

# RESPONSES TO CLIMATE MIGRATION

*Katrina Miriam Wyman\**

*In recent years there have been suggestions that climate change might generate 200 million or more migrants by 2050. In response to these suggestions, and concerns that existing law and policy will be inadequate to deal with the expected displacement, there recently have been several proposals for new legally binding multilateral instruments specifically addressing climate migration.*

*This Article makes three contributions to the nascent literature on the legal and policy responses to migration induced by climate change.*

*First, it identifies the two principal gaps in existing law and policy that underpin to a significant extent the recent proposals for a new binding multilateral instrument, describing these gaps as the “rights” gap and the “funding” gap.*

*Second, this Article analyzes three of the leading proposals for a new binding multilateral instrument. It identifies the ways that these proposals would respond to the rights and funding gaps and emphasizes the proposals’ limitations.*

*Third, this Article emphasizes that addressing climate migration ultimately requires increasing the resilience of communities especially vulnerable to climate change. It then identifies ways to mitigate the effects of the rights and funding gaps by reducing existing vulnerabilities to climate change, without a new binding multilateral instrument. While a series of measures relying largely on existing legal and policy tools may seem less satisfying than proposals for a new binding multilateral instrument, these measures are more likely to address the concerns about human vulnerability to climate change that the proposals for new binding multilateral instruments have admirably highlighted.*

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\* Professor of Law, New York University School of Law. Thank you to my colleagues Michael Oppenheimer and Richard Stewart who encouraged me to work on this Article after I guest lectured on climate migration in their class on Global Environmental Governance in the spring of 2011. The Article benefited from conversations and email exchanges with them and their students, as well as Jutta Brunneé, Dale Jamieson, Nancy Morawetz, and Liam Murphy; a Skype presentation to the Human Rights and Borders Workshop at the Academic Center for Law and Business in Ramat Gan, Israel during which I received helpful comments from Itamar Mann; and the work of the *Harvard Environmental Law Review*. Bonnie Docherty, Benedict Kingsbury, Jane McAdam, Bryce Rudyk, and Richard Stewart graciously read the Article in draft form and provided many very helpful comments and suggestions. Elizabeth Hallinan and Scott Snyder provided excellent research assistance. The Filomen D’Agostino and Max E. Greenberg Research Fund at New York University School of Law provided generous financial assistance.

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## INTRODUCTION

In recent years there have been suggestions that climate change might generate 200 million or more human migrants by 2050.<sup>1</sup> These suggestions rest on many assumptions, and there is considerable room for more thorough analysis of the potential numbers of climate change migrants.<sup>2</sup> Nonetheless, there recently have been several proposals for new legally binding multilateral instruments in response to the growing concerns that climate change will induce large scale human migration and that existing law and policy will be inadequate to deal with this migration.<sup>3</sup> None of these proposals has yet acquired a politically powerful national government champion. However, there already is an emerging literature discussing the proposals, sometimes critically.<sup>4</sup>

<sup>1</sup> See, e.g., Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, 357:1420 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y LONDON B 609, 609 (2002) ("When global warming takes hold, there could be as many as 200 million people overtaken by sea-level rise and coastal flooding, by disruptions of monsoon systems and other rainfall regimes, and by droughts of unprecedented severity and duration."); *id.* at 611 (estimating the number of people at risk due to sea-level rise, droughts, and other climate factors); CHRISTIAN AID, HUMAN TIDE: THE REAL MIGRATION CRISIS 5–6 (2007) (estimating that between "now and 2050 . . . 250 million people [will be] permanently displaced by climate change-related phenomena such as floods, droughts, famines and hurricanes") (citing an interview by Christian Aid with Dr. Norman Myers on March 14, 2007); Office of the U.N. High Comm'r for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law*, Submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention (AWG-LCA 6), at 3 (May 20, 2009), available at <http://www.unhcr.org/4a1e4d8c2.html> ("It is believed that between 50 and 200 million people may move by the middle of the century, either within their countries or across borders, on a permanent or temporary basis."); Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System To Protect Climate Refugees*, 10 GLOBAL ENVTL. POL. 60, 68 (2010) (citing various sources, including Myers, *supra*, and CHRISTIAN AID, *supra*) ("[M]ost estimates currently appear to expect an additional number of climate refugees of about 200-250 million by 2050.").

<sup>2</sup> Oli Brown, *The Numbers Game*, 31 FORCED MIGRATION REV. 8 (2008); Cecilia Tacoli, *Crisis or Adaptation? Migration and Climate Change in a Context of High Mobility*, 21 ENV'T AND URBANIZATION 513, 513–14, 516–17 (2009); François Gemenne, *Why The Numbers Don't Add Up: A Review of Estimates and Predictions of People Displaced by Environmental Changes*, 21S GLOBAL ENVTL. CHANGE S41 (2011); THE GOV'T OFFICE FOR SCI., LONDON, FORESIGHT: MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE 27–31 (2011) [hereinafter FORESIGHT]; ASIAN DEV. BANK, ADDRESSING CLIMATE CHANGE AND MIGRATION IN ASIA AND THE SOUTH PACIFIC ix, 10–11, 53–54 (2012). For a recent promising effort to analyze the potential for climate migration in a specific setting, see Shuaizhang Feng, Alan B. Krueger & Michael Oppenheimer, *Linkages Among Climate Change, Crop Yields and Mexico-US Cross-Border Migration*, PNAS (2010). Without more thorough analyses, the possibility of climate-induced migration will become a topic of ridicule. See, e.g., Editorial, *Climate Refugees, Not Found*, WALL STREET JOURNAL, Apr. 21, 2011, at A12.

<sup>3</sup> See *infra* notes 43–49 and accompanying text.

<sup>4</sup> See, e.g., Jane McAdam, *Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, 23 INT'L J. OF REFUGEE L. 2 (2011); Sheila McAnaney, *Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement*, 87 N.Y.U. L. REV. 1172

This Article makes three contributions to the nascent literature on the legal and policy responses to the possibility of climate change migration. First, it identifies the two principal gaps in existing law and policy that underpin, to a significant extent, the recent proposals for a new binding multilateral instrument dealing with climate change migration. This Article labels these gaps the “rights” gap and the “funding” gap. The “rights” gap is the lack of a right in existing law to remain permanently in another country due to environmental conditions in the home country. The lack of such a right has prompted calls for granting climate migrants seeking refuge in another country a right not to be returned to their home country. The “funding” gap is the lack of a dedicated source of international funding to help offset the costs that developing countries may incur in dealing with climate change migration. To remedy this gap, there are proposals for a new international fund financed by developed countries to assist developing countries with the costs of climate migration. Legal academics tend to emphasize the rights gap in discussing climate change migration, but the funding gap is arguably an equal and possibly greater motivator behind the recent proposals for a new binding multilateral instrument.

Second, this Article analyzes three of the leading proposals for a new legally binding multilateral instrument.<sup>5</sup> It identifies the ways that these proposals would respond to the rights and funding gaps and emphasizes their limitations. These proposals are vulnerable to concerns based on morality, practicality, and political feasibility.

Third, this Article emphasizes that addressing climate migration ultimately requires increasing the resilience of the communities vulnerable to climate change.<sup>6</sup> It then identifies ways to mitigate the effects of the rights and funding gaps by reducing existing vulnerabilities, without a new binding multilateral instrument. For example, to reduce the significance of the rights gap, the Article supports proactively increasing immigration levels from countries thought to be vulnerable to climate change.<sup>7</sup> The Article underscores the potential to address the funding gap using better financed versions of existing development assistance, disaster relief, migration, and climate change adaptation funds.<sup>8</sup>

A series of measures relying largely on existing legal and policy tools may seem less satisfying than proposals for a legally binding multilateral instru-

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(2012); Graeme Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in *CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES* 9 (Jane McAdam ed., 2010); FORESIGHT, *supra* note 2, at 20, 151–55.

<sup>5</sup> Biermann & Boas, *supra* note 1; Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 *HARV. ENVTL. L. REV.* 349 (2009); David Hodgkinson et al., *The Hour When the Ship Comes In’: A Convention for Persons Displaced by Climate Change*, 36 *MONASH UNIV. L. REV.* 69 (2010).

<sup>6</sup> For other sources taking the position that addressing climate change migration requires increasing resilience and promoting development, see, for example, *infra* note 210.

<sup>7</sup> See *infra* note 225 and accompanying text (endorsing the option of increasing immigration levels and identifying other sources supporting this option).

<sup>8</sup> See *infra* notes 246, 249, 253, and accompanying text (discussing this option and identifying other sources supporting this option).

ment.<sup>9</sup> But these measures may be more likely to address the concerns about human vulnerability to climate change that the proposals for new binding instruments usefully have highlighted. These measures also are generally less vulnerable to the range of moral, practical, and political difficulties that plague the proposals for new binding multilateral instruments.<sup>10</sup>

In Part I, this Article provides background on current expectations about climate-induced migration. In Parts II–IV, it analyzes, respectively, the rights and funding gaps that underpin proposals for a new binding multilateral instrument, the responses that three leading proposals offer to these gaps, and the limitations of these responses. Finally, in Part V, the Article identifies alternative responses to the rights and funding gaps. These alternatives aim to reduce the human vulnerability to climate change that lies at the heart of discussions of climate change migration.

## I. BACKGROUND ON CLIMATE MIGRATION<sup>11</sup>

There has been considerable policy-oriented discussion about how to mitigate the effects of climate change by taking measures to reduce greenhouse gas emissions or, increasingly, through geo-engineering. However, there is grow-

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<sup>9</sup> McAdam, *supra* note 4, at 26 (“[N]ational and regional responses may not seem as gratifying for some as securing a universal international treaty on climate-related movement.”). There is academic literature discussing the particular appeal of binding multilateral instruments. For example, in comparing multilateral and bilateral treaties, Gabriella Blum argues that multilateral treaties “as a general rule, enjoy a symbolic and normative power far greater than that of a random accumulation of more limited agreements.” Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT’L L.J. 323, 343 (2008). Comparing the choice of binding international agreements, which he calls contracts, as opposed to nonbinding agreements, which he calls pledges, Professor Kal Raustiala argues that “domestic actors may prefer contracts” based on “the belief that contracts are more effective than pledges at shaping state behavior” and because “domestic institutions in many states, especially democracies, require more process for contracts and therefore create more opportunity for influence by private actors.” Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 598 (2005).

<sup>10</sup> For clarity, it should be emphasized that the leading proposals analyzed in this Article propose to address climate change migration comprehensively. However, this Article sets to the side the distinct questions raised by the situation of island nations whose existence is threatened by climate change. In other work, I examine the moral rights of the citizens of these states, the moral obligations owed to them, and policy options for addressing the case of existentially threatened island nations. See Katrina M. Wyman, *Sinking States*, in PROPERTY IN LAND AND OTHER RESOURCES 439 (Daniel Cole & Elinor Ostrom eds., 2012) [hereinafter Wyman, *Sinking States*]; Katrina M. Wyman, *The National Immigration Policy Option: Limits and Potential*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE (Michael Gerrard & Gregory Wannier eds., forthcoming 2013) [hereinafter Wyman, *National Immigration Policy Option*]; Katrina Miriam Wyman, *Are We Morally Obligated to Assist Climate Change Migrants?* (draft) (on file with Harvard Law School Library) [hereinafter Wyman, *Are We Morally Obligated*]. See also *infra* notes 39–41 (briefly explaining that the situation of the threatened island nations is not representative of the broader concerns about climate change migration).

<sup>11</sup> The three proposals discussed in this Article for new binding multilateral instruments include analyses of existing understandings of climate change migration. See Biermann & Boas, *supra* note 1; Docherty & Giannini, *supra* note 5; Hodgkinson et al., *supra* note 5. The recent Foresight report also provides very helpful background. FORESIGHT, *supra* note 2.

ing awareness that climate change is happening and that humans will be required to adapt to it.<sup>12</sup> Migration is one longstanding response to environmental change and it presumably will be one way that humans adapt to climate change, although by no means the only way.<sup>13</sup>

As previously mentioned, there are suggestions that climate change could generate hundreds of millions of human migrants by the middle of the century due principally to sea level rise, increased frequency and intensity of extreme weather events, drought, and desertification. Walter Kälin, former Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons, offers a five-fold typology of the situations that may give rise to climate change-induced displacement: “(i) *Sudden-onset disasters* such as flooding . . . [;] (ii) *Slow-onset environmental degradation*” due, for example, to sea level rise, “droughts and desertification . . . [;] (iii) So-called ‘*sinking*’ *small island states*[;]” (iv) governmental designation of “*areas as high-risk zones too dangerous for human habitation*[;]” and “(v) . . . *unrest seriously disturbing public order, violence or even armed conflict*” due to growing resource scarcity.<sup>14</sup>

There are many criticisms of the methodologies and assumptions underlying the predictions of large numbers of climate migrants, and there is considerable uncertainty about the number of migrants that climate change may generate.<sup>15</sup> One reason that it is difficult to offer reliable predictions of the number of climate migrants is the uncertainty surrounding the impacts of climate change at localized levels.<sup>16</sup> Substantial work has been done on the possible global implications of various degrees of climate change, but uncertainty remains about the implications at the global level.<sup>17</sup> There is greater uncertainty

<sup>12</sup> There also is growing awareness that non-humans may require assistance adapting to climate change. See, e.g., Alejandro E. Camacho, *Assisted Migration: Redefining Nature and Natural Resource Law Under Climate Change*, 27 YALE J. ON REG. 171 (2009).

<sup>13</sup> For arguments that migration should be regarded as a potentially positive response rather than a negative development, see, for example, FORESIGHT, *supra* note 2, at 14, 22, 32, 113, 126; Hugo, *supra* note 4, at 29; Tacoli, *supra* note 2, at 513–14.

<sup>14</sup> Walter Kälin, *Conceptualising Climate-Induced Displacement*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 81, 85–86 (Jane McAdam ed., 2010).

<sup>15</sup> See *supra* note 2 (citing sources that criticize the predictions of large number of climate migrants).

<sup>16</sup> ASIAN DEV. BANK, *supra* note 2, at 12 (“[T]he impacts of climate change remain difficult to forecast at the local level”). In his recent book about climate-induced migration, Gregory White offers an example of how uncertainty about the impact of climate change contributes to uncertainty in estimating the number of migrants, focusing on uncertainty about the implications of climate change for the Sahel. GREGORY WHITE, CLIMATE CHANGE AND MIGRATION: SECURITY AND BORDERS IN A WARMING WORLD 138–39 (2011).

<sup>17</sup> See Neil Adger et al., *IPCC 2007: Summary for Policymakers*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 11–12, 15–18 (M.L. Parry et al. eds., 2007); S.H. Schneider et al., *2007: Assessing Key Vulnerabilities and the Risk from Climate Change*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 779, 781, 787–89 (tbl. 19.1), 790–97 (M.L. Parry et al. eds., 2007).

about the potential impacts of climate change in specific countries and areas within countries.<sup>18</sup> Complementing the uncertainty about the implications of climate change is the uncertainty about human capacity to adapt to climate change with or without migrating.<sup>19</sup>

It is also challenging to predict the number of climate migrants because it is difficult to attribute a migration decision to climate change, as migration decisions often are a response to a combination of factors.<sup>20</sup> The recent Foresight report from the UK conceptualizes migration decisions as “influenced by five broad categories of ‘driver[s]’” (economic, social, political, demographic, and environmental), with economic and social factors being “the most important.”<sup>21</sup> According to this conceptualization, “[e]nvironmental change . . . influence[s] migration outcomes through affecting existing drivers,” especially the “economic, environmental and, to a lesser degree, political drivers.”<sup>22</sup> However, even in the presence of “migration drivers,” there may not be migration because “whether migration occurs or not depends on a series of intervening factors and personal and household characteristics.”<sup>23</sup>

If climate change is best conceptualized as a background influence affecting other migration drivers, should migration still be attributed to climate

<sup>18</sup> Schneider et al., *supra* note 17, at 784 (“Most studies of impacts [of climate change] in the context of key vulnerabilities and Article 2 [of the UNFCCC] have focused on aggregate impacts, grouping developing countries or populations with special needs or situations.”); ASIAN DEV. BANK, *supra* note 2, at 12.

However, there is research on the potential regional impacts of climate change. See Adger et al., *supra* note 17, at 13–15; CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE chs. 9–16 (M.L. Parry et al. eds., 2007). There also is research on the implications of climate change at country and local levels. See, e.g., Schneider et al., *supra* note 17, at 791 (referring to estimates of economic impacts of climate change on “very small economies such as Kiribati”). The key is that statements about the global implications of climate change can be made with more precision than statements about the implications at lesser, downscaled levels.

<sup>19</sup> See Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 713, 755–57 (2011-2012).

<sup>20</sup> With respect to the difficulties of attributing migration decisions to climate change in particular, see, for example, McAdam, *supra* note 4, at 12–15; Hugo, *supra* note 4, at 10; Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 357, 366 (2011); Howard F. Chang, *The Environment and Climate Change: Is International Migration Part of the Problem Or Part of the Solution?*, 20 FORDHAM ENVTL. L. REV. 341, 345 (2009); ASIAN DEV. BANK, *supra* note 2, at viii, 2–3. The recent Foresight report emphasizes the difficulties of attributing migration decisions to environmental change. FORESIGHT, *supra* note 2, at 11 (“It is almost impossible to distinguish a group of ‘environmental migrants’, either now or in the future” because “migration is a multi-causal phenomenon and it is problematic to assign a proportion of the actual or predicted number of migrants as moving as a direct result of environmental change.”). See generally MICHELLE FOSTER, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION* 5–14 (2007).

<sup>21</sup> FORESIGHT, *supra* note 2, at 11, 43; see also *id.* at 33, 43–62.

<sup>22</sup> *Id.* at 11. Climate change is an example of environmental change under the Foresight report’s conceptualization, and thus the report regards it as a change that will influence migration decisions through existing drivers of migration. See, e.g., *id.* at 51–52 (Box 2.3: Primary environmental changes that are likely to influence the drivers of migration).

<sup>23</sup> *Id.* at 12.

change? Refugee law provides precedent for the idea that climate change may not have to “be the sole, or even the main, reason for . . . displacement”<sup>24</sup> for the movement to be ascribed to climate change. But difficult attribution decisions still need to be made even if this precedent is followed, taking into account the circumstances of migration decisions.

The areas most often mentioned as likely to produce large numbers of climate migrants are “Africa, Asia, Latin America and small island developing states.”<sup>25</sup> Yet climate change may even prompt migration within the United States, where discussion is already underway about relocating several indigenous villages in Alaska due to climate change.<sup>26</sup> Climate change also may contribute to additional migration into the United States from Mexico and the Republic of the Marshall Islands (“RMI”).<sup>27</sup>

An additional consideration that is highly relevant to the policy discussion is the socio-economic circumstances of the persons considered most likely to need to migrate.<sup>28</sup> Developing countries are most likely to bear the brunt of the

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<sup>24</sup> Mayer, *supra* note 20, at 369; *see also id.* at 368–69 (“[T]he most challenging definitional issue is probably the determination of a threshold of causal relationship between climate change and migration . . . . A solution may be found by analogy to the Refugee Convention, which does not require that persecution be the sole, or even the main, reason for the displacement of political refugees; it only requires that there is persecution. The same objective criterion that a good reason exists rather than *has been a determinant of personal choice* should be adopted concerning climate migrants.”) (footnote omitted); McAdam, *supra* note 4, at 14 (“[I]f we look at the refugee context, although some states require refugees to show that ‘persecution’ is ‘the essential and significant reason’ for flight, the Refugee Convention does not mandate this. Furthermore, the standard of proof in refugee law — a ‘well-founded fear of persecution’ — can be less than a 50 per cent chance.”) (footnote omitted).

<sup>25</sup> Biermann & Boas, *supra* note 1, at 69; *see also* Schneider et al., *supra* note 17, at 791.

