level rise and to emphasise the necessity for immediate action to be taken by the international community of states, in an attempt to protect the environment from damage.<sup>106</sup> This would, in turn, lead to a lessening of the adverse impacts of climate change and to reductions in the numbers of climate change displaced people.

Clearly, in the area of climate change, environmental protection should be the primary focus rather than human rights law. International environmental legal principles could help to provide an overall foundation for the obligations of states when dealing with the global crisis of climate change, in order to prevent or reduce the likelihood that violations of human rights may occur. Many of these core principles are referred to in the *UNFCCC* Article 3, which indicates that state parties should be guided by these principles in their actions to achieve the objective of the Convention, which is stated as:

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<sup>103</sup> *Draft Covenant*, above n 98, 37.

<sup>104</sup> Klaus Bosselmann, *When Two Worlds Collide: Society and Ecology* (1995) 286.

<sup>105</sup> See Keane, above n 83, 223.

<sup>106</sup> See Horn, above n 38, 254.

.... to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.<sup>107</sup>

The guiding principles that are listed in Article 3 that are relevant to the human rights position of effected populations are intergenerational equity and intragenerational equity,<sup>108</sup> common but differentiated responsibilities,<sup>109</sup> the precautionary principle,<sup>110</sup> sustainable development.<sup>111</sup> It is also necessary to take into account:

The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.<sup>112</sup>

Many of the states that will be severely affected are not the chief greenhouse gas emitters. There is therefore a responsibility for larger industrialised countries that have been large emitters of greenhouse gases both/either in the past and/or in the present to assist the victims of climate change.<sup>113</sup> On the other hand, many of the displaced people will be driven from their homes in island states or low lying coastal areas in developing countries; yet these states would be very low emitters of greenhouse gases and not chiefly responsible for the effects of climate change.

The application of these principles by states when taking action on climate change would also lead to a likely reduction of the violations of human rights that would otherwise arise as a result of climate change. Even though Article 3 sets out these principles as only of a guiding

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<sup>107</sup> UNFCCC, above n 1, art 2.

<sup>108</sup> Ibid art 3(1).

<sup>109</sup> Ibid art 3(1).

<sup>110</sup> Ibid art 3(3).

<sup>111</sup> Ibid art 3(4).

<sup>112</sup> Ibid art 3(2).

<sup>113</sup> Frank Biermann and Ingrid Boas, *Protecting Climate refugees: The Case for a Global Protocol* (2008) *Environment Magazine*  
<<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>> 1, 3.

nature, such that the wording of this article indicates that the provisions may not be considered binding and may instead be of a 'soft law' status, they evince an expectation that they should be taken into account when states are negotiating future instruments and protocols to the *UNFCCC*.<sup>114</sup> It is therefore self-evident that, specifically, the negotiations in Copenhagen later this year should be guided by these key principles.

If the precautionary principle<sup>115</sup> is adhered to by the international community, this should lead to states adopting serious targets for reductions of greenhouse gas emissions, because the international community would then be taking into account the aim of preventing the significant impact of climate change on small island states<sup>116</sup> and other vulnerable developing states. In addition, as a result of applying this principle, the international community should consider how to manage those areas that do suffer from adverse impacts, including the displacement of large numbers of people.

However, the application of this principle does not determine the actual amount of reductions required. States should be aiming to achieve sustainable outcomes for the atmosphere, so the climate can be conserved for future use by future generations. Birnie, Boyle and Regwell indicate the following concerning the application of the precautionary principle:

Endorsing this principle does not answer the question what measures are to be taken, or by whom, and it is clear that substantial problems of global and regional economic equity have to be addressed if the necessary action is to be undertaken by a sufficiently large number of relevant states.<sup>117</sup>

These principles guide states parties to the *UNFCCC*, with some arguing that the precautionary principle may possibly be international customary law. However, there is some controversy about whether and to what degree this principle is part of international customary law, because of uncertainty about the meaning and application of this

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<sup>114</sup> Birnie, Boyle and Redgwell, above n 96, 359.

<sup>115</sup> *UNFCCC*, above n 1, art 3(3). The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.

<sup>116</sup> Millar, above n 81, 88.