<sup>26</sup> *See* Robin Bronen, *Forced Migration of Alaskan Indigenous Communities Due to Climate Change*, in ENVIRONMENT, FORCED MIGRATION AND SOCIAL VULNERABILITY 87 (Tamer Afifi & Jill Jäger eds., 2010).

<sup>27</sup> *See generally* Feng et al., *supra* note 2. RMI has a Compact of Free Association (“COFA”) with the U.S. that includes immigration privileges that enable Marshallese to live and work in the U.S. for an unlimited time in unlimited numbers, although the privileges do not include a distinct path to U.S. citizenship. Briana Dema, *Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under the Compacts of Free Association*, 37 COLUM. J. ENVTL. L. 177, 185–90, 199, 203 (2012); Wyman, *National Immigration Policy Option*, *supra* note 10, at 12–13. For a perceptive analysis of the adequacy of RMI’s immigration privileges under the COFA for dealing with climate change displacement, *see* Dema, *supra*.

<sup>28</sup> There are different ways of thinking about vulnerability to climate change, and consequently different conceptions of which countries are vulnerable to the effects of climate change. *See* Hans-Martin Füssel, *How Inequitable is the Global Distribution of Responsibility, Capability, and Vulnerability to Climate Change: A Comprehensive Indicator-Based Assessment*, 20 GLOBAL ENVTL. CHANGE 597, 598–99 (2010); ASIAN DEV. BANK, *supra* note 2, at 11–12. Indeed, Füssel argues that “the identification of ‘particularly vulnerable’ countries is primarily a political rather than a scientific challenge.” Füssel, *supra*, at 599 (citing Hans-Martin Füssel, *Background Note: Review and Quantitative Analysis of Indices of Climate Change Exposure, Adaptive Capacity, Sensitivity and Impacts*, in WORLD DEVELOPMENT REPORT 2010, available at [http://siteresources.worldbank.org/intwdr2010/resources/5287678-1255547194560/wdr2010\\_BG\\_Note\\_Fussel.pdf](http://siteresources.worldbank.org/intwdr2010/resources/5287678-1255547194560/wdr2010_BG_Note_Fussel.pdf)). For a possible definition of vulnerability, *see* IPCC FOURTH ASSESSMENT REPORT, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY app. 1 at 883 (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-app.pdf>.

negative impacts of climate change.<sup>29</sup> Within developing countries, the people most likely to be affected by climate change probably will be those who are impoverished.<sup>30</sup> Poverty is associated with greater dependence “on climate-sensitive resources such as local water and food supplies.”<sup>31</sup> Poverty reduces resilience to environmental change.<sup>32</sup> It also makes it more difficult for persons to migrate, especially internationally, because migration is facilitated by access to financial resources.<sup>33</sup> Indeed, the Foresight report recently warned that “[e]nvironmental change is equally likely to make migration less possible as more probable . . . [b]ecause . . . populations who experience the impacts of environmental change may see a reduction in the very capital required to enable a move.”<sup>34</sup>

Although most climate change–induced migration is likely to be internal, with migrants moving within their countries of origin,<sup>35</sup> the loss of habitable land and reduced access to vital natural resources such as water may prompt some migrants to cross national borders.<sup>36</sup> When international climate migra-

<sup>29</sup> See, e.g., PANEL ON ADAPTING TO THE IMPACTS OF CLIMATE CHANGE, NAT'L RESEARCH COUNCIL, ADAPTING TO THE IMPACTS OF CLIMATE CHANGE 196 (2010) [hereinafter NATIONAL RESEARCH COUNCIL]; Robert Mendelsohn et al., *The Distributional Impact of Climate Change on Rich and Poor Countries*, 11 ENV'T & DEV. ECON. 159 (2006); Füssel, *supra* note 28; U. Thara Sinivasan, *Economics of Climate Change: Risk and Responsibility By World Region*, 10 CLIMATE POL'Y 298 (2010).

<sup>30</sup> See, e.g., Mendelsohn et al., *supra* note 29, at 174 (“There are several reasons to expect that individual poor will be burdened even more than the aggregate national numbers suggest.”).

<sup>31</sup> Adger et al., *supra* note 17, at 12.

<sup>32</sup> See, e.g., U.N. ENVTL. PROGRAMME, CLIMATE CHANGE 1, available at [http://www.unep.org/gc/gc26/factsheet/pdfs/Climate\\_change.pdf](http://www.unep.org/gc/gc26/factsheet/pdfs/Climate_change.pdf) (last visited Jan. 22, 2013) (on file with the Harvard Law School Library) (identifying the “limited capacity [of poor people and poor countries] to cope with climate variability and extremes” as one reason that they will “more severely” experience the “negative impacts” of climate change).

<sup>33</sup> See, e.g., Hodgkinson et al., *supra* note 5, at 82 & n.90; FORESIGHT, *supra* note 2, at 13 (“migration (especially international migration) is selective by economic status”); THE WORLD BANK, WORLD DEVELOPMENT REPORT 2010: DEVELOPMENT AND CLIMATE CHANGE 110 (2010) (discussing “[t]he migration hump”).

<sup>34</sup> FORESIGHT, *supra* note 2, at 9; see also *id.* at 12.

<sup>35</sup> Office of the U.N. High Comm’r for Refugees, *supra* note 1, at 4; see also Naser, *supra* note 19, at 743 (“Traditionally, most displacement due to environmental change has occurred within national boundaries.”); FORESIGHT, *supra* note 2, at 37 (“[T]here is some evidence to suggest that where global environmental change does act to raise levels of migration and displacement, the majority of additional migrants remain, and are likely to continue to remain, within their country of origin, owing to the prohibitive cost of international migration . . . .”); ASIAN DEV. BANK, *supra* note 2, at viii (“most environmental migration will occur within countries”); Gemenne, *supra* note 2, at 6 (“Most of displacements triggered by environmental factors are intranational, rather than international.”); Jane McAdam & Ben Saul, *Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh*, in 53 GERMAN YEARBOOK OF INTERNATIONAL LAW 233, 235 (Thomas Giegerich & Alexander Proelss eds., 2010) (“Most displacement in Bangladesh that can be linked to climate change is likely to be internal rather than cross-border in character . . . .”).

<sup>36</sup> See, e.g., Biermann & Boas, *supra* note 1, at 72 (“Most refugees may stay in their countries and regions, especially in the case of coastal erosion and sea-level rise. For example, Christian Aid expects that only 5 million climate refugees will cross international borders. However, international migration is not excluded.”) (citing CHRISTIAN AID, *supra* note 1, at 6); Hodgkinson et al., *supra* note 5, at 82 (“Migration experts state that most persons displaced by climate change will be unlikely to cross an international border.”) (internal citations omitted).



tion does occur, most of it likely will involve movement between developing countries, rather than from developing to developed countries.<sup>37</sup>

There has been considerable press coverage of the possibility that the populations of the small island nations of Kiribati, the Maldives, RMI, and Tuvalu will need to migrate to other countries because theirs will become uninhabitable due to climate change.<sup>38</sup> But the international migration that climate change may induce from these countries is unlikely to be representative of the mostly internal phenomenon of climate change migration.<sup>39</sup> Moreover, the total aggregate population of these four nations is under 500,000, a relatively small number that it likely would be feasible to resettle, hopefully gradually, if it becomes necessary.<sup>40</sup> By way of context, 1,042,625 people became legal permanent residents of the United States in 2010, over twice the combined population of the four island nations commonly mentioned as existentially threatened by climate change.<sup>41</sup> As indicated earlier, this Article sets to the side the distinct questions raised by the situation of the island nations that are existentially threatened by climate change.<sup>42</sup>

## II. RIGHTS AND FUNDING GAPS

Responding to the growing discussion of the migration that climate change may induce, several proposals have been advanced for a new binding multilateral instrument (or amendments to existing binding multilateral instruments) to deal with climate change displacement. These include proposals from the Maldives,<sup>43</sup> the German Advisory Council on Global Change,<sup>44</sup> a Bangladeshi

<sup>37</sup> Mayer, *supra* note 20, at 397; GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, CLIMATE CHANGE AS A SECURITY RISK 118 (2008).

<sup>38</sup> See, e.g., Nicholas D. Kristof, *Island Nations Fear Sea Could Swamp Them*, N.Y. TIMES, Dec. 1, 1997, at F9; Nicholas Schmittle, *Wanted: A New Home For My Country*, N.Y. TIMES, May 10, 2009 (Magazine), at MM38.

<sup>39</sup> See McAnaney, *supra* note 4; see also Jessica Ayers et al., *Global Adaptation Governance Beyond 2012: Developing-Country Perspectives*, in GLOBAL CLIMATE GOVERNANCE BEYOND 2012: ARCHITECTURE, AGENCY, AND ADAPTATION 270, 278–79 (Frank Biermann et al. eds., 2010) (arguing that “‘developing countries’ as a group have hugely divergent interests when it comes to adaptation” and distinguishing “between the needs of small-island developing states and inland least-developed countries, with sea-level rise meaning inevitable retreat for populations of the former, while for the latter building resilience may rely more heavily on strengthening progress against existing development indicators less easily associated with climate change”).

<sup>40</sup> ROSS GARNAUT, THE GARNAUT CLIMATE CHANGE REVIEW: FINAL REPORT 149 (2008).

<sup>41</sup> RANDALL MONGER & JAMES YANKAY, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, POLY DIRECTORATE, ANNUAL FLOW REPORT, U.S. LEGAL PERMANENT RESIDENTS: 2010 1 (March 2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf).

<sup>42</sup> See *supra* note 10.

<sup>43</sup> In 2006, the Maldives proposed a new protocol to the 1951 Refugee Convention covering environmental refugees. Maldives Draft Protocol on Environmental Refugees: A Report on the Original Meeting and the Proposed Amendments to the 1951 Convention and 1967 Protocol (Sept. 18, 2007) (on file with the Harvard Law School Library). The proposal is referenced in Docherty & Giannini, *supra* note 5, at 365 & n.90; McAdam, *supra* note 4, at 6; Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, 50 ENV’T 10, 16 n.1 (2008); Frank Biermann & Ingrid Boas, *Global Adaptation Governance: The Case of Protecting Climate*

non-governmental organization network,<sup>45</sup> and academics and legal practitioners in Europe,<sup>46</sup> the United States,<sup>47</sup> and Australia.<sup>48</sup> This Article focuses on three leading proposals from academics and legal practitioners for new binding multilateral protection for climate change migrants: the proposals of Biermann and Boas, Docherty and Giannini, and Hodgkinson et al.<sup>49</sup>

The leading proposals for a new multilateral protection instrument generally seek to fill what I call the rights and funding gaps in the context of offering comprehensive arrangements for dealing with climate migration. However, the proposals are not always explicit about the gaps they seek to fill, and the recommendations in some of the proposals are more focused on one gap than the other. The proposals include reasons why they should be adopted, but the proposals focus more on how to fill the gaps than why filling the gaps should be

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*Refugees*, in GLOBAL CLIMATE GOVERNANCE BEYOND 2012: ARCHITECTURE, AGENCY AND ADAPTATION 255, 259–60 (Frank Biermann et al. eds., 2010) [hereinafter Biermann & Boas, *Global Adaptation Governance*]; Biermann & Boas, *supra* note 1, at 74.

<sup>44</sup> GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, *supra* note 37, at 129 (advocating a “cross-sectoral multilateral convention” addressing environmental migrants, including climate change migrants, distinct from the Refugee Convention); *id.* at 205–06 (recommending that the convention include a version of the non-refoulement principle for environmental migrants, a requirement that “industrialized and newly industrializing countries . . . compensate for” climate change damages, and a formula for allocating among countries “the costs of receiving refugees”); *id.* at 211 (advocating the establishment of “a fund for environmentally induced migration”).

<sup>45</sup> McAdam, *supra* note 4, at 6; McAdam & Saul, *supra* note 35, at 233, 279–80.

<sup>46</sup> Biermann & Boas, *supra* note 1.

<sup>47</sup> Docherty & Giannini, *supra* note 5.

<sup>48</sup> Hodgkinson et al., *supra* note 5.

<sup>49</sup> See discussion in Part III, *infra*. See also, e.g., Claire DeWitte, *At the Water’s Edge: Legal Protections and Funding For a New Generation of Climate Change Refugees*, 16:1 OCEAN & COASTAL L.J. 211, 222, 226–28 (2010) (discussing Biermann & Boas, *supra* note 1 and Docherty & Giannini, *supra* note 5).

A proposal I do not analyze, though it has gained considerable attention, is MICHEL PRIEUR ET AL., DRAFT CONVENTION ON THE INTERNATIONAL STATUS OF ENVIRONMENTALLY-DISPLACED PERSONS (second version, May 2010), available at <http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons%20%28second%20version%29.pdf>. It recommends a new multilateral protection instrument to assist “environmentally-displaced persons,” a broad category that would encompass but not be limited to climate change migrants. For brief histories of the literature on environmental refugees, see, for example, FORESIGHT, *supra* note 2, at 26–27; Biermann & Boas, *Global Adaptation Governance*, *supra* note 43, at 256; Jane McAdam, *Environmental Migration Governance* 6 (UNSW Law Research Paper No. 2009-1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1412002](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412002).

A second, more recent proposal I do not analyze is Mayer, *supra* note 20. Mayer proposes that climate migration be addressed through a United Nations General Assembly resolution that would create “a global framework that would be implemented through bilateral and regional negotiations and cooperation and funded by the international community through a United Nations . . . agency.” *Id.* at 361; see also *id.* at 410–16. Mayer does not propose a new multilateral convention or protocol to an existing convention.

Even more recently, Christine Gibb and James Ford offered a third proposal that the UNFCCC recognize “climate migrants” through “a Decision [of the Conference of the Parties] that builds on Decision 14(f)/CP.16 [in the Cancun Adaptation Framework] that calls upon parties to implement the Nansen Principles . . . and is led by an Ad Hoc Working Group on Climate Migration within the UNFCCC.” Christine Gibb & James Ford, *Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?*, 7 ENVTL. RES. LETT. 1, 4 (2012).

prioritized.<sup>50</sup> Instead, a separate nascent, philosophically oriented literature focuses more on why we might have duties to climate change migrants, and less on the institutional framework through which any duties might be fulfilled.<sup>51</sup>

### A. *Rights Gap*

The rights gap underpins many of the proposals for new binding multilateral protection for climate change migrants, especially the proposals from legal academics and practitioners.<sup>52</sup> The gap refers to the fact that under existing law, persons who need to move to another country because of climate change impacts in their home country have no right to remain permanently in another country. This rights gap exists for two reasons.

First, the domestic immigration policies of most countries generally do not allow non-citizens to remain permanently because of environmental conditions in their home countries.<sup>53</sup> Immigration legislation in some countries, including the United States, provides a framework under which non-citizens may remain temporarily because of environmental conditions in their home country.<sup>54</sup> But countries rarely enable people to remain permanently because of environmental conditions back home.<sup>55</sup>

Second, climate migrants are unlikely to qualify for protection under international law for two main reasons. First, climate migrants are unlikely to be considered refugees under the United Nations Convention Relating to the Sta-

<sup>50</sup> See, e.g., Biermann & Boas, *supra* note 1, at 76; Docherty & Giannini, *supra* note 5, at 382; Hodgkinson et al., *supra* note 5, at 81, 106.

<sup>51</sup> See, e.g., Cara Nine, *Ecological Refugees, States Borders, and the Lockean Proviso*, 27:4 J. APPLIED PHIL. 359 (2010); Peter Penz, *International Ethical Responsibilities to 'Climate Change Refugees'*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 151 (Jane McAdam ed., 2010); Mathias Risse, *The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth*, 23 ETHICS & INT'L AFF. 281 (2009); Sujatha Byravan & Sudhir Chella Rajan, *The Ethical Implications of Sea-Level Rise Due to Climate Change*, 24 ETHICS & INT'L AFF. 239 (2010). I have contributed to this literature. Wyman, *Sinking States*, *supra* note 10.

<sup>52</sup> See, e.g., Biermann & Boas, *supra* note 1, at 72–73 (discussing gaps in refugee instruments and institutions); Docherty & Giannini, *supra* note 5, at 357–59 (discussing “[t]he [l]egal [g]ap,” which they define as a gap in “legal frameworks” and “institutions”); Hodgkinson et al., *supra* note 5, at 75–77, 102 (discussing inadequacy of, and gap in, international law).

<sup>53</sup> Susan Martin, *Climate Change, Migration, and Governance*, 16 GLOBAL GOVERNANCE 397, 409–10 (2010).

<sup>54</sup> See 8 U.S.C. § 1254a(b)(1). For more on Temporary Protected Status in the U.S. and the E.U.'s Temporary Protection Directive, see Martin, *supra* note 53, at 405–06; Susan Martin, *Climate Change and International Migration, Background Paper WMR 2010*, IOM International Organization for Migration (June 2010); JANE McADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 100–03 (2012).

<sup>55</sup> Two exceptions are Finland and Sweden. Jane McAdam, *From Economic Refugees to Climate Refugees?*, 10 MELB. J. INT'L L. 579, 589 n.47 (2009) (reviewing MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGEE FROM DEPRIVATION (2007)); Martin, *supra* note 53, at 406–07; Martin, *supra* note 54, at 9; Mayer, *supra* note 20, at 383; ASIAN DEV. BANK, *supra* note 2, at 59 (Box 8: Asylum for those Displaced by Disasters); McADAM, *supra* note 54, at 104; Vikram Kolmannskog, *The Point of No Return — Exploring Law and on Cross-Border Displacement in the Context of Climate Change*, 34 REFUGEE WATCH 28, 37 (Dec. 2009).

tus of Refugees (“Refugee Convention” or “Convention”). Second, they are unlikely to be able to invoke the non-refoulement principle under existing international human rights law.

Under the Refugee Convention, persons who qualify as refugees are granted many rights, including the Convention’s signature right of non-refoulement. As set out in the Convention, non-refoulement is a right not to be returned or expelled if return or expulsion would result in persecution based on “race, religion, nationality, membership of a particular social group or political opinion.”<sup>56</sup> Going beyond the Convention requirements, some countries, including the United States, often provide successful refugee claimants with a path to permanent residence and, eventually, citizenship.<sup>57</sup>

However, most climate change migrants will not be considered “refugees” under the definition of “refugee” in the Refugee Convention.<sup>58</sup> Many countries use this definition in their domestic immigration laws in deciding whether to allow foreigners to claim refugee status.<sup>59</sup> Unsuccessful attempts by citizens of Kiribati and Tuvalu to claim refugee status in Australia and New Zealand emphasize the difficulties that climate change migrants would encounter under the definition.<sup>60</sup>

Under the Refugee Convention definition, a refugee is a person who:

[O]wing 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 protec-

<sup>56</sup> United Nations Convention Relating to the Status of Refugees, art. 33(1), opened for signature July 28, 1981, 189 U.N.T.S. 150 [hereinafter U.N. Refugee Convention] (“No contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

<sup>57</sup> STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 893–94 (5th ed. 2009) (discussing the distinction between asylum, under which people may be able to remain permanently in the U.S., and withholding of removal, which is the U.S. equivalent of non-refoulement); *see also* 8 U.S.C. § 1231(b)(3) (withholding of removal/non-refoulement); 8 U.S.C. § 1158 (asylum); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, I AM A REFUGEE OR ASYLEE HOW DO I . . . BECOME A PERMANENT U.S. RESIDENT? (Aug. 2008), available at <http://www.uscis.gov/USCIS/Resources/D3en.pdf>.

<sup>58</sup> *See* U.N. Refugee Convention, *supra* note 56. A number of scholars have argued that most climate migrants will not be considered refugees under the Convention definition of “refugee.” The analysis in this article draws especially on McAdam, *supra* note 55, and Jane McAdam & Ben Saul, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, in HUMAN SECURITY AND NON-CITIZENS: LAW, POLICY AND INTERNATIONAL AFFAIRS 357 (Alice Edwards & Carla Ferstman eds., 2010). McAdam’s recent book also thoroughly analyzes whether people fleeing the effects of climate change would be able to rely on the Refugee Convention. McADAM, *supra* note 54, at 42–48.

<sup>59</sup> Martin, *supra* note 54, at 8.

<sup>60</sup> *See, e.g., Refugee Appeal No. 72189/2000* (Refugee Status Appeals Authority, S. Joe, 17 Aug. 2000) (N.Z.); *RRT Case Number 0907346*, [2009] RRTA 1168, (Refugee Review Tribunal, 10 Dec. 2009) (Austl.), available at <http://www.unhcr.org/refworld/docid/4b8fdd952.html> [hereinafter RRT Case Number 0907346]. The decisions of the New Zealand Refugee Status Appeals Authority and the Australian Refugee Review Tribunal are cited in McAdam, *supra* note 55, at 591; McADAM, *supra* note 54, at 47 n.43.

tion 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.<sup>61</sup>

To start, climate change migrants will have a hard time establishing that they are suffering from persecution, because climate change (or the emission of greenhouse gases) is unlikely to be regarded as a form of persecution as persecution has been interpreted under the Refugee Convention.<sup>62</sup> Secondly, migrants would need to establish that they have a well-founded fear of being persecuted because of one of the five grounds listed in the Refugee Convention (race, religion, nationality, membership of a particular social group or political opinion). But “[t]he impacts of climate change . . . are largely indiscriminate, rather than tied to particular characteristics.”<sup>63</sup> While it might be tempting to argue that climate change migrants comprise “a particular social group,” this argument is unlikely to succeed because “the group must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.”<sup>64</sup>

A third obstacle presented by the Refugee Convention definition is the requirement that claimants be “unable” or “unwilling” to avail themselves of the protection of their country of nationality. The definition envisages people claiming refugee status because they are persecuted by their governments or because their governments are allowing them to be persecuted. This is unlikely to be the situation of most climate change migrants. Their governments likely will not have abandoned them and indeed may be actively trying to assist them in dealing with climate change.<sup>65</sup> A fourth component of the Refugee Convention definition that makes it ill-suited to assisting climate change migrants is that it requires that claimants be outside the country of their nationality to claim refugee status.<sup>66</sup> This requirement, which is not necessarily part of all national legislative definitions of refugee,<sup>67</sup> would prevent climate change migrants from seeking to invoke refugee protections before they leave their home countries. Since the need to move due to environmental change may be predictable

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<sup>61</sup> U.N. Refugee Convention, *supra* note 56, art. 1(A)(2); 1967 Protocol art. 1(2).

<sup>62</sup> See, e.g., McAdam, *supra* note 55, at 590–92; Mayer, *supra* note 20, at 381–82; see also RRT Case Number 0907346, *supra* note 60, at ¶51 (“[T]he Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required.”). In considering this last quotation, it is worth noting that Australia appears to be unusual in that its Migration Act seems to have been interpreted “to require motivation on the part of those who persecute, in the sense that people are persecuted because of something perceived about them or attributed to them.” GUY S. GOODWILL-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 91–92 (3d ed. 2007).

<sup>63</sup> McAdam, *supra* note 55, at 592.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; Docherty & Giannini, *supra* note 5, at 358.

<sup>66</sup> McAdam, *supra* note 55, at 590; see also McAdam & Saul, *supra* note 58, at 370–71; Mayer, *supra* note 20, at 406.

<sup>67</sup> United States legislation allows for refugee claims from persons in their home state. 8 U.S.C. § 1101(a)(42); LEGOMSKY & RODRÍGUEZ, *supra* note 57, at 891.

in advance, there are opportunities for planned migration that the Convention definition would not be able to facilitate.<sup>68</sup>

Regional arrangements for refugees in Africa and Latin America define refugees more expansively than the Refugee Convention and may provide more promising grounds for protecting climate change migrants. The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems (“OAU Convention”) starts with the Refugee Convention definition and then adds that “the term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”<sup>69</sup> The Cartagena Declaration on Refugees (“Cartagena Declaration”), which is non-binding, similarly starts with the Refugee Convention definition and then adds that refugees include “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or *other circumstances which have seriously disturbed public order*.”<sup>70</sup> Climate migrants might argue that climate change is an event seriously disturbing public order.<sup>71</sup> But neither the OAU Convention nor the Cartagena Declaration was designed to protect environmental migrants, and they would need to be extended to offer protection to climate change migrants.<sup>72</sup>

Another potential avenue of protection under international law for climate change migrants is the non-refoulement principle in human rights law. As explained above, it is unlikely that climate migrants will be able to rely on the right of non-refoulement in the Refugee Convention because most climate migrants will not fit within the Convention’s definition of refugee. The non-refoulement principle also exists under human rights treaties and possibly as a matter of customary international law, with broader grounds for invoking it

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<sup>68</sup> Biermann & Boas, *Global Adaptation Governance*, *supra* note 43, at 258 (“climate refugees are predictable within limits”). While there is considerable uncertainty about how many people will migrate, where they will leave from and where they will go, it is likely that over time, as the effects of climate change become more tangible, more information will be available about which populations will be most vulnerable to the effects of climate change and need to migrate. It seems reasonable to assume that the need to migrate due to the effects of climate change will be more predictable than the need to flee due to the kind of persecution for which the Refugee Convention is available. *See also* Biermann & Boas, *supra* note 1, at 74.

<sup>69</sup> Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1(2), Sept. 10, 1969, 1001 U.N.T.S. 45 (emphasis added).

<sup>70</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, III(3), available at <http://www.unhcr.org/refworld/docid/3ae6b36c.html> (emphasis added).

<sup>71</sup> *See, e.g.*, Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 ENVTL. LAW 365, 389–90 (2007); Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 L. & POL’Y 502, 518 n.8 (2008); Martin, *supra* note 53, at 405.

<sup>72</sup> Alice Edwards, *Refugee Status Determination in Africa*, 14 AFR. J. COMP. & INT’L L. 204, 225–27 (2006); Lopez, *supra* note 71, at 389–90; Biermann & Boas, *supra* note 1, at 73; McAdam & Saul, *supra* note 58, at 372–73 (citing Edwards, *supra*); McADAM, *supra* note 54, at 48–49.

than under the Refugee Convention.<sup>73</sup> According to Jane McAdam and Ben Saul, “*non-refoulement* under treaty and customary international law now encompasses non-return to persecution, arbitrary deprivation of life, torture or cruel, inhuman, or degrading treatment or punishment.”<sup>74</sup> Still, without further jurisprudential expansion, the injuries that climate change inflicts are unlikely to rise to the severity of harm required to invoke the principle.<sup>75</sup> Moreover, to take advantage of the non-refoulement principle embedded in human rights law, a claimant already must be outside of his or her home country.

### B. Funding Gap

The other major gap in existing law and policy underpinning the proposals for a binding multilateral protection instrument for climate migrants is the funding gap.<sup>76</sup> This gap refers to the lack of a dedicated international source of funds to help offset the costs of climate migration, especially in the developing world.<sup>77</sup> There is apparently no existing estimate of the potential costs associated with climate migration.<sup>78</sup> The expectation that most migrants will move internally within their home countries means that providing developing countries with funds to offset the cost of climate migration will entail international funding for internal displacement, a matter typically regarded as falling within the purview of nation states.<sup>79</sup>

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<sup>73</sup> GOODWILL-GILL & McADAM, *supra* note 62, at 354 (discussing the acceptance of non-refoulement as a principle of customary international law).

<sup>74</sup> McAdam & Saul, *supra* note 58, at 378–79.

<sup>75</sup> *Id.* at 378–80; McAdam & Saul, *supra* note 35, at 266; see also Bruce Burson, *Protecting the Rights of People Displaced by Climate Change: Global Issues and Regional Perspectives*, in CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 159, 162–67 (Bruce Burson ed., 2010); McADAM, *supra* note 54, at 52–89, 98; Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, U.N. HIGH COMM’R FOR REFUGEES, LEGAL AND PROTECTION POLICY RESEARCH SERIES 15–36 (May 2011), available at <http://www.unhcr.org/refworld/docid/4e09a3492.html>.

<sup>76</sup> See, e.g., Biermann & Boas, *supra* note 1, at 79–82; Docherty & Giannini, *supra* note 5, at 358 (“[A]lthough the UNFCCC has an initiative to help states with adaptation to climate change, that program does not specifically deal with the situation of climate change refugees.”); Hodgkinson et al., *supra* note 5, at 108 (agreeing with Biermann and Boas that protecting climate refugees “is . . . essentially a development issue” and arguing that “the emphasis of a global . . . instrument should be less on the protection of persons outside their states, and more to do with supporting governments, local communities and agencies in protecting people within their own territory.”).

<sup>77</sup> ASIAN DEV. BANK, *supra* note 2, at 67 (“No international funding source or relief organization is dedicated exclusively to climate change and migration, but at least three categories of funds and organizations can be directly linked to climate-induced migration” (migration organizations, disaster relief resources, and climate change funds and organizations)).

<sup>78</sup> Gibb & Ford, *supra* note 49, at 5 (UNFCCC and World Bank estimates of adaptation costs do not include “the cost of migration, for which no assessment exists”).

<sup>79</sup> Internal displacement usually is understood as the responsibility of the nation state out of respect for national sovereignty. Hodgkinson et al., *supra* note 5, at 102, 105; Martin, *supra* note 53, at 402. However, international law is not completely silent on internal displacement. It requires that countries respect the human rights of “individuals within their territory or jurisdiction.” McAdam & Saul, *supra* note 58, at 373. In addition, the non-binding Guiding Principles on Internal Displacement apply to internal displacement, likely including climate-induced internal migration, although there is room to doubt whether they would apply to climate migration due to

While there is no international fund dedicated to climate change migration, there are at least four existing sources of funding that might be useful for addressing climate migration.<sup>80</sup> One source is existing funds for migration, such as the International Organization for Migration's Development Fund. It "provides special support to IOM developing member states and member states with economies in transition for the development and implementation of joint government-IOM projects to address particular areas of migration management."<sup>81</sup> According to a recent report from the Asian Development Bank, "[t]he IOM Development Fund (formerly known as the 1035 Facility) . . . has funded and is funding pilot migration and climate change and environmental projects (in Egypt, Mauritius, and Kenya)."<sup>82</sup>

"Disaster [r]elief [r]esources"<sup>83</sup> are a second potentially relevant source of funds for climate migration. These include "the United Nations Central Emergency Response Fund"<sup>84</sup> and the Asian Development Bank's Asia Pacific Disaster Response Fund.<sup>85</sup> Development assistance is a third potentially relevant source of funds for addressing climate migration because, as discussed further below, climate migration is an issue that should be addressed in part by reducing pre-existing vulnerabilities.

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slow-onset changes. See *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*]. For contrasting views, see Kälin, *supra* note 14, at 92 and Hodgkinson et al., *supra* note 5, at 104–06. The Guiding Principles have been translated into national and international law. McAdam & Saul, *supra* note 35, at 270.

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention"), which is not yet in force, draws on the Guiding Principles. The Kampala Convention "is the first treaty to expressly recognize climate change as a form of 'natural or human made' disaster." McADAM, *supra* note 54, at 99 n.2. It states that "States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change." African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) art. 5(4), Oct. 22, 2009, available at <http://www.unhcr.org/refworld/docid/4aes72d82.html>. For further analysis of the limits imposed by human rights and the Guiding Principles, as well as the Kampala Convention, see Martin, *supra* note 53, at 402, 412.

It should be emphasized that human rights and the Guiding Principles are international sources of rights, not international funding. Indeed, Principle 3 of the Guiding Principles states that "[n]ational authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction." *Guiding Principles*, *supra*, at 3. See also DeWitte, *supra* note 49, at 226.

<sup>80</sup> See ASIAN DEV. BANK, *supra* note 2, at 67, 68, 70 (referring to "at least three categories of funds and organizations that can be directly linked to climate-induced migration": "organizations concerned with migration," "disaster relief resources," and "climate change funds."); Gibb & Ford, *supra* note 49, at 5 ("Funding could be sought from one of the UNFCCC adaptation funding mechanisms, the UN Central Emergency Response Fund and/or official development assistance.").

<sup>81</sup> ASIAN DEV. BANK, *supra* note 2, at 67.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 68. Hodgkinson et al. also mention that existing disaster relief tools might be used to assist people who move due to disasters related to climate change. Hodgkinson et al, *supra* note 5, at 87.

<sup>84</sup> ASIAN DEV. BANK, *supra* note 2, at 68; see also Gibb & Ford, *supra* note 49, at 5 (also mentioning the U.N. Central Emergency Response Fund).

<sup>85</sup> ASIAN DEV. BANK, *supra* note 2, at 69.



“[C]limate change funds”<sup>86</sup> financing adaptation are a fourth potential source of funds for dealing with climate migration. While there has been considerable discussion of climate change mitigation, discussion is only beginning about ways to assist developing countries with adaptation.<sup>87</sup> The Cancun Adaptation Framework adopted by the Conference of the Parties in December 2010 recognizes migration as a type of adaptation and in so doing invites funding for migration related issues within the context of increased action on adaptation.<sup>88</sup> But the Framework does not impose any obligations on states in relation to migration, such as assisting developing countries with the costs of climate migration.<sup>89</sup>

<sup>86</sup> *Id.* at 70.

<sup>87</sup> See, e.g., CARE ET AL., IN SEARCH OF SHELTER: MAPPING THE EFFECTS OF CLIMATE CHANGE ON HUMAN MIGRATION AND DISPLACEMENT 1 (2009) (“Until recently, climate change research and negotiations have focused almost exclusively on the imperative of reducing greenhouse gas emissions. Now, however, it is clear that emissions reductions efforts have been too little, too late.”); Ayers et al., *supra* note 39, at 271 (analyzing the history of the discussion of adaption under the UNFCCC and arguing “that the current climate governance architecture is not conducive for fair and effective action on adaptation for developing countries” because the architecture is not well-suited to “the integration of local and place-based knowledge”); Jessica Ayers & David Dodman, *Climate Change Adaptation and Development I: The State of the Debate*, 10 PROGRESS IN DEV. STUD. 161, 162–63 (2010) (discussing the history of adaptation in international climate policy).

As an indication of the greater attention to mitigation than adaptation, Caravani et al. estimated in 2010 that “[j]ust looking at dedicated climate funds, mitigation activities currently represent 82% of total climate finance, with adaptation representing only 8%.” CARAVANI ET AL., CLIMATE FINANCE FUNDAMENTALS BRIEF 3: ADAPTATION FINANCE (NOV. 2010). A 2011 article reviewing estimates of the need for adaptation funding and current levels of adaptation funding similarly concluded that “[h]istorically, adaptation has received much less than half of climate change funding.” Joel B. Smith et al., *Development and Climate Change Adaptation Funding: Coordination and Integration*, 11 CLIMATE POL’Y 987, 993 (2011). In a similar vein, the Organisation for Economic Co-operation and Development (“OECD”) reports that the 24 countries that are members of its Development Assistance Committee (“DAC”) provided US\$17.6 billion in bilateral aid for climate mitigation in 2010, but only US\$9.3 billion in bilateral aid for climate adaptation. Approximately US\$4 billion of this aid was marked as for both mitigation and adaptation. OECD, FIRST-EVER COMPREHENSIVE DATA ON AID FOR CLIMATE CHANGE ADAPTATION (NOV. 2011), <http://www.oecd.org/dataoecd/54/43/49187939.pdf>.

<sup>88</sup> In encouraging the “Parties to enhance action on implementing adaptation actions,” the Cancun Adaptation Framework invites the Parties to undertake “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation.” United Nations Framework Convention on Climate Change, Cancun, Mex., Nov. 29–Dec. 10, 2010, *Report of the Conference of the Parties on its Sixteenth Session*, at II para. 14(f), U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter Cancun Report], available at <http://unfccc.int/files/na/application/pdf/07a01-1.pdf>. On the background to the language and its expected significance, see Koko Warner, *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations*, U.N. HIGH COMMISSIONER FOR REFUGEES: LEGAL AND PROTECTION POLICY RESEARCH SERIES (May 2011), available at <http://www.unhcr.org/4df9cc309.html>; McADAM, *supra* note 54, at 232–33.

<sup>89</sup> Warner, *supra* note 88, at 12 (describing “what was being asked” as “voluntary measures to enhance understanding, coordination and cooperation” and indicating that “[w]hile the topic of migration and displacement itself has the potential to be divisive, the way that it had been couched and presented to UNFCCC delegates (voluntary, not embedded in normative language, not linked to contentious issues) prepared the grounds for its inclusion”); Gibb & Ford, *supra* note 49, at 1 (The language “neither obliges signatories to take action, nor specifies how implementation should occur.”).

There are a number of existing multilateral sources dedicated to funding climate change adaptation efforts in developing countries that potentially could be used to finance measures related to climate migration.<sup>90</sup> A prominent example is the Adaptation Fund established “by the parties to the Kyoto Protocol.”<sup>91</sup> It finances “adaptation projects and programmes in developing countries,” using funding from “2% of the Certified Emission Reduction issued for projects of the Clean Development Mechanism and other sources of funding.”<sup>92</sup> It started approving projects for funding in 2010 and to date has approved projects amounting to US\$166.4 million, none of which appear to concern migration directly.<sup>93</sup>

In 2010, in Cancun, the Conference of the Parties agreed to establish a Green Climate Fund to fund mitigation and adaptation in developing countries.<sup>94</sup> In December 2009 in Copenhagen, “developed countries [had] proposed a fund of up to US\$100 billion per year to help developing countries mitigate and adapt to climate change.”<sup>95</sup> The \$100 billion goal “was reaffirmed” at Cancun<sup>96</sup> and a share of it is expected to flow through the Green Climate Fund, although the size and sources of funding for the Green Climate Fund remain unclear. In an encouraging step for redressing the imbalance be-

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<sup>90</sup> See CARAVANI ET AL., *supra* note 87, at 2–3 (discussing the Least Developed Countries Fund, the Special Climate Change Fund, the Strategic Priority on Adaptation, the Pilot Program for Climate Resilience and the Adaptation Fund); Biermann & Boas, *supra* note 1, at 80 (referring to the Adaptation Fund, the Special Climate Change Fund, and the Least Developed Countries Fund); Jessica M. Ayers & Saleemul Huq, *Supporting Adaptation to Climate Change: What Role for Official Development Assistance?*, 27 DEV. POL’Y REV. 675, 677–78 (2009) (discussing the Least Developed Countries Fund, the Special Climate Change Fund, the Global Environment Facility Trust Fund’s Strategic Priority for Adaptation, and the Adaptation Fund).

Several developed countries seem to have established funding sources to finance climate adaptation bilaterally, although at least a few of these sources may be funding initiatives unrelated to climate adaptation. These funds potentially could be used to address climate change migration. See *Funding for Adaptation*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/adaptation/implementing\\_adaptation/adaptation\\_funding\\_interface/items/4638.php](http://unfccc.int/adaptation/implementing_adaptation/adaptation_funding_interface/items/4638.php) (last visited Jan. 22, 2013) (on file with the Harvard Law School Library) (describing Australia’s Adaptation to Climate Initiative and Small Activities Scheme, Germany’s International Climate Initiative, Japan’s Cool Earth Partnership, and Spain’s MDG Achievement Fund); see also ASIAN DEV. BANK, *supra* note 2, at 70 (listing “country and regional programs that could relate to climate-induced migration”).

<sup>91</sup> *About the Adaptation Fund*, ADAPTATION FUND, <http://www.adaptation-fund.org/about> (last visited Jan. 22, 2013) (on file with the Harvard Law School Library).