<sup>117</sup> Birnie, Boyle and Redgwell, above n 96, 377.

principle.<sup>118</sup> The precautionary principle is based on a premise that the lack of scientific certainty as to the negative environmental consequences of a particular action should not be used as a justification to carry out that action. This has the effect of reversing the burden of proof as to the consequences of an action, placing it on those who claim that an activity is *not* damaging.<sup>119</sup> Principle 15 of the *Rio Declaration* sets out the principle as follows:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>120</sup>

The application of the principle is designed to enable the international community to address a global environmental problem before its effects are felt or its existence scientifically proven.<sup>121</sup>

The *UNFCCC* also indicates that sustainable development should be considered when measures are adopted to deal with climate change.<sup>122</sup>

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<sup>118</sup> Ibid 160.

<sup>119</sup> Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (2006), 50.

<sup>120</sup> *Rio Declaration on Environment and Development*, 31 ILM 874, UN GAOR, UN Doc A/CONF.151/26 (Volume 1) (1992).

<sup>121</sup> United Nations Environment Programme, Ozone Secretariat, *The Vienna Convention for the Protection of the Ozone Layer* (2001) 30

<<http://www.unep.org/Ozone/pdfs/viennaconvention2002.pdf>> at 18 June 2008. The obligation to apply the precautionary principle has been defined in article 2(2)(a) of the *Convention for the Protection of the Marine Environment of the North East Atlantic*, opened for signature 22 September 1992, 32 ILM 1069 (entered into force 25 March 1998) in the following terms: '... preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects'.

For a detailed discussion of the precautionary principle see, eg, Birnie, Boyle and Redgwell, above n 96; Philippe Sands, *Principles of International Environmental Law* (2<sup>nd</sup> ed, 2003), 266-79; James Cameroon and Juli Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) 14(1) *Boston College International and Comparative Law Review* 1; Lothar Gündling, 'The Status in International Law of the Principle of Precautionary Action' (1990) 5 *International Journal of Estuarine and Coastal Law* 23.

<sup>122</sup> *UNFCCC*, above n 1, art 3(4) provides as follows: 'The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.'

There is also some question about the ambit of the *UNFCCC* and whether it extends to the human rights consequences of climate change. It is possible that addressing these issues may not yet have a great deal of support among developed and developing countries.<sup>123</sup> However, it is clear that the guiding principles in Article 3 of the *UNFCCC*, as well as the recognition of sustainable development in this instrument, indicate that human rights are a concern and the crisis facing climate change displaced people should be addressed.

Consequently, these guiding principles and the political necessity of ensuring that agreement is reached on the placement of these peoples could lead to negotiations at Copenhagen either in relation to a separate treaty,<sup>124</sup> a new international agreement,<sup>125</sup> or a protocol to the *UNFCCC* on this issue, as has been suggested by some commentators.<sup>126</sup> These negotiations should take place coincidentally with other discussions regarding climate change issues, as they are a fundamental consideration that need to be dealt with by the international community as it addresses climate change. This should happen before these migrations take place, so that there are systems in place to aid these people. It is therefore submitted that the focus at COP15 should be on a precautionary approach, to try to prevent these events from occurring and to encourage the implementation of more realistic and effective targets to reduce greenhouse gas emissions.

## X A NEW INTERNATIONAL AGREEMENT

A number of commentators have suggested that negotiations should commence on a convention to cover the interests of climate change displaced people. Some consider that this should be effected through a separate convention addressing this issue of climate change refugees,<sup>127</sup> while others argue for an amendment to the 1951 *Geneva Convention Relating to the Status of Refugees*,<sup>128</sup> and still others suggest regulation or based upon the *Convention against Torture*.<sup>129</sup> However, it

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<sup>123</sup> Millar, above n 81, 91.

<sup>124</sup> Hodgkinson and Burton, above n 92, 3; see Millar, above n 81, 84.

<sup>125</sup> Von Doussa, Corkery and Chartres, above n 82, 182.

<sup>126</sup> Biermann and Boas, above n 112, 2.

<sup>127</sup> Hodgkinson and Burton, above n 92.

<sup>128</sup> Marei Pelzer 'Environmentally Displaced Persons not Protected: Further Agreement' (2009) *Environmental Policy and Law* 90, 90; see Lee, above n 58, 366; see Lopez, above n 83, 402.