<sup>92</sup> *Id.*; see also Report of the Adaptation Fund Board, Draft decision -/CMP.7, para. 9, *available at* [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cmp7\\_report\\_adaptation\\_fund.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cmp7_report_adaptation_fund.pdf) (indicating, for the Adaptation Fund, “the accrual of proceeds from the monetization of certified emission reductions reached USD 166 million as at 31 August 2011; cumulative contributions from donors reached USD 86 million”).

<sup>93</sup> Report of the Adaptation Fund Board, *supra* note 92; *Funded Projects*, ADAPTATION FUND, [http://www.adaptation-fund.org/funded\\_projects](http://www.adaptation-fund.org/funded_projects) (last visited Jan. 22, 2013) (on file with the Harvard Law School Library).

<sup>94</sup> Cancun Report, *supra* note 88, para. 100.

<sup>95</sup> Lorrae van Kerkhoff et al., *Designing the Green Climate Fund: How to Spend \$100 Billion Sensibly*, ENVIRONMENT: SCIENCE AND POLICY FOR SUSTAINABLE DEVELOPMENT (May–Jun. 2011), *available at* <http://www.environmentmagazine.org/Archives/Back%20Issues/2011/May-June%202011/green-climate-fund-full.html>.

<sup>96</sup> *Id.*

tween the focus on mitigation and adaptation, in Durban in 2011, the Conference of the Parties directed the board of the yet-to-be-implemented Green Climate Fund “to balance the allocation of the Green Climate Fund resources between adaptation and mitigation activities.”<sup>97</sup> “The Fund will have thematic funding windows. Initially the Fund will have windows for adaptation and mitigation.”<sup>98</sup> The Fund’s board also will have the power “to add, modify and remove additional windows and substructures or facilities as appropriate.”<sup>99</sup> Accordingly, the Fund’s board would seem to have the authority to establish a window within the Fund for climate migration, or a “substructure” or “facility” for climate migration under the adaptation window.<sup>100</sup> Incorporating a special window or other structure could provide the first dedicated multilateral source of funding for climate migration.

### III. THREE LEADING PROPOSALS

Let us now turn to the proposals of Biermann and Boas (“B&B”), Docherty and Giannini (“D&G”), and Hodgkinson et al. (“HEA”) for a new multilateral protection instrument addressing climate migration. Each of these three proposals recommends a new instrument to address climate change migration comprehensively. The proposals are admirable for their efforts to address an important topic. They also are detailed and well thought out, and the following analysis cannot hope to do justice to their many components because it focuses solely on their responses to the rights and funding gaps.<sup>101</sup> For ana-

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<sup>97</sup> Green Climate Fund — Report of the Transitional Committee, Draft Decision -/CP.17, para. 8, available at [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_gcf.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_gcf.pdf) (advance unedited version). See also Governing Instrument for the Green Climate Fund, Annex to Green Climate Fund — Report of the Transitional Committee Draft Decision, *supra*, at para. 50 [hereinafter Governing Instrument] (“The Board will balance the allocation of resources between adaptation and mitigation activities under the Fund and ensure appropriate allocation of resources for other activities.”).

In 2010, in Cancun, the Conference of the Parties decided “that a significant share of new multilateral funding for adaptation should flow through the Green Climate Fund.” Cancun Report, *supra* note 88, IV.A, para. 100.

<sup>98</sup> Governing Instrument, *supra* note 97, para. 37.

<sup>99</sup> *Id.* para. 39.

<sup>100</sup> See DeWitte, *supra* note 49, at 233 (proposing that the Green Climate Fund be used to prevent and mitigate human displacement due to sea level rise as a concrete step that can be taken “[u]ntil there is an internationally recognized definition of climate change refugee, and possibly a new United Nations Convention that focuses on this population’s unique needs”); McAnaney, *supra* note 4, at 1204–05 (arguing that climate migration should be considered a form of adaptation and become eligible for funding from the UNFCCC’s funding instruments for adaptation, including the Green Climate Fund); FORESIGHT, *supra* note 2, at 199 (referring to potential for the Green Climate Fund and other sources of “climate finance support” to be used to fund migration); ASIAN DEV. BANK, *supra* note 2, at 70 (suggesting that the Green Climate Fund could be used to finance costs related to climate migration); Gibb & Ford, *supra* note 49, at 3 (“Support for climate migration initiatives could be channeled through existing adaptation funding mechanisms.”).

<sup>101</sup> An example of an issue that I do not analyze is the institutions through which the proposals would be implemented. See, e.g., Docherty & Giannini, *supra* note 5, at 388–402 (coordinating agency, body of scientific experts, and independent convention); Biermann & Boas, *supra* note 1, at 76 (protocol to UNFCCC); *id.* at 76–79 (organizational setting and network of agen-

lytical convenience, it is helpful to discuss the proposals of D&G and HEA together since they share a legal orientation, and separately the proposal of B&B, which is less rights oriented and more funding oriented.

A. *Docherty & Giannini and Hodgkinson et al.*

D&G and HEA have a similar, although not identical, conception of the individuals they regard as the ultimate beneficiaries of their proposals.<sup>102</sup> The intended beneficiaries are people who are forced to move,<sup>103</sup> regardless of whether they relocate temporarily or permanently,<sup>104</sup> due to a “sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed,” according to D&G,<sup>105</sup> or “to which humans very likely contributed,” according to HEA.<sup>106</sup> Both D&G and HEA envisage group designations of beneficiaries.<sup>107</sup> D&G refer to the in-

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cies); Hodgkinson et al., *supra* note 5, at 81–117 (standalone convention with institutional organization).

Particularly worth noting are the legal instruments that the proposals favor for their implementation. D&G and HEA advocate a standalone convention for their proposals. Docherty & Giannini, *supra* note 5, at 391–402; Hodgkinson et al., *supra* note 5, at 81–117.

B&B favor a “Climate Refugee Protocol” to the UNFCCC to implement their proposals. Biermann & Boas, *supra* note 1, at 76. However, they leave open the option of integrating their proposals for dealing with climate migration into an adaptation protocol to the UNFCCC, provided that their proposals for distinctive mechanisms for addressing migration remain intact. *Id.* at 78; Biermann & Boas, *Global Adaptation Governance*, *supra* note 43, at 262. B&B argue that climate migration deserves distinctive multilateral attention because dealing with migration as another instance of adaptation will require migration to compete with other adaptation measures for financial assistance in an allocation process that is likely to be influenced by political considerations. Biermann & Boas, *supra* note 1, at 78, 81. The difficulty with this argument is that there is no way out of the political “competition” for dollars. *Id.* (using the phrase “in competition”). Even if developed countries set up a new instrument, including a fund to deal specifically with climate migration, the resources devoted to this instrument will reflect judgments about the value of addressing climate migration as opposed to other adaptation measures that inevitably will be influenced by political considerations.

<sup>102</sup> D&G define the intended beneficiary “as an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.” Docherty & Giannini, *supra* note 5, at 361. HEA define the intended beneficiaries as “groups of people whose habitual homes have become or will, on the balance of probabilities, become temporarily or permanently uninhabitable as a consequence of a climate change event.” Hodgkinson et al., *supra* note 5, at 90. Recalling D&G, they “define a ‘climate change event’ as ‘sudden or gradual environmental disruption that is consistent with climate change and to which humans very likely contributed.’” *Id.* at 90.

<sup>103</sup> Docherty & Giannini, *supra* note 5, at 369. HEA are less explicit than D&G about the need for migration to be forced, but they also seem to envisage that only forced displacement will be covered. HEA take a broad view of when climate migration is forced, stating that “prospective migration based on the likely consequences of climate change is as coerced as migration in response to climate change impacts that immediately render a particular area uninhabitable.” Hodgkinson et al., *supra* note 5, at 89.

<sup>104</sup> Docherty & Giannini, *supra* note 5, at 369; Hodgkinson et al., *supra* note 5, at 84.

<sup>105</sup> Docherty & Giannini, *supra* note 5, at 361.

<sup>106</sup> Hodgkinson et al., *supra* note 5, at 90. *See also id.* at 85 (explaining that “a ‘very likely’ standard” is more limiting than “more likely than not”) (internal quotes omitted).

<sup>107</sup> *Id.* at 90; Docherty & Giannini, *supra* note 5, at 375. D&G also envisage that there could be individual determinations. *Id.* at 374.

tended beneficiaries as “climate change refugees”<sup>108</sup> while HEA use the term “climate change displaced persons (‘CCDPs’).”<sup>109</sup>

One substantive difference between D&G and HEA concerns the scope of the migration they would cover. D&G follow the Refugee Convention and confine the intended beneficiaries of their proposal to persons who cross an international boundary, in acknowledgement of “international law’s current emphasis on state sovereignty.”<sup>110</sup> HEA would assist internally and externally displaced persons because focusing on external migration would keep the instrument from dealing with most climate migration, which is expected to be internal, and especially from helping the most impoverished migrants, who are less likely to have the resources to cross an international border.<sup>111</sup> In addition, HEA maintain that limiting an instrument to external migration would reflect “the preoccupations of the ‘developed’ world” with threats to its security, rather than the needs of developing countries.<sup>112</sup>

Both D&G and HEA would deal with the current rights gap under which persons forced to relocate due to climate change lack a right to remain permanently in another country, but in a surprisingly limited way that reflects the influence of the Refugee Convention. As mentioned above, under the Refugee Convention, persons who qualify as refugees are granted the right of non-refoulement, but not the right to resettle permanently in their host state.<sup>113</sup> D&G and HEA would address the rights gap by creating a version of the non-refoulement principle in the new multilateral instrument. The principle would “prohibit forced return to a home state when climate-induced environmental change would threaten the refugee’s life or ability to survive.”<sup>114</sup>

Neither D&G nor HEA would grant climate refugees or CCDPs a permanent right to resettle. However, both D&G and HEA include proposals that might facilitate permanent resettlement. D&G propose that the host state “facilitate naturalization of the refugee.”<sup>115</sup> HEA recommend that the rights of cross-border CCDPs “should expand on an incremental basis, with rights accruing the longer CCDPs remain in a host nation.”<sup>116</sup> HEA also contemplate

<sup>108</sup> Docherty & Giannini, *supra* note 5, at 349.

<sup>109</sup> Hodgkinson et al., *supra* note 5, at 70.

<sup>110</sup> Docherty & Giannini, *supra* note 5, at 369.

<sup>111</sup> Hodgkinson et al., *supra* note 5, at 82.

<sup>112</sup> *Id.* at 83; *see also* GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, *supra* note 37, at 116–29 (discussing migration partly as a security risk); *id.* at 204 (emphasizing that addressing environmental migration through “an approach which focuses primarily on the industrialized countries’ internal security is too one-sided, reactive and, at best, only effective in the short term”); WHITE, *supra* note 16, at 5–7, 144–45 (referring to analysis of climate-induced migration as a security issue and arguing that it should not be addressed as such).

<sup>113</sup> *See, e.g.*, LEGOMSKY & RODRIGUEZ, *supra* note 57, at 893 (“Nothing in the 1951 Convention or 1967 Protocol obligates any nation to grant asylum . . .”).

<sup>114</sup> Docherty & Giannini, *supra* note 5, at 377; *see also* Hodgkinson et al., *supra* note 5, at 110 (“[N]on-refoulement would prohibit the forcible return of a refugee to a situation if ‘climate-induced environmental change would threaten the refugee’s life or ability to survive.’” (quoting Docherty & Giannini, *supra* note 5, at 377)).

<sup>115</sup> Docherty & Giannini, *supra* note 5, at 377.

<sup>116</sup> Hodgkinson et al., *supra* note 5, at 110; *see also id.* at 104 (“[T]he Convention we envisage would allow rights to be gradually accrued based on the duration of displacement . . .”).

special arrangements to address the plight of existentially threatened small island states, in particular bilateral arrangements between host and threatened states that would reflect the principles of “proximity, self-determination and the safe-guarding of intangible culture.”<sup>117</sup>

One potential justification for the lack of a right to permanent resettlement in D&G and HEA is the breadth of potential beneficiaries. Recall, for example, that D&G and HEA would cover not only persons relocating permanently but also persons relocating temporarily, a category that by definition would not require a right to permanent resettlement.

D&G and HEA also would address the funding gap in similar ways through the creation of an international fund, financed mostly by developed countries, which would make payments to states or non-governmental organizations. D&G propose “a global fund” to which countries would be obligated to contribute based on the principle of “common but differentiated responsibilities,” meaning in practice their contributions to climate change and capacity to pay.<sup>118</sup> The fund would make payments “to states in need” and non-governmental organizations assisting refugees.<sup>119</sup> HEA propose a “Climate Change Displacement Fund” that developed states would be obligated to fund based again on common but differentiated responsibilities.<sup>120</sup> Developing countries would be able to request funding to cover resettlement for internally or internationally displaced CCDPs.<sup>121</sup> “[C]ivil society within state parties” also could request funding, but their requests would have to come through “the relevant state party.”<sup>122</sup>

### B. Biermann and Boas

Compared with D&G and HEA, B&B’s proposal is animated more by a concern with the funding gap than the rights gap. B&B implicitly recognize the rights gap, pointing out for example that persons forced to flee their home countries due to climate change would not be protected by the Refugee Convention, and that the OAU Convention and Cartagena Declaration were not

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<sup>117</sup> *Id.* at 112.

<sup>118</sup> Docherty & Giannini, *supra* note 5, at 386–87.

<sup>119</sup> *Id.* at 385. D&G contemplate that the global fund they recommend “should award aid not only for assistance measures but also for measures to reduce the impact of a foreseeable refugee crisis” on the basis that “prevention is as important as remediation.” *Id.* at 387; *see also id.* at 384 (“Assistance Obligations in the Climate Change Refugee Instrument”) and 401. This provision for preventative funding could enable the fund to finance “*in situ* adaptation measures” in countries of origin, but only insofar as these measures would “reduce the impact of foreseeable refugee crises.” McAnaney, *supra* note 4, at 1185 & 1185 n.67.

<sup>120</sup> Hodgkinson et al., *supra* note 5, at 93–98.

<sup>121</sup> *Id.* at 93. When requesting funding, the “state party would . . . request an *en masse* designation of the status of CCDPs.” *Id.* HEA suggest that their “Convention would largely operate prospectively,” with “assistance” provided for resettling populations whose environment “was likely to become” uninhabitable. *Id.* at 86. They indicate that their “Convention would, therefore, provide a forum for the provision of pre-emptive adaptive resettlement to populations most vulnerable to the impacts of climate change.” *Id.* at 109.

<sup>122</sup> *Id.* at 93.

designed to cover climate refugees.<sup>123</sup> But B&B suggest that it would be unresponsive to the “core” issues that climate migration will raise to devote efforts to giving persons forced to flee their home countries due to climate change rights analogous to refugee rights.<sup>124</sup> They argue that “climate refugees require a different kind of protection” because they mostly will be able to remain within their home countries, “will still be able to enjoy protection of their governments,” and would be able to plan their migrations if provided adequate support, unlike traditional refugees who must flee in haste.<sup>125</sup>

Unlike D&G and HEA’s legally oriented proposals, B&B maintain that “the problem of climate refugees is at its core a problem of development policy.”<sup>126</sup> They elaborate:

[A]n international regime for climate refugees will focus less on the protection of persons outside their states than on supporting governments, local communities, and support agencies to protect people within their own territory. The governance challenge of protecting and resettling climate refugees is thus essentially about international assistance and funding for the domestic support and resettlement programs of affected countries that have requested such support.<sup>127</sup>

B&B focus mostly on the need for a responsibility-sharing mechanism to ensure that developing countries are not required to absorb the entire costs of climate migration.<sup>128</sup> They propose a “Climate Refugee Protection and Resettlement Fund.”<sup>129</sup> Financial support would be available to pay the “full incremental costs [for] . . . the protection and resettlement of climate refugees . . . where general causality with climate change is undisputed, namely sea-level rise.”<sup>130</sup> The Fund would pay part of the costs where “climate change is only one cause of environmental degradation.”<sup>131</sup> B&B indicate that financing for the Fund would come from “the international community,” although they are largely silent on the mechanisms for raising financing.<sup>132</sup> The proposal seems

<sup>123</sup> Biermann & Boas, *supra* note 1, at 72–73.

<sup>124</sup> *Id.* at 74.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* HEA agree with B&B that protecting climate refugees is “essentially a development issue.” Hodgkinson et al., *supra* note 5, at 108 (internal quotes omitted). Also, White argues for dealing with climate-induced migration through development policy. WHITE, *supra* note 16, at 135–42.

<sup>127</sup> Biermann & Boas, *supra* note 1, at 76.

<sup>128</sup> *Id.* at 79.

<sup>129</sup> *Id.* at 81.

<sup>130</sup> *Id.* See also Daniel A. Farber, *Basic Compensation For Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1610 (2007) (advocating a compensation system for climate change victims that would limit damage payments to harms “likely to occur [because of environmental effects that] . . . can be clearly identified as consequences of climate change”). Farber identifies these harms as harms to temperate sensitive natural systems, and harms due to sea level rise, droughts, and flooding. *Id.* at 1610–13.

<sup>131</sup> Biermann & Boas, *supra* note 1, at 82.

<sup>132</sup> *Id.* at 79; see also Biermann & Boas, *Global Adaptation Governance*, *supra* note 43, at 264 (“[T]he Climate Refugee Protection and Resettlement Fund could be coupled with currently proposed, novel income-raising mechanisms, such as an international air-travel levy.”) (citations

to envisage payments being made to states, rather than individuals, with “populations” determined by state parties to the protocol, or committees of them, to be “‘climate refugees in need of relocation.’”<sup>133</sup> B&B indicate that developing countries would be the main beneficiaries of their proposal.<sup>134</sup>

B&B’s proposal, like HEA, would cover internal and external migration, on the basis that “[i]t seems difficult to argue that a global governance mechanism for . . . [the] protection [of climate refugees] should bestow a different status, and different term, depending on whether they have crossed a border.”<sup>135</sup> B&B also would cover temporary and permanent migration.<sup>136</sup>

Unlike D&G and HEA, however, B&B would make assistance contingent on the type of impact giving rise to the migration. Their definition of climate change refugees requires that refugees “have to leave their habitats . . . because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity.”<sup>137</sup> In addition, B&B would differentiate the level of funding available among the three types of impacts that would be funded, with sea-level rise resulting in an entitlement for full funding and the other two categories of impact resulting in only partial funding, on the basis that it is easier to tie sea-level rise to climate change.<sup>138</sup>

#### IV. LIMITATIONS OF PROPOSALS

Proposals to establish a binding multilateral protection instrument for climate migrants are vulnerable to at least three criticisms regarding morality, practicality, and political feasibility.

##### A. Morality

The first, and most fundamental, problem with these proposals is a moral weakness: It is difficult to justify developing a new legally binding international instrument to protect persons displaced by climate change in particular.

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omitted). They envisage that funding would come from “industrialized countries, and possibly wealthier developing countries.” *Id.* at 265.

<sup>133</sup> Biermann & Boas, *supra* note 1, at 82. The idea that states would be the recipients of funding is more evident when B&B describe the operation of the Climate Refugee Protocol, which could include the Fund. B&B indicate that state parties “to the protocol — and in fact only state parties — would be entitled to propose areas under [their] . . . jurisdiction for inclusion into the list of affected areas.” *Id.* at 77. An “executive committee” of the state parties to the protocol would decide which areas would be included on the list. Biermann & Boas, *Global Adaptation Governance*, *supra* note 43, at 263–64. “Inclusion . . . would trigger specific rights and support mechanisms, including financial support, voluntary resettlement programs over several years, together with the purchase of new land, and, especially in the case of small island states, organized international migration.” Biermann & Boas, *supra* note 1, at 77–78.

<sup>134</sup> Biermann & Boas, *supra* note 1, at 78; *see also id.* at 67.

<sup>135</sup> *Id.* at 66.

<sup>136</sup> *Id.* at 65.

<sup>137</sup> *Id.* at 67.