<sup>129</sup> *Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment*, opened for signature 4 February 1985, 1465 U.N.T.S. 85 (entry into force 26 June

is probable that these negotiations would be unsuccessful, because this may only give protection to climate change displaced persons who cross a state border and would not give relief to those displaced within the territory of their home state.<sup>130</sup> It may also be the case that governments would not agree to extend similar protection for much larger numbers of refugees.<sup>131</sup>

Another commentator has suggested the development of a broader convention to assist both internally displaced people, as well as those who cross borders as a result of environmental destruction, and that this convention should be based upon international environmental law principles.<sup>132</sup> The advantage of a convention that addresses both of these types of displaced people is that developing countries could receive more assistance. In addition, if developed countries assist these people while they are within the jurisdiction of their home states, this is less likely to lead to cross border migration and possible conflict with other states that could threaten international security. Other proposals that only deal with cross border migrants leave many internally displaced people without protection.<sup>133</sup>

A preferable approach is that of Biermann and Boas, who argue that negotiations should commence to develop a 'Protocol on the Recognition, Protection and Resettlement of Climate Refugees' to the UNFCCC.<sup>134</sup> As many displaced people will be located within the jurisdiction of their home state, it is possible for an agreement to cover displacement of people in need of assistance within their home state, as well as to those people who, in the circumstances, have no choice but to leave their home state.

The five reasons given by Biermann and Boas for the development of this Protocol are outlined (in summary) as follows:

1. It would be more consistent with the goal of planned voluntary resettlement of people over many decades, rather than emergency relief.

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1987); see Dana Falstrom 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 1, 18.

<sup>130</sup> Lopez, above n 83, 408.

<sup>131</sup> Biermann and Boas, above n 112, 2.

<sup>132</sup> Gregory McCue, 'Environmental Refugees: Applying International Law to Involuntary Migration' (1993-1994) 6 *Georgetown International Environmental Law Review* 151, 177.

<sup>133</sup> Lopez, above n 83, 408.

<sup>134</sup> Biermann and Boas, above n 112, 2.

2. The recognition of climate change displaced people as permanent immigrants to their new countries that accept them.
3. The regime is aimed towards groups of people, who may be whole populations of affected regions or states.
4. The aim is to support governments and local authorities to protect people within their home territory as well as to assist domestic help and resettlement programs in affected states.
5. This is a global problem and a global responsibility, particularly on the part of those industrialised countries that have contributed to a large degree to past and present emissions of greenhouse gases. In this way, industrialised countries would contribute to the financing and support for resettlement of displaced people.<sup>135</sup>

Biermann and Boas refer to the climate change displaced people as 'climate refugees' and they also make suggestions about the content of the proposed protocol. States parties to this Protocol could propose areas under their jurisdiction with populations in need of relocation because of climate change. An executive committee, composed of both affected countries and donor countries, could determine both whether the specified territory should be included on the list of affected areas and also the type of assistance that should be provided, after a formal proposal has been submitted from the government of the affected state. This assistance would be supported by a funding mechanism and could include financial, voluntary resettlement, purchase of new land and migration plans.<sup>136</sup> An equal number of donor and affected states would make up the executive committee, which would be make decisions requiring a majority of donor countries and a majority of affected developing states.

These arguments in favour of a protocol were, however, rejected by Hulme, who points out that the concept of 'climate refugee' is open to the argument that it has a neo-colonial ideology and would therefore be rejected by some governments.<sup>137</sup> It would be necessary to define who falls into the category of 'climate refugee' – this may be difficult given that there is often more than one cause of the decision to migrate,

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<sup>135</sup> Ibid 2.

<sup>136</sup> Ibid 3.

<sup>137</sup> Mike Hulme, *Commentary – Climate Refugees: Cause for a New Agreement?* (2008) Environment Magazine  
<<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/hulme-full.html>> 1, 2.



including related economic, political and social factors. In addition, areas that may become uninhabitable might not necessarily remain in that condition, and may later be able to become habitable. The approach could also be viewed as a colonisation of environmental problems.<sup>138</sup>