<sup>138</sup> *Id.* at 64, 81–82. For criticisms of B&B’s definition, *see*, for example, Docherty & Gianini, *supra* note 5, at 368.



Many people must leave their place of residence due to conditions that are not of their own making and are unrelated to climate change (e.g. war, poverty, and lack of access to essential environmental resources). Yet the international community has no legally binding instrument to help many of these persons relocate within their own countries or resettle elsewhere. Why should it single out climate change migrants for a new binding multilateral instrument that would take many resources to develop and implement?<sup>139</sup>

As mentioned above, proposals such as those offered by B&B, D&G, and HEA devote little space to analyzing why they should be implemented, offering arguments only in passing.<sup>140</sup> The nascent philosophically oriented literature on duties to climate migrants complements these institutionally oriented proposals, exploring in depth why the international community might have obligations to climate change victims while largely glossing over the institutions through which such obligations might be implemented.<sup>141</sup> While much of this philosophically oriented literature is concerned with elaborating moral arguments supporting the idea that the international community owes obligations to climate victims, upon closer inspection the arguments commonly offered for such duties encounter difficulties.

Perhaps the most commonly given argument for an international obligation to assist climate victims is rooted in corrective justice.<sup>142</sup> Aristotelian-in-

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<sup>139</sup> See McAdam, *supra* note 4, at 13–14; McAdam & Saul, *supra* note 35, at 279; Alexander Betts & Esra Kaytaz, *National and International Responses to the Zimbabwean Exodus: Implications For the Refugee Protection Regime, New Issues in Refugee Research: Research Paper No. 175*, U.N. HIGH COMM’R FOR REFUGEES, REFUGEE AGENCY POLICY DEV. & EVALUATION SERV. (July 2009), at 1, available at <http://www.unhcr.org/4a76fc8a9.html> (arguing that the Zimbabwean exodus is an example of “‘survival migration,’ fleeing an existential threat . . . [that] is likely to re-emerge in the context of environmental, livelihood and state collapse elsewhere”); Alexander Betts, *Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants*, 22 INT’L J. REFUGEE L. 209, 210–11 (2010) (arguing that “there has been a longstanding recognition that other categories of vulnerable migrant beyond refugees are also in need of international protection”).

<sup>140</sup> See *supra* note 50 and accompanying text.

<sup>141</sup> See *supra* note 51 (citing philosophically oriented literature).

<sup>142</sup> The idea that developed countries bear responsibility for the negative impacts of climate change based on corrective justice or the related principle of causal responsibility is embedded explicitly and implicitly in many sources. See, e.g., Sujatha Byravan & Sudhir Chella Rajan, *Providing New Homes For Climate Change Exiles*, 6 CLIMATE POL’Y 247, 249 (2006); Byravan & Rajan, *supra* note 51; Farber, *supra* note 130, at 1641–42; Daniel A. Farber, *The Case For Climate Compensation: Justice For Climate Change Victims in a Complex World*, 2008 UTAH L. REV. 377, 388–403 (2008) [hereinafter Farber, *The Case for Climate Compensation*]; Mayer, *supra* note 20, at 376–77 (developing countries could invoke “[t]he principle of tort responsibility” or “unjust enrichment” in arguing for assistance from developed countries for addressing climate migration); Penz, *supra* note 51; Paul Baer, *Adaptation to Climate Change: Who Pays Whom?*, in CLIMATE ETHICS: ESSENTIAL READINGS 247 (Stephen M. Gardiner et al. eds., 2010); Stephen Humphreys, *Competing Claims: Human Rights and Climate Harms*, in HUMAN RIGHTS AND CLIMATE CHANGE 37, 43 (Stephen Humphreys ed., 2009) (“[I]nternational funding for the adaptation needs of vulnerable countries appears as a proposed solution to the problem of corrective justice.”); David Weisbach, *Negligence, Strict Liability, and Responsibility for Climate Change*, 97 IOWA L. REV. 521, 551–61 (2012); *id.* at 551 n.57 (“Corrective-justice intuitions seem to be behind many of the claims about responsibility for climate change and the use of past emissions data.”). For a discussion of causal responsibility, see, for example, David Miller, *Distributing Responsibilities*, 9 J. POL. PHIL. 453, 455–58, 459 n.10 (2001).

spired corrective justice requires that wrongdoers repair the wrongs that they have done to their victims.<sup>143</sup> Corrective justice might suggest that developed countries, such as the United States, are obligated to assist the victims of climate change because their plight is the result of greenhouse gases wrongfully emitted by these countries.

Eric Posner and Cass Sunstein have emphasized the difficulties of using corrective justice to ground duties to mitigate climate change through greenhouse gas reductions.<sup>144</sup> To a significant extent, their analysis also applies to the use of corrective justice to ground obligations to assist with climate migration. First, corrective justice usually is understood to require a wrong,<sup>145</sup> and it will not be straightforward to establish that emitting greenhouse gases was wrongful.<sup>146</sup> Second, assuming that some or all of greenhouse gas emissions are deemed wrongful, there is the problem that the wrongdoers responsible for these emissions may no longer exist when climate migration occurs in the future. This is an issue under corrective justice because corrective justice imposes duties of repair only on wrongdoers, and there is no duty bearer with an obligation of repair once the wrongdoers cease to exist.<sup>147</sup>

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<sup>143</sup> I have previously argued that there are non-Aristotelian versions of corrective justice, in particular Nozickian corrective justice. Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 160 (2008).

<sup>144</sup> See generally Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565 (2007–2008). See *id.* at 1565 (pointing out the difficulties with arguing that the United States should “reduce its greenhouse gas emissions beyond the point that is justified by its own self-interest” based on corrective justice and distributive justice). For other doubts about using corrective justice to establish duties to mitigate and compensate for climate change, see ERIC A. POSNER & DAVID WEISBACH, *CLIMATE CHANGE JUSTICE* (2010); Matthew D. Adler, *Commentaries: Corrective Justice and Liability for Global Warming*, 155 U. PA. L. REV. 1859 (2007); Weisbach, *supra* note 142, at 551–62. The following discussion of the relevance of corrective justice to duties to address climate migration is similar to the discussion in Wyman, *Are We Morally Obligated*, *supra* note 10.

<sup>145</sup> Contemporary tort theorists partial to corrective justice usually insist that it requires a wrong. See, e.g., Adler, *supra* note 144, at 1859–60; Weisbach, *supra* note 142, at 551–52, 554. For arguments for imposing strict liability for greenhouse gas emissions, see Byravan & Rajan, *supra* note 51, at 248; Penz, *supra* note 51, at 165–66.

<sup>146</sup> See also Posner & Sunstein, *supra* note 144, at 1597–1601 (discussing “the culpability problem” with using corrective justice to ground duties to reduce greenhouse gas emissions); Weisbach, *supra* note 142, at 554 (“To determine fault on a global scale for pervasive activities that span more than a century is simply impossible.”). But see Farber, *supra* note 130, at 1642 (“[I]t seems arguable that at some point it became negligent not to take reasonable precautionary measures to reduce emissions.”).

The standard for state responsibility in international environmental law might be used to assess whether greenhouse gas emissions are wrongful for corrective justice. See generally PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* 214–21 (3rd ed. 2009) (analyzing state responsibility); McADAM, *supra* note 54, at 92–96 (analyzing whether states are legally responsible for climate change-related displacement).

<sup>147</sup> Wyman, *supra* note 143, at 150; Weisbach, *supra* note 142, at 557–58; see also Posner & Sunstein, *supra* note 144, at 1593 (referring to “the wrongdoer identity problem,” and arguing that “[t]he basic problem for corrective justice is that dead wrongdoers cannot be punished or held responsible for their behavior, or forced to compensate those they have harmed”). For Posner and Sunstein’s discussion of the problems that the wrongdoer identity problem creates for corrective justice arguments for duties to mitigate, see *id.* at 1593–95.

There might be ways of overcoming the obstacle stemming from the requirement that wrongdoers continue to exist. It might be argued that even if the individuals who emitted greenhouse gases

A third difficulty with invoking corrective justice is that corrective justice requires a causal relationship between the underlying wrong for which amends are sought and the harm that victims experience.<sup>148</sup> In the case of climate migration, it would be necessary to establish a causal chain, linking greenhouse gas emissions in developed countries, environmental impacts such as drought, flooding, or sea level rise in developing countries, and migration decisions.

It could be difficult to establish the first requirement of a link between emissions and environmental impacts in developing countries. An environmental impact such as drought or flooding may not be due to human-related greenhouse gas emissions. There may be multiple causes of flooding or drought, including the conventional environmental and land use policies of developing countries.<sup>149</sup>

Assuming an environmental impact can be linked to greenhouse gas emissions, it will be difficult to establish that the emissions came from the developed world because greenhouse gases mix uniformly. While the developed world currently is responsible for a substantial share of the cumulative stock of greenhouse gas emissions, emissions from rapidly industrializing developing countries are increasing and expected to account for most of the cumulative stock of emissions in the future.<sup>150</sup>

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within developed countries have passed away by the time that climate migration emerges as a prominent issue, the states of which they were citizens will remain, and it is these states that are obligated to make repair to the developing countries experiencing climate migration. *See, e.g.,* Byravan & Rajan, *supra* note 51, at 255–56. *But see* Posner & Sunstein, *supra* note 144, at 1572 (“Nations are not individuals: they do not have mental states and cannot, except metaphorically, act.”). Farber maintains that the United States has a moral responsibility to reduce its greenhouse gas emissions and compensate countries that are victims of climate change because individual Americans were at fault for or benefited from greenhouse gas emissions. Farber, *The Case for Climate Compensation*, *supra* note 142, at 394–400.

Another way of overcoming the objection might be to argue that climate migration is not merely an issue for the distant future. It is possible that people may already be moving or be moving in the near future, due in part to climate change, without recognizing the impacts of climate change on their movement. *See, e.g.,* McAdam & Saul, *supra* note 35, at 246–47.

<sup>148</sup> Posner & Sunstein, *supra* note 144, at 1597 (discussing “the causation problem” that arises in attempting to use corrective justice as grounds for a duty to mitigate greenhouse gas emissions); Chang, *supra* note 20, at 344 (“[S]cientific uncertainty may undermine our ability to attribute any particular environmental harm to anthropogenic climate change.”); Hodgkinson et al., *supra* note 5, at 76 (“In any event, a causal link between the specific emissions of a state and climate change events which result in displacement is difficult to establish.”); *but see* Farber, *The Case for Climate Compensation*, *supra* note 142, at 400–03 (offering ways of overcoming concerns about causation).

<sup>149</sup> *See generally* Farber, *supra* note 130, at 1652–53 (noting that “the claimant’s personal conduct might be used as a basis for avoiding or reducing compensation” for climate change, and discussing ways of handling claimants’ greenhouse gas emissions in advocating compensation for climate change).

<sup>150</sup> NATIONAL RESEARCH COUNCIL, *supra* note 29, at 185 (“[T]he high-income countries have been the leading contributors to cumulative GHG emissions. However, emissions in the emerging economies (e.g., Brazil, China, and India) are projected to grow much more rapidly than those in developed countries. In fact, current projections indicate that the low- and middle-income countries will account for the bulk of cumulative global GHG emissions in the future.”) (citations omitted); Weisbach, *supra* note 142, at 536–38 (identifying the extent to which high-income countries account for the cumulative stock of greenhouse gas emissions under various measures); *id.* at 544–45 (emphasizing growth in greenhouse gas emissions from developing countries); Posner & Sunstein, *supra* note 144, at 1578 (By 2030, “the developing world is expected to contribute no

There also may be obstacles to tying environmental impacts to migration decisions, the final step in the causal chain. As mentioned above, migration decisions often are the product of a combination of factors, which makes it difficult to attribute these decisions to a single factor such as climate change-related environmental impacts.<sup>151</sup>

The difficulties with tying greenhouse gas emissions in developed countries to environmental impacts and migration decisions in developing countries could be alleviated by rejecting the idea that greenhouse gas emissions from developed countries have to be the sole cause of the impacts. We might embrace the idea that they only have to be a necessary or a substantial cause, or apply the principles of market share or joint and several liability.<sup>152</sup> However, at a certain point, we might find ourselves having relaxed the causal requirements for corrective justice to the point that it is no longer possible to be confident that we are requiring developed countries to make payments because of actions that they undertook, which is the basis of corrective justice.

Distributive justice also might be invoked as a moral basis for requiring developed countries to assist developing countries with climate-related migration.<sup>153</sup> The idea is intuitive: There are significant disparities in wealth between the developed and the developing world, and developed countries should assist developing countries to reduce these disparities. The leading proposals analyzed in this article recommend two measures that might have the effect of reducing the existing disparities: monetary transfers from developed to developing countries to offset the costs of climate migration, and the provision of a right of non-refoulement that would enable individual citizens of developing

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less than 55% of total emissions, with 45% coming from developed nations.”); *see also id.* at 1578 tbl. 2 and tbl. 3.

<sup>151</sup> *See supra* note 20 and accompanying text.

<sup>152</sup> Farber, who favors compensation for climate change victims, argues that “[i]t is obviously impossible to link any specific GHG emissions with any specific injury, due to the cumulative nature of the greenhouse effect. Thus, some form of *Sindell*-like apportionment seems to be the only workable solution.” Farber, *supra* note 130, at 1640 (referring to *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980)).

<sup>153</sup> Farber, *supra* note 130, at 1643–44 (discussing “[t]he income redistribution” function of climate compensation); Farber, *The Case for Climate Compensation*, *supra* note 142, at 403–05 (making a distributive justice argument); *see also* Posner & Sunstein, *supra* note 144, at 1565 (referring to the distributive justice argument that the United States should “reduce its greenhouse gas emissions beyond the point that is justified by its own self-interest, simply because the United States is wealthy, and because the nations most at risk from climate change are poor”).

Distributive arguments for climate compensation from developed countries based on their capacity to pay often are combined with corrective justice arguments emphasizing their responsibility for a substantial share of the cumulative stock of greenhouse gas emissions. *See, e.g.*, Biermann & Boas, *Global Adaptation Governance*, *supra* note 43, at 258; Mendelsohn et al., *supra* note 29, at 175; Füssel, *supra* note 28, at 598; GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, *supra* note 37, at 200; Byravan & Rajan, *supra* note 51, at 246, 251, 254.

There is a legal basis for the idea that developed countries should provide financial assistance to developing countries for the costs of adapting to climate change, including migration. United Nations Framework Convention on Climate Change art. 4.4, May 9, 1971 U.N.T.S. 107; S. TREATY Doc. 102-38 (1992) (stating that developed countries are to “assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects”).

countries to remain in developed countries as long as they could not safely return for climate-related reasons.<sup>154</sup>

Assume that we are obligated to redistribute resources to address global socio-economic differences.<sup>155</sup> Posner and Sunstein's arguments against grounding duties to mitigate climate change in distributive justice also apply to the idea of rooting duties to assist with climate migration in distributive justice.<sup>156</sup> If we are seeking to achieve global socio-economic justice, it is far from clear that we would prioritize the development of mechanisms to help developing countries with climate migration. Such mechanisms might raise the living standards of impoverished people in the developing world, but only imperfectly and tangentially to their main purpose.<sup>157</sup> There is unlikely to be a perfect correlation between the countries most negatively affected by climate change and existing levels of wealth and income. Climate vulnerability is related not only to national wealth and income but also to factors such as country location, existing climate, and dependence on sectors sensitive to climate.<sup>158</sup>

Mathias Risse recently offered a distinctive Grotius-inspired rationale for providing the citizens of the island nations existentially threatened by climate change with a right to relocate to other countries.<sup>159</sup> This rationale potentially could be extended to justify a new protection instrument for climate migrants generally. The rationale invokes Grotius's idea that God originally granted the earth to mankind in common.<sup>160</sup> According to Grotius, when humans elaborated private property, private property rights were created subject to an instrument resembling an easement which allows an individual in dire circumstances to use the property of another to preserve his life and property, subject to certain conditions.<sup>161</sup> The basis for this right of necessity is that private property

<sup>154</sup> See also Posner & Sunstein, *supra* note 144, at 1586 (distinguishing "an in-kind benefit" and "a general grant of money that poor nations could use as they wish").

<sup>155</sup> See *infra* note 204 (citing sources on global socio-economic justice).

<sup>156</sup> Posner & Sunstein, *supra* note 144, at 1571 ("[S]ignificant greenhouse gas reductions are a crude and somewhat puzzling way of attempting to achieve redistributive goals."); *id.* at 1587 ("[T]here is a highly imperfect connection between distributive goals on the one hand and requiring wealthy countries to pay for emissions reductions on the other.").

<sup>157</sup> See also Weisbach, *supra* note 142, at 558 ("[R]edistribution of wealth is best done through mechanisms carefully designed to be most effective.").

<sup>158</sup> See, e.g., Mendelsohn et al., *supra* note 29, at 162 (illustrating the importance of location and climate for country vulnerability in stating that "the poor nations of the world bear the brunt of climate change damages primarily because they are located in the low latitudes and are already too hot"); *id.* at 175 (suggesting that dependence on agriculture increases country vulnerability to climate change and indicating that "[a]s countries develop, they move away from agriculture, making their economies more resilient to climate change"). As these quotations imply, some of the factors suggesting vulnerability to climate change may be correlated, such as poverty, warm climate, and low latitude.

<sup>159</sup> Risse, *supra* note 51. The following discussion of Risse's Grotius-inspired rationale draws on, but also departs from, my earlier discussion of the rationale in Wyman, *Sinking States*, *supra* note 10, at 456–59. The following discussion is similar to my discussion of Risse's rationale in Wyman, *Are We Morally Obligated*, *supra* note 10.

<sup>160</sup> HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* II.2.II.1 (Richard Tuck ed. 2005).

<sup>161</sup> *Id.* at II.2.VI.2, II.2.VII, II.2.VIII, II.2.IX. I describe the instrument as an easement in Wyman, *Sinking States*, *supra* note 10, at 458.

cannot have been intended to undermine the fundamental right to self-preservation.<sup>162</sup>

Risse secularizes the rationale, arguing that we can substitute the starting assumption — that the earth was given to mankind in common through a divine grant — with the idea that we own the earth collectively, because none of us created the earth's resources but each of us needs them.<sup>163</sup> The collective ownership of the earth rationale justifies a right of relocation for citizens of threatened island nations (and potentially other climate victims) on the basis that they face dire necessity. In these circumstances, the right of these citizens to self-preservation should trump the right of nations to exclude them. The national right to exclude resembles the individual property owner's right to exclude, which is overridden by the private right of necessity.

Risse's Grotius-inspired rationale for a right of relocation for citizens of small island nations is creative.<sup>164</sup> However, it is worth emphasizing that Risse's collective ownership of the earth rationale is, at its core, another rationale for global socio-economic justice that may not justify the narrow pursuit of a new international instrument addressing climate migration.<sup>165</sup> The argument that we have a right to enter other countries when we face dire necessity because the earth is collectively owned suggests that anyone facing dire necessity, whether due to climate change, environmental conditions unrelated to climate change, war, or other circumstances, has a right to enter another country because the earth belongs to humankind in common. It is individual need coupled with collective ownership of the earth that drives the right to override nations' and individuals' usual right to exclude. If need and collective ownership are at the core of the argument, then we should construct a universal means of addressing that need, and not limit ourselves to addressing the needs of climate migrants.

### B. Practicality

In addition to the moral qualms that we may have about designing a new binding legal instrument to assist solely climate migrants, any proposal for such an instrument also presents practical problems. As mentioned above, it may be difficult in practice to identify persons who migrate due to climate change because migration decisions are typically the result of several factors.<sup>166</sup> While the environment may influence migration decisions, environmental considerations are rarely the sole factor determining the decision to migrate. The multi-

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<sup>162</sup> GROTIUS, *supra* note 160, at II.2.VI.4; Risse, *supra* note 51, at 285–86; STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 45 (1991).

<sup>163</sup> Risse, *supra* note 51, at 283, 286.

<sup>164</sup> I previously argued that Risse offers the most promising rationale for a right to safe haven for citizens of small island states existentially threatened by climate change. Wyman, *Sinking States*, *supra* note 10, at 456.

<sup>165</sup> Risse's article on the right to relocation acknowledges broad implications for his work. Risse, *supra* note 51, at 283–84.

<sup>166</sup> See *supra* note 20 and accompanying text.

plicity of factors influencing migration decisions will make it hard to ascribe migration to climate change.<sup>167</sup>

Setting to the side the prevailing multi-factorial understanding of migration decisions, B&B, D&G, and HEA recommend definitions intended to confine the beneficiaries of their proposals to climate refugees or climate change displaced persons.<sup>168</sup> It is questionable whether the proposals' definitions would cover all people migrating because of climate change while excluding people migrating for other reasons, assuming, as the proposals must, that it is possible to identify people moving because of climate change.

B&B propose to "restrict the notion of climate refugees to the victims of a set of three direct, largely undisputed climate change impacts: sea-level rise, extreme weather events, and drought and water scarcity."<sup>169</sup> In addition, B&B propose to differentiate the level of funding available from their Climate Refugee Protection and Resettlement Fund based on the extent to which the eligible impact can be causally linked with climate change. Full reimbursement would be available for the incremental costs due to sea-level rise on the basis that "general causality with climate change is undisputed" while only "additional funding" would be available for migration due to the other climate impacts on the basis that climate might be "only one causal factor to account for environmental degradation."<sup>170</sup>

However, if the goal is to assist climate migrants, B&B's highly specific definition of climate refugee might be under-inclusive. As D&G argue, B&B's decision to restrict eligibility to persons moving due to three types of climate impact "does not take into account the possibility that advances in science could enable more accurate determination of which events are caused by climate change."<sup>171</sup> Thus B&B's restrictive list of impacts risks excluding from coverage persons who are displaced due to impacts that future science suggests are climate impacts.

In addition, B&B's definition includes a number of exclusions that could be questioned. The definition excludes persons who migrate for reasons that B&B deem indirectly related to climate change, "such as international or na-

<sup>167</sup> McAdam and others emphasize the difficulty of attributing migration decisions to climate change because of the multiple factors influencing these decisions. See, e.g., McAdam, *supra* note 4, at 12 ("It is conceptually problematic and empirically flawed in most cases to suggest that climate change alone *causes* migration.") (emphasis in original); *id.* at 13 ("[I]t would seem both practically impossible and conceptually arbitrary to differentiate between those displaced people who deserve 'protection' on account of climate change, and those who are victims of 'mere' economic or environmental hardship."); FORESIGHT, *supra* note 2, at 151 ("[M]igration is a multi-causal phenomenon . . . . [A]ny attempt to assess which proportion of a migration 'decision' is influenced by environmental change is unlikely to be scientifically credible.")

<sup>168</sup> HEA explicitly refer to the "multi-factorial nature of population movements." Hodgkinson et al., *supra* note 5, at 86; see also *id.* at 72-73, 90. However, their proposal, like the others, requires a definition of persons displaced due to climate change to guide implementation, a point that HEA acknowledge. *Id.* at 90 (quoting Stephen Castles, *Environmental Change and Forced Migration: Making Sense of the Debate* 9 (U.N. High Comm'r for Refugees, Working Paper No. 70) (2002)).

<sup>169</sup> Biermann & Boas, *supra* note 1, at 64.

<sup>170</sup> *Id.* at 81.

<sup>171</sup> Docherty & Giannini, *supra* note 5, at 368.

tional conflicts over diminishing natural resources.”<sup>172</sup> For example, while B&B would cover refugees from drought, they would not cover persons who flee conflicts triggered by the same drought.<sup>173</sup> B&B also would exclude persons who migrate due to efforts to mitigate and adapt to climate change, such as the building of dams or planting of “biofuels crops.”<sup>174</sup>

There is a smaller risk that B&B’s definition also could be over-inclusive. Future science might suggest that components of the three types of impacts that B&B would cover should not be attributed to climate change. Also, as B&B acknowledge, extreme weather events, drought, and water scarcity generally may be linked to climate change, but climate change also might be only one factor contributing to them. B&B’s effort to address this multi-causality by limiting the funding for migration due to these environmental impacts to “additional” funding begs the question of how the Climate Refugee and Resettlement Fund would ensure it reimburses only for the portion attributable to climate change.<sup>175</sup> If the Fund paid for more than the migration due to climate-related drought damage, it would overpay in B&B’s terms. Conversely, it would underpay if it paid for less than the migration due to climate-related drought.

D&G limit the beneficiaries of their proposal by defining a “climate change refugee as an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary *as the result of a sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.*”<sup>176</sup> D&G envisage that a “body of scientific experts” created by their proposed convention would define the disruptions that the convention would cover and periodically review whether disruptions should be incorporated into or removed from the eligible list.<sup>177</sup>

HEA largely follow D&G in attempting to circumscribe the beneficiaries of their proposal by limiting them to persons moving due to events that are “consistent with climate change and to which humans very likely contributed,” rather than itemizing a list of covered climate change impacts.<sup>178</sup> However, HEA argue that their “‘very likely’ standard” would make it harder than D&G’s “‘more likely than not’ standard” to gain coverage, and accordingly their standard would better target resources to assist persons moving due to

<sup>172</sup> Biermann & Boas, *supra* note 1, at 64.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 63.

<sup>175</sup> See *infra* note 255 (referring to the difficulties Tuvalu experienced in apportioning the costs of an infrastructure project between underlying development needs and climate change impacts).

<sup>176</sup> Docherty & Giannini, *supra* note 5, at 361 (emphasis added).

<sup>177</sup> *Id.* at 389–90.

<sup>178</sup> Hodgkinson et al., *supra* note 5, at 90. HEA define CCDPs as “groups of people whose habitual homes have become” — or will, on the balance of probabilities, become — “temporarily or permanently uninhabitable as a consequence of a climate change event.” They “define a ‘climate change event’ as ‘sudden or gradual environmental disruption that is consistent with climate change and to which humans very likely contributed.’” *Id.* at 90.



climate change.<sup>179</sup> Similar to D&G, HEA envisage that a scientific body would assist policymakers in applying the definition.<sup>180</sup>

The open-endedness of the definitions of D&G and HEA may detract from their efforts to assist climate migrants but only such migrants. D&G and HEA emphasize that the IPCC has been able to identify impacts “as ‘consistent with’” climate change.<sup>181</sup> They also are confident in the ability of science to indicate whether environmental disruptions consistent with climate change are related to human actions, based again on the work of the IPCC.<sup>182</sup> However, in characterizing a type of disruption as consistent with climate change or related to human activity, scientists will likely be making judgments amid uncertainty. Moreover, they presumably will be doing so with the knowledge that their characterizations of disruptions may influence policymakers’ determinations about eligibility for protection under the climate migration instrument.<sup>183</sup> If the scientists are apt to err on the side of over-inclusion in the face of uncertainty, eligibility might be extended beyond the limits that D&G and HEA envisage. On the other hand, if the scientists are inclined to err on the side of under-inclusion in the face of uncertainty, eligibility might be overly constrained. The open-ended definitions of D&G and HEA carry the danger of de facto delegating their conventions’ breadth of coverage to a body of scientists.

Despite the difficulties with each proposal’s definition of the intended beneficiaries, it may be possible to devise a definition that in principle would protect climate migrants and only those migrants. Nonetheless, the difficulties underscore that it will not be easy to craft such a definition. Moreover, because

<sup>179</sup> *Id.* at 85 (“Our Convention would adopt a ‘very likely’ standard to identify certain phenomena and trends as consistent with climate change, and human contribution. The reasons for this higher standard are that it provides increased certainty and targeted resource allocation in the context of a convention that could apply to hundreds of millions of people.”).

<sup>180</sup> *Id.* at 86, 94, 96.

<sup>181</sup> Docherty & Giannini, *supra* note 5, at 370; Hodgkinson et al., *supra* note 5, at 84.

<sup>182</sup> Docherty & Giannini, *supra* note 5, at 370–72, 375, 389; Hodgkinson et al., *supra* note 5, at 84–85.

<sup>183</sup> See also McAnaney, *supra* note 4, at 1192. It should be emphasized that neither D&G nor HEA seem to envisage that the scientists’ advice will be determinative of eligibility. They both seem to envisage policymakers making the final decision, using the scientific advice. See Docherty & Giannini, *supra* note 5, at 375 (“[T]he body of scientific experts . . . should consider . . . whether an environmental disruption that leads to a displacement is covered under the definition of climate change refugee . . . . The body’s conclusions should in turn influence which communities are granted group status.”) (emphasis added); Hodgkinson et al., *supra* note 5, at 96 (The Climate Change Displacement Environment and Science Organisation (“CCDESOS”) “would advise . . . the CCDO [Climate Change Displacement Organisation] on climate change science matters as they affected displacement (both sudden . . . and slow onset).”) (emphasis added); *id.* at 94 (The CCDO Council “would . . . assess developing state party (home or host state) requests for internal and international resettlement assistance, including the making of *en masse* designations . . . . Determinations of the Council, including those related to designations, would be informed by information and guidance provided by the CCDF [the Climate Change Displacement Fund] and the CCDESOS.”).

HEA argue that “the definition of a ‘climate change displaced person’ is . . . less pivotal” under their “proposal than” the definition of refugee under the Refugee Convention because under their proposal “protection and assistance would not be triggered solely by fulfilling the requirements of a definition, but rather through an international process of status designation, informed by scientific studies, affected communities, states and international institutions.” *Id.* at 90–91.

of the multiplicity of factors influencing migration, it may not be possible in practice to ascribe many migration decisions to climate change.

### C. Political Feasibility<sup>184</sup>

A third difficulty that confronts proposals for a new binding multilateral instrument on climate migration is that these proposals combine two politically contentious issues: immigration policy and climate policy. The combination is likely to make it difficult to negotiate, ratify, and implement a new binding multilateral instrument.<sup>185</sup>

Immigration policy is a controversial issue in many countries, especially in the current economic climate.<sup>186</sup> A new binding multilateral instrument would require countries to assume new obligations to citizens of other countries that would be difficult to estimate *ex ante* because of uncertainties about the impacts of climate change, human ability to adapt to them *in situ* without moving, and attributing migration decisions to climate change.<sup>187</sup>

Adding to its complexity, a new multilateral instrument would require politically difficult decisions by developing as well as developed countries for the benefit of citizens of other states. For the new instrument to address the rights gap, developing as well as developed countries would have to accept the non-refoulement principle for climate migrants proposed by D&G and HEA or a variation of this principle. Developing countries may be even more concerned than developed countries about the uncertain extent of the obligations they would be undertaking by consenting to non-refoulement for climate migrants. If the current allocation of responsibility for refugees is a guide, developing countries, not developed countries, might find themselves hosting the overwhelming majority of climate migrants subject to non-refoulement.<sup>188</sup> Indeed, developing countries currently host “four-fifths of the world’s refugees,” with

<sup>184</sup> B&B use “the political feasibility of reform options” as one of three criteria for evaluating “governance mechanisms” for climate refugees. Biermann & Boas, *Global Adaptation Governance*, *supra* note 43, at 257. They also discuss the political obstacles to the implementation of their proposals. Biermann & Boas, *supra* note 1, at 82–83. McAnaney emphasizes that “[a]ny policy proposal needs to be politically feasible.” McAnaney, *supra* note 4, at 1201.

<sup>185</sup> On the political obstacles to a new binding multilateral instrument, see generally McAdam, *supra* note 4, at 15–17; Hugo, *supra* note 4; Mayer, *supra* note 20, at 360–61, 407–08; Williams, *supra* note 71, at 517–18; Martin, *supra* note 53, at 411–12; McAnaney, *supra* note 4, at 1201–03; Warner, *supra* note 88, at 13–14. McAdam emphasizes that “even if a treaty text could be agreed upon, its ratification, implementation and enforcement could not easily be compelled.” McAdam, *supra* note 4, at 17.

<sup>186</sup> See, e.g., WHITE, *supra* note 16, at 5; Myers, *supra* note 1, at 611; Tacoli, *supra* note 2, at 515.

<sup>187</sup> Philippe Boncour & Bruce Burson, *Climate Change and Migration in the South Pacific Region: Policy Perspectives*, in CLIMATE CHANGE AND MIGRATION SOUTH PACIFIC PERSPECTIVES 5, 21 (Bruce Burson ed., 2010); Mayer, *supra* note 20, at 407.

<sup>188</sup> Mayer, *supra* note 20, at 397 (“Developing countries that are neighboring affected areas are likely to be the main destinations for climate migrants.”); GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, *supra* note 37, at 118 (“Most cross-border environmentally induced migration will probably take the form of south-south migration; no trend towards large south-north migrations has been identified.”) (citations omitted); WHITE, *supra* note 16, at 125 (“The bulk of CIM

“[t]he 49 Least Developed Countries provid[ing] asylum to almost 2 million refugees.”<sup>189</sup>

Examining climate migration through the lens of climate politics similarly provides little basis for optimism about the likelihood of ratifying, implementing or even negotiating a new multilateral instrument on climate migration. While the Kyoto Protocol<sup>190</sup> is in effect, it has not been ratified by the United States, whose participation also would be important for the functioning of a new multilateral instrument addressing climate migration. The lack of U.S. ratification has burdened the climate process since the country is the single largest historical source of greenhouse gas emissions.<sup>191</sup> It would be problematic if the U.S. similarly refused to ratify a new multilateral instrument on climate migration because it also is an important destination country for immigrants and refugees. For example, in 2010, the U.S. “received the highest number” of refugees submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”) for resettlement of any country.<sup>192</sup>

The failure of a number of the countries that ratified the Kyoto Protocol to meet their emission reduction targets for the first commitment period underscores the potential that countries might agree to a new international instrument addressing climate migration but then fail to implement the instrument. Consider Canada, which recently became the first country to withdraw from the Kyoto Protocol after having ratified it.<sup>193</sup> Canada’s greenhouse gas emissions have increased by approximately one-third compared to 1990 levels rather than declined as required under the Kyoto Protocol.<sup>194</sup>

The absence of binding commitments to reduce greenhouse gas emissions beyond the end of the first commitment period under the Kyoto Protocol also suggests a disinclination among countries at this juncture to negotiate legally binding climate change instruments. In 2012, the Kyoto Protocol’s first commitment period ends. The outlook currently seems dim for new international agreement on another round of binding emission reduction targets.<sup>195</sup> Many countries have made non-binding pledges to reduce their greenhouse gas emis-

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[climate-induced migration] has been and will likely be within countries and regions of the world’s tropic regions, not directed to North Atlantic borders.”).

<sup>189</sup> U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS 2010 2 (2010), available at <http://www.unhcr.org/4dfa11499.html>.

<sup>190</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

<sup>191</sup> Posner & Sunstein, *supra* note 144, at 1579 tbl.4.

<sup>192</sup> U.N. HIGH COMM’R FOR REFUGEES, *supra* note 189, at 3. In particular, 71,400 of resettled refugees settled in the U.S. out of a total population of “98,800 resettled refugees.” *Id.*

<sup>193</sup> See Adam Vaughan, *What Does Canada’s Withdrawal From Kyoto Protocol Mean?*, THE GUARDIAN, Dec. 13, 2011, available at <http://www.guardian.co.uk/environment/2011/dec/13/canada-withdrawal-kyoto-protocol>; Richard Black, *Canada to Withdraw from Kyoto Protocol*, BBC NEWS, Analysis, Dec. 13, 2011, available at <http://www.bbc.co.uk/news/world-us-canada-16151310>.

<sup>194</sup> Vaughan, *supra* note 193 (“Canada was meant to cut emissions by 6% by 2012 on 1990 levels, but instead they have risen by around a third.”).

<sup>195</sup> See also McAnaney, *supra* note 4, at 1199. On the significance of the end of the first commitment period without agreement on binding reduction targets for a second commitment period, see Kyoto Protocol art. 3, paras. 7, 9.

sions after 2012, but there is no formal agreement on reduction targets for a second commitment period.<sup>196</sup>

At the Conference of the Parties in Durban in 2011, countries launched the Ad Hoc Working Group on a Durban Platform for Enhanced Action “to develop a protocol, another legal instrument or an agreed outcome with legal force under the [United Nations Framework] Convention [on Climate Change] applicable to all Parties.”<sup>197</sup> The agreement was a landmark because it set the stage for negotiation of a new regime that would impose emission reduction requirements on all countries, including emerging economies such as China and India, not just on the developed countries that had assumed the burden of reductions under the Kyoto Protocol. However, assuming the Working Group produces a new regime of emissions reductions, the regime would be implemented only after 2020.<sup>198</sup> Furthermore, the regime might not be legally binding if the option that is pursued is the third option of “an agreed outcome with legal force.”<sup>199</sup> The third option was inserted at the insistence of India, which opposes any legal instrument that would impose binding requirements on it to reduce its greenhouse gas emissions.<sup>200</sup> India is not alone in this regard. While most of the state parties to the UNFCCC may support another round of legally binding emission reduction commitments, there is “a powerful minority of Parties” opposed to binding commitments.<sup>201</sup>

Given the unwillingness of a number of leading countries to commit to another set of binding reduction targets to limit the extent of climate change, it is difficult to imagine agreement emerging on a new binding multilateral instrument addressing the consequences of climate change that countries have been unwilling to take measures to minimize. The international appetite for legally binding measures addressing climate change seems limited, at least at this juncture, when the impacts of climate change are still subtle in many places around the world.

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<sup>196</sup> Fiona Harvey & John Vidal, *Global Climate Change Treaty in Sight After Durban Breakthrough*, THE GUARDIAN, Dec. 11, 2011, available at <http://www.guardian.co.uk/environment/2011/dec/11/global-climate-change-treaty-durban> (“All of the world’s biggest economies and emitters already have targets to cut emissions between now and 2020, when” any deal agreed upon in light of Durban “would come into force.”).

<sup>197</sup> UNFCCC, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Decision -/CP.17 art. 2, available at [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_durbanplatform.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf), (advance unedited version). For a legal analysis of the Durban Platform text, see Jacob Werksman, *Q&A: The Legal Aspects of the Durban Platform Text*, WORLD RESOURCES INSTITUTE INSIGHTS (Dec. 14, 2011), <http://insights.wri.org/news/2011/12/qa-legal-aspects-durban-platform-text>.

<sup>198</sup> Werksman, *supra* note 197.

<sup>199</sup> *Id.*

<sup>200</sup> See *id.*; India ‘Won’t Sign Binding Emissions Pact’: Minister, PHYS.ORG, Dec. 27, 2011, <http://www.physorg.com/news/2011-12-india-wont-emissions-pact-minister.html>.

<sup>201</sup> Werksman, *supra* note 197.

## V. ALTERNATIVES

Underpinning the proposals for new binding multilateral instruments is a recognition that climate change will worsen conditions in many developing countries, prompting some number of people in these countries to need to move. For the reasons discussed, it is far from clear that a new binding multilateral instrument is the appropriate response to the implications of climate change for many people in developing countries. There are many people who need to move for reasons not of their own making unrelated to climate change, and it is not clear why we should develop special protections for climate migrants rather than seek mechanisms to assist vulnerable migrants generally.<sup>202</sup> The moral concerns raised by the idea of developing a new instrument addressing climate migration are especially salient when we recognize the multiplicity of factors influencing migration decisions and the resultant practical difficulty of identifying persons migrating or needing to migrate because of climate change. On top of the moral and practical concerns, there are the political obstacles to negotiating, ratifying, and implementing a new binding multilateral agreement in a world where climate change and immigration policy are contentious issues.