Biermann and Boas respond to these suggestions by stating that they remain in favour of a protocol to resolve this issue,<sup>139</sup> particularly as it is likely that the adverse effects of climate change will lead to human tragedy in the future. The idea of 'climate refugees' may be difficult to define, as would also be the reasons for the migration. However, this question could be subject to determination through political compromise in negotiations between industrialised countries and developing nations.<sup>140</sup> There would be no danger of paternalism under this protocol, because it requires the assertion by developing countries of the specific affected areas and the procedures and action taken would have to be approved by the majority of developing countries that have ratified the protocol, as well as the majority of donor countries.<sup>141</sup>

In addition, the protocol is aimed at those affected areas where temporary migration is no longer an option and the migrants will need to resettle in a permanent home. These commentators also reject the criticism of green neo-colonialism, because this protocol is directed at supporting millions of people in those developing countries that have not been major greenhouse gas emitters, but yet they may have to give up their homes as a result of a global crisis stemming from large amounts of greenhouse gas emissions from industrialized and wealthier countries.<sup>142</sup>

Clearly, there is an urgent need for negotiations to commence on an international agreement to deal with assistance and support for climate change displaced people. The suggestions raised by Biermann and Boas are pointing the international community in the right direction as it seeks to find solutions to protect the human rights of these people before the predicted violations occur.

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<sup>138</sup> Ibid 2.

<sup>139</sup> Biermann and Boas, above n 112.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid 3.

<sup>142</sup> Ibid.

## XI CONCLUSION

It is clear that the effects of climate change are impacting, and will continue to do so upon the lives of many people. Even though there may still be areas of disagreement among states and the scientific community as to these precise effects, and the extent to which action is to be taken to mitigate them, all agree that some form of legal regulation is necessary. This is even more important given the impact that climate change has on human security, human habitation and, ultimately, on the fundamental human rights of all individuals.

It is therefore necessary to incorporate human rights considerations into the forefront of current negotiations that are directed towards a 'post-Kyoto' world. The lack of specific attention to this issue thus far, coupled with the inadequacies of the existing legal framework of human rights instruments and mechanisms of enforcement make this an imperative. The consequences of not acting in a comprehensive and appropriate way are too dire to contemplate.

By highlighting the dire consequences for many human beings, increased attention to the overwhelming necessity to protect the global climate will result. This will indicate that appropriate remedial measures themselves depend upon the global cooperation of all states, acting together as part of the common concern of humankind.

## POSTSCRIPT

As this article was being finalised, the diplomatic discussions at COP15 had just concluded. It was clear from the discussions that very significant divides had emerged between the various vested interests (of which there were many) who were in Copenhagen. Those developing and small island states who were most vulnerable to the effects of climate change argued in vain that strong action, founded upon a legally binding agreement, should be undertaken. Instead, a non-binding agreement of only two and a half pages and 12 paragraphs – the '*Copenhagen Accord*' – was concluded, largely at the instigation of the United States, China, India, Brazil and South Africa, and subsequently 'noted' by the conference in plenary session.

The *Copenhagen Accord* is important in certain respects – it is the product of 'agreement' between both developed and the major polluting developing countries. As such, it does set some form of framework upon which more concrete requirements can be built. It provides for significant funding commitments – although the amounts may still fall far short of what is required – and makes some

progress on the issue of deforestation and forest degradation.

However, overall, it is an abject disappointment to many who looked upon COP15 to set a more rigid, legally binding and committed path to meeting what the Accord itself recognises as 'one of the greatest challenges of our time'.<sup>143</sup> It does not prescribe any binding obligations – indeed the Accord is a non-binding instrument – and is couched in some vagaries that will be difficult to clarify in the months ahead. Significantly, while it does prioritize adaptation funding to the 'most vulnerable developing countries',<sup>144</sup> the commitments are vaguely expressed and there is no reference whatsoever to the real impacts on the human rights of those affected.

The coming months will see further diplomatic wrangling leading up to the clarification of emissions targets by 31 January 2010.<sup>145</sup> However, if the negotiations that culminated in the events in Copenhagen are anything to go by, those who had hoped that the fundamental human rights issues that are inexorably connected to climate change would be properly addressed should not set their expectations very high at all.

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<sup>143</sup> *Copenhagen Accord*, 15<sup>th</sup> sess, Agenda Item 9, para 1, UN Doc FCCC/CP/2009/L.7 (2009).

<sup>144</sup> *Ibid* para 8.

<sup>145</sup> *Ibid* paras 4-5.