Notwithstanding the problems with the treaty proposals, however, the recognition underpinning them that climate change will worsen conditions in many developing countries warrants significant legal and policy attention. What the discussion of climate migration emphasizes is that there are many parts of the world that are ill-equipped to deal with the effects of climate change. As B&B argue in a passage quoted above, “the problem of climate refugees is at its core a problem of development policy.”<sup>203</sup> There are many possible moral grounds for insisting that industrialized countries are obligated to assist developing countries with development.<sup>204</sup> The discussion about climate migration underscores the need to lessen the vulnerability and increase the resilience of vulnerable populations.<sup>205</sup>

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<sup>202</sup> See generally Betts, *supra* note 139 (proposing guidelines for “vulnerable irregular migrants”).

<sup>203</sup> Biermann & Boas, *supra* note 1, at 74. HEA agree with B&B that protecting climate refugees is “essentially a development issue.” Hodgkinson et al., *supra* note 5, at 108 (citation omitted) (internal quotation marks omitted).

<sup>204</sup> Cosmopolitan arguments for transfers from developed countries or their citizens to the developing world include THOMAS W. POGGE, *REALIZING RAWLS* (1989), who argues from a liberal egalitarian perspective, and PETER SINGER, *THE LIFE YOU CAN SAVE: ACTING NOW TO END WORLD POVERTY* (2009), who argues from a utilitarian perspective. However, the idea that we have obligations to transfer resources to other countries to promote global socio-economic justice is controversial. See generally Thomas Nagel, *The Problem of Global Justice*, 33:2 *PHIL. & PUB. AFF.* 113 (2005). For a response to Nagel’s arguments, see, e.g., Lea Ypi et al., *Associative Duties, Global Justice, and the Colonies*, 37:2 *PHIL. & PUB. AFF.* 103, 134 (2009) (arguing that colonialism may create “associative duties that give rise to duties of robust distributive justice” even after colonial rule ends).

<sup>205</sup> Recall that this article does not address the situation of the small island nations existentially threatened by climate change for which internal development may not be a realistic long-term response. *Supra* notes 10 and 42 and accompanying text.

B&B's own proposal falls short of addressing the development challenge that they rightly recognize is highlighted by the prospect that climate change may induce migration. Their proposal would reduce "the impact[ ]"<sup>206</sup> of climate migration on developing countries by transferring funding from industrialized countries to assist with the protection and resettlement of climate refugees.<sup>207</sup> But their proposal would not address "the root causes"<sup>208</sup> of climate migration, namely the economic, political, social, demographic, and environmental conditions which drive migration decisions and which, to varying degrees, are the focus of development policy.<sup>209</sup>

This Part identifies responses to the rights and funding gaps that might reduce the vulnerabilities to climate change that give rise to climate migration concerns.<sup>210</sup> The responses take the form of a series of legal and policy propos-

For examples of sources emphasizing the importance of development in a world where the climate is changing, see *infra* note 210 (citing sources arguing for increasing resilience to address climate migration and reducing vulnerability to facilitate adaptation). For ideas about the type of development that is desirable in a world affected by climate change, see *Defining Climate Compatible Development*, CLIMATE & DEVELOPMENT KNOWLEDGE NETWORK, <http://cdkn.org/resource/defining-climate-compatible-development-3/> (last visited Jan. 22, 2013) (on file with the Harvard Law School Library).

<sup>206</sup> I borrow this description of B&B's proposal as addressing an impact of climate change but not the root causes of the impact from E. Lisa F. Schipper, who argues, not referring to B&B's proposal, that "work on adaptation so far has addressed the impacts of climate change, rather than sufficiently addressing the underlying factors that cause vulnerability to it." E. Lisa F. Schipper, *Climate Change Adaptation and Development: Exploring the Linkages 3* (Tyndall Centre for Climate Change Research, Working Paper 107, July 2007). Ayers et al. similarly argue that "technology-based measures that specifically react to the impacts of climate change can only be partially effective if they do not also address non-climatic factors that are the underlying 'drivers' of vulnerability." Ayers et al., *supra* note 39, at 276.

<sup>207</sup> Biermann & Boas, *supra* note 1, at 81.

<sup>208</sup> ASIAN DEV. BANK, *supra* note 2, at 41 (critiquing proposals to address climate migration through humanitarian assistance and legal protection as "do[ing] little to address the root causes of the problem," but not specifically referring to B&B); see also *id.* (arguing that to address climate migration, "the resilience of communities needs to be strengthened, and this is the reason why climate-induced migration needs to be framed in a development agenda first"); Gibb & Ford, *supra* note 49, at 6 ("A real and lasting response to climate migration must address not only the displacement itself but also its underlying causes . . . . For climate migration these are often not environmental but related to the causes of vulnerability such as wider political, economic, social and demographic processes."); WHITE, *supra* note 16, at 135–42 (discussing development and climate change).

<sup>209</sup> B&B's focus on alleviating the impacts of climate change rather than addressing the root causes contributing to these impacts may be characteristic of proposals dealing with adaptation under the UNFCCC. See, e.g., Ayers & Dodman, *supra* note 87, at 164 ("Within the international climate change frameworks of the UNFCCC, 'adaptation to what?' is interpreted as adaptation specifically to climate change, rather than to broader climate variability (including climate change), and without taking into account underlying drivers of vulnerability stemming from development needs.").

<sup>210</sup> Several sources argue for promoting resilience and development to address climate change migration. See, e.g., FORESIGHT, *supra* note 2, at 21 (emphasizing the need for "[p]olicies to build long-term resilience"); ASIAN DEV. BANK, *supra* note 2, at viii ("[C]limate-induced migration needs to be addressed as part of the development agenda."); *id.* at 41–45 (elaborating on the argument); CARE ET AL., *supra* note 87, at v (arguing that improving the resilience of vulnerable populations could reduce the migration that otherwise would occur due to climate change).

There are similar arguments that adaptation to climate change requires reducing existing vulnerability. See, e.g., Schipper, *supra* note 206, at 6 ("[V]ulnerability must be reduced first through

als that would not require a new binding multilateral instrument. In elaborating the responses, this Part explains why they generally are less prone to the moral, practical, and political problems undermining the proposals for new binding multilateral instruments.

### A. *The Rights Gap*

As explained earlier, the rights gap underlying a number of the recent proposals for binding multilateral instruments is the lack of a right in existing law to remain permanently in a destination country due to environmental conditions back home. D&G and HEA propose to extend the principle of non-refoulement to prevent the return of persons when “climate-induced environmental change would threaten the refugee’s life or ability to survive.”<sup>211</sup> This is a legal *ex post* response to climate migration that would help climate migrants who flee to another country after they have done so. Extending non-refoulement to climate displaced persons probably would “do little to address” the underlying economic, political, social, demographic, or environmental drivers of migration in the first place.<sup>212</sup>

If we agree that dealing with climate migration ultimately requires addressing the underlying causes of migration, a better response would seem to be to expand ways for people to move *ex ante*, many years before conditions deteriorate. Increasing opportunities for people to migrate *ex ante* would take advantage of the potential for migration to benefit countries of origin and accordingly reduce the extent of subsequent forced displacement and the effects of the rights gap.

While the literature on climate migration often portrays migration as a negative and unwelcome phenomenon, there is considerable literature emphasizing the potential benefits of migration for countries of origin, as well as for migrants and destination countries, “within the right policy context.”<sup>213</sup> Migration may benefit countries of origin through the remittances that migrants may

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targeted climate-aware development practice (‘climate proof’ development) in order for adaptation to take place. Creating enabling conditions for an adaptation process to take place implies reduction of vulnerability.”); Ayers & Huq, *supra* note 90, at 680 (“[B]uilding adaptive capacity requires actions that focus not only on the measurable and verifiable impacts of climate change but also on a wide range of factors that contribute to a broader reduction in vulnerability to climate variability and climate change.”).

<sup>211</sup> Docherty & Giannini, *supra* note 5, at 377; *see also* Hodgkinson et al., *supra* note 5, at 110; *supra* note 114 and accompanying text.

<sup>212</sup> *See* ASIAN DEV. BANK, *supra* note 2, at 41 (referring to the inadequacies of proposals to address climate migration through new legal protections and humanitarian assistance).

<sup>213</sup> Hugo, *supra* note 4, at 29 (referring to benefits for sending and receiving countries). *See, e.g.,* Jon Barnett & Michael Webber, *Accommodating Migration To Promote Adaptation to Climate Change* (Background Paper to the 2010 World Development Report, Policy Research Working Paper No. 5270) 3, 19 (Apr. 2010); THE WORLD BANK, *GLOBAL ECONOMIC PROSPECTS: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION* xii–xiv (2006); Chang, *supra* note 20, at 346–48, 352; FORESIGHT, *supra* note 2, at 32, 183–84; Christian Barry, *Immigration and Global Justice*, 4 *GLOBAL JUSTICE: THEORY PRACTICE RHETORIC* 30 (2011).

return home.<sup>214</sup> These may have a variety of economic benefits, including “reducing the incidence and severity of poverty,”<sup>215</sup> “smooth[ing] household consumption,”<sup>216</sup> “diversify[ing]”<sup>217</sup> household incomes, and providing money to fund education and health care.<sup>218</sup> “[L]ow-skilled emigration” also may have positive impacts on employment markets in the areas migrants leave.<sup>219</sup> The low-skilled workers who remain may face less competition for employment, and wages may rise.<sup>220</sup> Migration also may reduce the pressures on natural resources in sending countries.<sup>221</sup> In addition, migrants may form diaspora networks that offer knowledge and contacts to people back home, including new ways of doing business.<sup>222</sup> There is the risk of a “brain drain” from countries of origin of highly skilled workers,<sup>223</sup> but the “brain drain” may not be an issue for all developing countries, and there are ways of reducing or dealing with the brain drain.<sup>224</sup>

How might immigration policy be changed to increase resilience in developing countries vulnerable to the effects of climate change? One option would be to make it easier for citizens of developing countries that are vulnerable to climate change to move to destination countries temporarily or permanently, for example, by boosting allowable immigration levels from these countries.<sup>225</sup>

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<sup>214</sup> THE WORLD BANK, *supra* note 213, at xiii; Barnett & Webber, *supra* note 213, at 22. While emphasizing the benefits of remittances, the World Bank cautions that “the impact of remittances on growth is unclear.” THE WORLD BANK, *supra* note 213, at xiii.

The following discussion of the benefits of migration for sending countries draws on Wyman, *National Immigration Policy Option*, *supra* note 10, at 19 and the sources cited therein.

<sup>215</sup> THE WORLD BANK, *supra* note 213, at xiii.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at xiv.

<sup>220</sup> *Id.*

<sup>221</sup> Barnett & Webber, *supra* note 213, at 24 (“Migration reduces per capita demands on resources in sending regions, which increases adaptive capacity.”).

<sup>222</sup> THE WORLD BANK, *supra* note 213, at xiv.

<sup>223</sup> Mayer, *supra* note 20, at 392.

<sup>224</sup> Barry, *supra* note 213, at 37–38.

<sup>225</sup> Other proposals to expand migration opportunities in light of climate change include Barnett & Webber, *supra* note 213, at 18, 32 (arguing that “[l]abor migration offers the best potential for harnessing the power of migration to promote adaptation to climate change” and suggesting that “international migration policies [should be oriented] to benefit people in [the] most vulnerable regions”); McAdam & Saul, *supra* note 35, at 287 (“Bangladesh, its neighbors and the international community should establish more bilateral and regional ‘economic’ migration opportunities for Bangladeshis” as a way of “addressing . . . climate change-related displacement in Bangladesh . . . .”); Chang, *supra* note 20, at 342–46, 356 (arguing that developed countries should relax immigration restrictions, and arguing against defining a new legal category of “environmental migrants” because of the difficulty of defining such a category); FORESIGHT, *supra* note 2, at 197 (advocating bilateral or regional agreements on migration to address impacts of environmental change); ASIAN DEV. BANK, *supra* note 2, at 56–58, 73 (advocating use of regional approaches that build on existing migration channels).

Recently, I argued that there is scope for using existing domestic immigration policy in destination countries to address the potential need to resettle the populations of the atoll nations of RMI, Tuvalu, and Kiribati that may be existentially threatened by climate change. Wyman, *National Immigration Policy Option*, *supra* note 10, at 1. The discussion that follows draws on my earlier work. For similar arguments, see Hugo, *supra* note 4; Richard Bedford & Charlotte Bedford, *International Migration and Climate Change: A Post-Copenhagen Perspective on Options for*



This option would not create a new immigration category for climate change migrants. It would expand the numbers of persons from developing countries vulnerable to climate change who could move to destination countries through already existing categories in national immigration legislation and policy. It also might be necessary to relax the criteria for admission under existing categories to enable greater numbers of people to enter, or to assist people in countries of origin to satisfy admission criteria that are significant barriers to entry.<sup>226</sup>

Destination countries could work bilaterally with countries vulnerable to climate change to develop and implement changes in immigration policy in destination countries. For example, sending countries might assist destination countries in preparing temporary or permanent migrants for travel to the destination country. Alternatively, regional groupings of likely sending and destination countries could work together to allocate responsibility for increasing immigration levels from developing countries in particular regions of the world, based on factors such as historical ties among nations and existing patterns of immigration.<sup>227</sup> If countries then enshrined these arrangements in bilateral or regional treaties, the treaties would offer greater flexibility than a binding multilateral instrument to tailor the provisions to meet country-specific circumstances.<sup>228</sup>

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*Kiribati and Tuvalu*, in CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 89 (Bruce Burson ed., 2010); McADAM, *supra* note 54, at 204.

<sup>226</sup> Bedford & Bedford, *supra* note 225, at 126–27 (referring to requirements under New Zealand’s Pacific Access Category that keep people from moving using the category).

<sup>227</sup> See also Williams, *supra* note 71, at 518 (advocating for “regional cooperation and bilateral agreement” to address climate migration); Mayer, *supra* note 20, at 361 (advocating for “bilateral and regional negotiations” under the umbrella of a United Nations General Assembly resolution); FORESIGHT, *supra* note 2, at 197 (advocating for “bilateral or regional agreements on migration” to address impacts of environmental change); ASIAN DEV. BANK, *supra* note 2, at 56–58, 73 (advocating for use of regional approaches that build on existing migration channels); McAdam & Saul, *supra* note 35, at 287 (advocating “bilateral and regional ‘economic’ migration opportunities for Bangladeshis”); McAdam, *supra* note 4, at 26 (advocating “bilateral and regional agreements”); Wyman, *National Immigration Policy Option*, *supra* note 10, at 11–12 (threatened islands and destination countries could divide up responsibility for migration); Hodgkinson et al., *supra* note 5, at 95 (advocating “regional Council committees”); *id.* at 81 (advocating “‘bilateral displacement agreements’ . . . between small island states and host states”).

Refugee scholars have previously advocated regional and bilateral approaches for allocating responsibility for refugees in general, not specifically climate migrants. See Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243, 279–80 (1997); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 169–90 (1997). For critical discussions see Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 295–99 (1998); Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 BROOK. J. INT’L L. 355, 380–83 (2008–2009). For Schuck’s reply, see generally Peter H. Schuck, *A Response to the Critics*, 12 HARV. HUM. RTS. J. 385 (1999).

<sup>228</sup> Blum, *supra* note 9, at 339 (arguing that bilateral treaties “better” promote “flexibility and adaptation to the special circumstances of a particular setting” than multilateral treaties); *id.* at 347 (Bilateral treaties facilitate “tailoring arrangements to particular relationships.”); *id.* at 374 (Bilateral treaties “are expedient in that they can take into account the specific needs and requirements of each country.”).

There is a risk that destination countries might cap the number of immigrants from climate vulnerable countries at numbers too low to effectively increase resilience in countries vulnerable to climate change. An ex post complement to the idea of boosting immigration levels under existing categories would be to develop non-binding guidelines at the international level along the lines that Alexander Betts suggests for “vulnerable irregular migrants,” not specifically climate change migrants.<sup>229</sup> Guidelines for vulnerable irregular migrants might assist people forced to relocate if the measures proposed here to promote resilience are inadequate by clarifying the rights of such migrants and the obligations of countries to them.<sup>230</sup>

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It is often thought that developing countries are disadvantaged when negotiating bilaterally with developed countries and that multilateral forums are preferable for developing countries because such forums offer the opportunity to form coalitions and negotiate as a group. *Id.* at 341, 347–48. But there are situations when developing countries may prefer bilateral to multilateral settings. *Id.* at 342, 347–48. For example, if developing countries have historical relationships with their developed country negotiating partners, the developing countries may be able to draw on these relationships in bargaining with developed countries. When negotiating for increased immigration flows, developing countries might prefer to negotiate with a small number of countries in which they already have diaspora populations than a large number of countries with whom they have little pre-existing relationship. The diaspora populations might provide a source of influence in the destination country. *See, e.g., id.* at 342 (referring to “the targeted swaying of domestic constituencies in the other country” as a strategy that a weaker state can use in negotiating bilaterally with a stronger state).

<sup>229</sup> Betts recommends developing guiding principles on the protection of vulnerable migrants modeled on the Guiding Principles on Internal Displacement. Betts, *supra* note 139. He suggests that guiding principles “could be developed *either* in relation to the overall category of ‘vulnerable irregular migrants’ *or*, more realistically, applied to specific sub-divisions of the issues, addressing, for example, survival migrants, trafficking persons, stranded migrants, or forcibly deported migrants separately.” *Id.* at 216. Betts suggests that it is likely to be particularly difficult to reach consensus on guidelines addressing climate change migration. *Id.* at 219, 233–34.

More narrowly focused than Betts’s proposal, there have been a number of proposals for developing guidelines specifically on climate migration. Jane McAdam, *How to Address the Protection Gaps — Ways Forward 1–2* (June 5, 2011) (The Nansen Conference: Climate Change and Displacement in the 21st Century, Oslo, Norway), available at <http://d2530919.hosted213.servethecloud.com/expose/global/download.asp?id=2267&fk=1626&thumb=>; *see also* Roger Zetter, *Legal and Normative Frameworks*, 31 *FORCED MIGRATION REV.* 62, 63 (2008) (suggesting Guiding Principles as “a model” for addressing climate change displacement); Martin, *supra* note 53, at 412 (advocating Guiding Principles as a model for establishing international standards about climate migration); Mayer, *supra* note 20, at 411 (advocating a United Nations General Assembly resolution that includes “guidelines for the treatment of climate migrants and for the monitoring of climate change-induced migration” that would “constitute general considerations that may later be implemented through regional negotiations or referred to by national institutions”); McAdam, *supra* note 75, at 57, 61–70.

In June 2011, the government of Norway and other organizations held a conference which produced the Nansen Principles, ten principles “to guide responses to some of the urgent and complex challenges raised by displacement in the context of climate change and other environmental hazards.” The Principles include a recommendation to develop “a guiding framework or instrument . . . to meet the protection needs of people displaced owing to sudden-onset disasters.” *The Nansen Principles*, in *THE NANSEN CONFERENCE: CLIMATE CHANGE AND DISPLACEMENT IN THE 21ST CENTURY* 5 (2011), available at <http://www.unhcr.org/4ea969729.pdf>. *See also id.* at 19 (chairperson’s summary); McADAM, *supra* note 54, at 237–66; FORESIGHT, *supra* note 2, at 197–98 (discussing the Nansen Principles); ASIAN DEV. BANK, *supra* note 2, at 56 (same).

<sup>230</sup> Betts, *supra* note 139, at 216–23.

### 1. *Morality, Practicality, and Politics*

The option of boosting immigration levels from developing countries thought to be threatened by climate change is much less morally problematic than the proposals for a new binding multilateral instrument with special protections for climate change migrants. As explained above, this option would not establish any special protections for climate change migrants or displaced persons. Whether affected by climate change or not, people would be allowed to immigrate if (1) they satisfy existing immigration criteria or more liberal versions of them, (2) they come from countries thought to be vulnerable to climate change, and (3) the increased migration might reduce the vulnerability of their home countries. If we want to ensure complete neutrality with respect to climate change, we might even boost immigration from developing countries in general on the basis of the countries' level of economic development, with the least developed countries receiving the greatest level of increase.

The option also would not suffer from the practical problems that affect the proposals for special protections for climate change refugees or displaced persons. By using existing categories in immigration law, this option would avoid the difficult issue of defining the terms "climate migrant," "refugee," or "displaced person."<sup>231</sup> Policymakers still would require advice as to which countries are especially vulnerable to climate change, and available information could be used as a starting point. Allowable immigration levels from different countries could be increased or decreased as updated information becomes available about which countries are especially vulnerable to climate change.<sup>232</sup>

As discussed above, approaches targeted to assisting climate change refugees or displaced persons need to carefully define their intended beneficiaries to include all people migrating because of climate change and to exclude people migrating for other reasons. We would not need to worry about being over- or under-inclusive along these lines under the option of boosting immigration levels under existing categories, because the goal would be to boost resilience in countries threatened by climate change, not to narrowly assist people harmed by climate change. Resilience could be promoted by admitting people who themselves are and are not affected by climate change, provided their countries generally were regarded as vulnerable to climate change.

In increasing immigration levels we would need to be careful to boost levels in ways that would most increase resilience in countries vulnerable to climate change.<sup>233</sup> This might mean disproportionately boosting immigration levels for unskilled labor, on the basis that the emigration of unskilled labor

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<sup>231</sup> Chang, *supra* note 20, at 343–46, 356 (arguing that developed countries should relax immigration restrictions, but arguing against defining a new legal category of "environmental migrants" because of the difficulty of defining such a category).

<sup>232</sup> As indicated earlier, there are different ways of understanding vulnerability to climate change. *See supra* note 28.

<sup>233</sup> Barnett & Webber indicate that "[t]here is considerable scope for careful and coordinated policies to minimize many of the potential costs and maximize many of the potential benefits arising from migration that may be exacerbated by climate change." Barnett & Webber, *supra* note 213, at 30.

might have the most beneficial economic impact in developing countries.<sup>234</sup> It also would be important to implement supportive mechanisms to make the best use of the economic benefits of the increased immigration for sending countries. There is existing literature on measures that sending and receiving countries can take to promote remittances from diaspora communities that might be tapped to provide ideas.<sup>235</sup>

The option of boosting immigration levels from developing countries threatened by climate change likely would be welcomed by a number of these countries. Migration already is widely recognized as a development strategy for developing countries, notwithstanding concerns that migration leads to a “brain drain.”<sup>236</sup> Indeed, several of the countries predicted to be sources of climate migration already pursue migration as a development strategy.<sup>237</sup>

The idea of increasing existing immigration levels from countries vulnerable to climate change is likely to be controversial in destination countries, although it might attract less opposition than a new multilateral instrument on climate migration. Notwithstanding anti-immigration sentiment in destination countries, many of these countries have economic incentives to increase immigration levels.<sup>238</sup> Many developed countries face a “demographic deficit.”<sup>239</sup> The population is aging and may decline in the future, and these developments are “likely to put pressure on labour costs and skill shortages, and potentially could lead to an increased demand for migrants.”<sup>240</sup> As the Foresight report argues, “future demographic deficits in some countries suggest that a ‘win-win’ solution may in some cases be found where there are opportunities for planned, circular migration from countries which are likely to be vulnerable to environmental change.”<sup>241</sup>

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<sup>234</sup> See, e.g., Barry, *supra* note 213, at 38 (noting that “grant[ing] more visas to unskilled workers from poorer countries” could be a way of increasing immigration without contributing to a “brain drain” of highly-skilled workers from developing countries).

<sup>235</sup> See, e.g., THE WORLD BANK, *supra* note 213, at xv–xvi; Barnett & Webber, *supra* note 213, at 32 (Box 5: Suggested policies with respect to labor migration).

<sup>236</sup> See ASIAN DEV. BANK, *supra* note 2, at 38 (“Migration is a way for origin areas to cope with environmental impact and, given an appropriate policy context, to enhance development.”).

<sup>237</sup> McAdam & Saul, *supra* note 35, at 284 (“International migration is a central pillar of Bangladesh’s long-term economic growth strategy . . . .”); Wyman, *National Immigration Policy*, *supra* note 10, at 19 (“Kiribati and Tuvalu and to a lesser extent the Marshall Islands . . . have actively encouraged international labor migration.”) (quoting JOHN CONNELL & RICHARD P.C. BROWN, ASIAN DEV. BANK, REMITTANCES IN THE PACIFIC: AN OVERVIEW 43–44 (2005)).

<sup>238</sup> A similar argument is developed in Wyman, *National Immigration Policy*, *supra* note 10, at text accompanying notes 94–101.

<sup>239</sup> See FORESIGHT, *supra* note 2, at 22.

<sup>240</sup> *Id.* at 61; see also *id.* at 48.

<sup>241</sup> *Id.* at 22; see also OECD, LOOKING TO 2060: LONG-TERM GLOBAL GROWTH PROSPECTS: A GOING FOR GROWTH REPORT 13–14 (OECD Economic Policy Papers No. 03) (Nov. 2012) (discussing “[p]opulation ageing” and the implications of migration for “population growth” and “working age population”). Canada is already making immigration policy changes in light of changing demographics. Bill Curry, *Ottawa’s Overhaul of Immigration Points System Puts Premium on Young Workers*, GLOBE AND MAIL, Aug. 22, 2012, at A4 (“New immigration rules will target workers aged 18 to 35 as the Conservative government provides the clearest sense yet of how Canada will rely on young immigrants to soften the fiscal pain of a demographic crunch.”).

Boosting immigration levels under domestic immigration law also likely is more attractive to destination countries than a new binding multilateral instrument because of the greater control such policy changes might afford destination countries. A binding multilateral instrument would obligate destination countries to grant a right of non-refoulement or a variation of this right to a number of climate migrants that would be difficult to estimate *ex ante*. Boosting immigration levels under existing categories as a matter of domestic law would allow destination countries to retain a greater degree of control over entry.

The idea of developing non-binding guidelines on vulnerable irregular migrants along the lines suggested by Betts would avoid privileging people moving because of climate change over other migrants equally in need of assistance. The idea also would avoid the practical difficulty of identifying and defining a category of persons moving because of climate change. However, it would be necessary to define who would count as vulnerable irregular migrants and be covered by the guidelines, a process that Betts acknowledges would be difficult.<sup>242</sup> In addition, there likely would be political obstacles to developing such guidelines. For example, destination countries likely would be wary of agreeing to any guidelines that might become a vehicle for imposing new obligations, although as Betts suggests, they might recognize benefits in guidelines that clarify their existing obligations under international law.<sup>243</sup>

### B. *The Funding Gap*

As discussed above, the funding gap refers to the lack of a dedicated international source of funds to help offset the costs of climate migration, especially in the developing world. The proposals for new binding multilateral instruments discussed in this Article would address the funding gap by establishing a fund that would assist developing countries with the costs that they incur in resettling people due to climate change, and possibly implementing preventive “measures to reduce the impact of foreseeable refugee cris[es].”<sup>244</sup> Again, establishing a fund to help developing countries with their relocation and resettlement costs and limiting climate refugee crises would address the impact of climate change migration but not its underlying drivers.<sup>245</sup>

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<sup>242</sup> Betts, *supra* note 139, at 233–34.

<sup>243</sup> *Id.* at 224–25.

<sup>244</sup> Docherty & Giannini, *supra* note 5, at 387. See *supra* note 119 (discussing the component of D&G’s proposal that might provide limited funding for avoiding refugee crises). As mentioned above, HEA indicate that their “Convention would . . . provide a forum for the provision of pre-emptive adaptive resettlement.” Hodgkinson et al, *supra* note 5, at 109; see also *supra* note 121 (discussing the pre-emptive aspect of HEA’s proposals). B&B emphasize that “at the core of a regime on climate refugees is not programs on emergency response and disaster relief, but instead, planned and voluntary resettlement over longer periods of time.” Biermann & Boas, *supra* note 1, at 75. Thus the proposals of HEA and B&B, like those of D&G, presumably would help avoid refugee crises.

<sup>245</sup> ASIAN DEV. BANK, *supra* note 2, at 41 (discussing the limits of “humanitarian assistance” and legal protections as methods for addressing “the root causes” of climate migration).

If we are interested in addressing the root causes of climate migration, a better response would be to increase funding for development assistance to promote resilience to climate change, and therefore reduce the extent of forced dislocation due to climate change. The idea of scaling up development assistance to reduce vulnerability to climate change is not new.<sup>246</sup> The use of development policy has been promoted for several years and “[m]ost major donor agencies[,] including the World Bank, regional development banks and national donors” have made efforts to incorporate climate change into their work.<sup>247</sup> It is well recognized that “sustainable development can reduce vulnerability to climate change, because vulnerability depends on factors linked to development, including access to economic, ecological, social and human resources, and inadequate institutions, governance and infrastructure.”<sup>248</sup>

Adaptation funding sources under the UNFCCC could be used to “complement” development assistance from the major donor agencies.<sup>249</sup> While development assistance can be used to generally reduce populations’ vulnerability

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<sup>246</sup> See, e.g., Ayers & Dodman, *supra* note 87, at 163 (suggesting that in the 1990s, “[d]evelopment was seen as making an important contribution to climate change adaptation through strengthening entitlements and boosting the resilience of individuals and communities”); Ayers & Huq, *supra* note 90, at 682 (suggesting that “new development funds relevant to climate-change adaptation should be used to fund what the UNFCCC cannot; namely, broader resilience building, necessary for ‘additional’ adaptation to be successful”).

<sup>247</sup> Ayers & Dodman, *supra* note 87, at 164 (arguing that donor agencies are “‘climate-proofing’ their development investments,” which is not the same as integrating adaptation into development); see also *id.* at 166 (“Development practitioners have also begun to incorporate adaptation into their work.”); Schipper, *supra* note 206, at 6 (“[t]he disaster risk reduction community” and “development agencies” “have . . . placed adaptation on their agendas”).

<sup>248</sup> Ayers & Huq, *supra* note 90, at 676; Ayers & Dodman, *supra* note 87, at 161.

The debate about the effectiveness of development aid is potentially relevant to the idea of using existing development policy to reduce vulnerability to climate change. Empirical research suggests that foreign aid may not promote economic growth, although it is still possible that it reduces poverty. See, e.g., Eskander Alvi & Aberra Senbeta, *Does Foreign Aid Reduce Poverty?*, 24 J. INT’L DEV. 955, 955–59, 965–66, 968–69 (2012) (discussing their own findings and situating them within existing literature). Poverty reduction may be beneficial from the standpoint of reducing vulnerability to climate change because the poor typically are considered the most vulnerable to climate change. ASIAN DEV. BANK, *supra* note 2, at 45 (“[M]ore successful poverty reduction strategies can help alleviate climate change impacts and migration.”).

The literature on the effectiveness of aid also examines the effectiveness of different types of aid. For example, Alvi and Senbeta find that “aid from multilateral sources reduces poverty whereas aid from bilateral sources does not.” Alvi & Senbeta, *supra*, at 967. They also “find that grants have poverty-reducing effects whereas loans do not.” *Id.* This finding suggests that we should focus on boosting grants from multilateral donor agencies rather than grants or other aid from bilateral sources if we are interested in reducing poverty to facilitate adaptation to climate change.

<sup>249</sup> Ayers & Huq, *supra* note 90, at 677 (offering “a framework for using ODA to help build adaptive capacity at the national level in developing countries, in such a way as to complement rather than compete with Convention-based mechanisms for adaptation finance”). Under the framework recommended by Ayers & Huq, “mainstreaming adaptation into development across scales can help build adaptive capacity in partner countries and reduce ‘baseline’ vulnerability, on top of which Convention-based action on adaptation will be more effective.” *Id.* at 689.

For other proposals to use sources of funding for climate adaptation, including the Green Climate Fund, to address climate migration, see *supra* note 100.

(including their vulnerability to climate change),<sup>250</sup> adaptation funding is limited to addressing only vulnerability to climate change impacts.<sup>251</sup> Funding for adaptation probably is best considered funding for development, but development specifically targeted to reducing climate change impacts.<sup>252</sup>

To the extent that development proves inadequate and people are displaced, there are existing international sources of funding for migration and disaster relief that could be enlarged and better financed to help offset the costs that developing countries face in relocating and resettling individuals in a world where the climate is changing. A 2012 report prepared for the Asian Development Bank refers to several existing international sources of funding for migration and disaster relief that might be accessed by developing countries.<sup>253</sup> Adaptation funds established under the UNFCCC also potentially could be used to finance resettlement and relocation costs, assuming again that it is possible to tie these costs to climate change.

### 1. *Morality, Practicality, and Politics*

The idea of using development assistance, migration, and disaster relief funding sources does not raise the moral problem of creating a special funding source for climate migration. The idea also avoids the practical problems associated with creating special funds for climate migration that require demonstrating a link with climate change as a condition of eligibility.

Conceivably, the use of climate adaptation funds to address climate migration might raise moral and practical problems along the lines discussed earlier. Making climate adaptation funds available to address climate migration would result in a pool of funds available to address climate but not other forms of

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<sup>250</sup> Ayers & Huq, *supra* note 90, at 681 (“ODA has the remit to address a wider range of vulnerabilities than those included in the narrow definition of adaptation considered by the UNFCCC, and so could complement Convention approaches by addressing the underlying causes of vulnerability, thus increasing the effectiveness of climate-specific adaptations.”); *id.* at 680 (“An analysis of the categories of ODA activities reported by the OECD DAC countries demonstrated that more than 60% of all ODA could be relevant to building adaptive capacity and facilitating adaptation.”) (citing ELLINA LEVINA, OECD, ADAPTATION TO CLIMATE CHANGE: INTERNATIONAL AGREEMENTS FOR LOCAL NEEDS (2007), available at [www.oecd.org/env/climate\\_change/39725521.pdf](http://www.oecd.org/env/climate_change/39725521.pdf)).

<sup>251</sup> Ayers & Dodman, *supra* note 87, at 165 (“[T]he UNFCCC treats adaptation in the narrowest sense, as an issue of climate change, with adaptation actions limited to changes that are proven to be anthropogenic and distinct from climatic variability.”).

<sup>252</sup> Ayers & Dodman, *supra* note 87, at 165 (“adaptation and development are often viewed as synonymous” but “not all adaptation is development, and not all development contributes towards adaptation”); Ayers et al., *supra* note 39, at 273–74 (referring to the Least Developed Countries Fund, the Special Climate Change Fund and the Kyoto Adaptation Fund as “development-focused and enabl[ing] . . . investments in agriculture and food security, water resources, disaster preparedness and health”).

<sup>253</sup> ASIAN DEV. BANK, *supra* note 2, at 67–71 (referring for example to the IOM Development Fund, the IOM Migration Emergency Funding Mechanism, the United Nations Central Emergency Response Fund, and the Asian Development Bank’s Asia Pacific Disaster Response Fund). The report also emphasizes the use of market mechanisms to assist with the costs of climate migration, such as insurance products. *Id.* at 69–71. See also Hodgkinson et al., *supra* note 5, at 87 (referring to the potential to use existing disaster relief tools).

migration. However, if there is a moral problem here, it is unimportant. Since climate adaptation funds are mandated to address climate impacts, using these funds to address climate migration would be more likely to reduce funding for other types of climate adaptation measures than to reduce funding for other forms of migration.<sup>254</sup> On the other hand, there might be more meaningful practical problems with using climate adaptation funds to address climate migration because it would be necessary to establish that displacement is linked to climate change to be eligible for funding. In fact, some scholarship suggests that developing countries have already encountered practical difficulties in accessing climate adaptation funds for measures such as infrastructure projects because the funds must be used to address climate change impacts.<sup>255</sup>

The idea of using development assistance, migration, disaster relief, and climate adaptation funds might have some political appeal to developed countries. Relying on better-financed versions of these existing funding sources would have economies of scale and avoid duplication. However, the prospect of increasing the funding available to these sources is likely to be contentious given the current fiscal climate in many developed countries.

Some developing countries might oppose using better-financed versions of existing sources of development assistance and migration and disaster relief funding. Because developed countries historically have been the leading emitters of greenhouse gases, developing countries emphasize that developed countries have obligations to pay for the costs that climate change imposes on developing countries.<sup>256</sup> Developed countries also agreed as a matter of international law in the UNFCCC to “assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.”<sup>257</sup> Developing countries are likely to be concerned that developed countries will evade their responsibility for helping

<sup>254</sup> To be clear, this Article does not question the international community’s decision to establish climate adaptation funding sources. Developed countries are legally obligated to assist developing countries in adapting to climate change. United Nations Framework Convention on Climate Change, *supra* note 153, at art. 4.4. There are many moral, practical, and political justifications for climate adaptation funding not addressed in this article.

<sup>255</sup> Ayers & Huq, *supra* note 90, at 678 (discussing the difficulties that arise from the fact that the Least Developed Countries Fund and the Special Climate Change Fund “will only meet the costs of additional adaptation needs imposed on the country by the impacts of climate change”); Ayers et al., *supra* note 39, at 275 (distinguishing “between the impacts of climate change specifically, versus vulnerability to climatic variability more generally, has not been productive in terms of progressing action on adaptation in developing countries on the ground”).

Ayers & Dodman give the example of a “coastal infrastructure” project in Tuvalu. In Tuvalu, coastal “erosion . . . [is] a problem regardless of climate change (and so an existing development need), but one exacerbated by climate change (so also an additional cost). The [Least Developed Countries Fund] . . . will only fund the additional cost of adaptation. However, not only has distinguishing between ‘additional’ and ‘baseline’ adaptation needs on the ground proved extremely difficult, but, being a poor country, Tuvalu cannot afford to meet the costs of baseline infrastructure.” Ayers & Dodman, *supra* note 87, at 166; *see also* Ayers & Huq, *supra* note 90, at 679 (Tuvalu example); Ayers et al., *supra* note 39, at 277 (Tuvalu example).

<sup>256</sup> Ayers et al., *supra* note 39, at 275 (referring to the “arguments . . . that the responsibility for assisting the vulnerable developing countries to adapt to the impacts of climate change must be based on the ‘polluter pays principle’”).

<sup>257</sup> United Nations Framework Convention on Climate Change, *supra* note 153, art. 4.4.



with adaptation if climate migration is addressed using existing funding sources for development assistance, migration, and disaster relief, even if the idea is to use better financed versions of these sources.<sup>258</sup> Using non-climate funds to meet needs related to climate change might be regarded as undermining the idea that developed countries have special obligations due to their responsibility for climate change.<sup>259</sup> In addition, developing countries are unlikely to support using development institutions to distribute funding, because developing countries have little control over the governance of these institutions.<sup>260</sup>

Developing countries likely would be more amenable to the use of climate adaptation funds, especially newer entities such as the Green Climate Fund, over which developing countries have greater institutional control. Contributions to the climate adaptation funds may be more likely to be regarded by developing countries as representing contributions made on account of climate change, because the funds are specifically designed to finance adaptation to climate change.<sup>261</sup> Developing countries might insist on significantly higher levels of funding for climate adaptation funds if they were to be used to address climate migration.

#### CONCLUSION

In the past several years, the possibility that climate change may prompt large-scale human migration has attracted growing attention from scholars and policymakers. Discussion of climate change migration remains beset with uncertainty about the potential number of people who may migrate, and even about whether it will be possible to attribute many migration decisions to climate change. Nonetheless, scholars and others concerned about the lack of protections that would be available to climate change migrants have proposed new multilateral legal instruments to provide rights to climate migrants similar to the rights under the Refugee Convention, and to establish funds dedicated to assisting developing countries with the costs of climate migration. As dis-

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<sup>258</sup> See, e.g., Ayers et al., *supra* note 39, at 275 (developing countries support the distinction “between funding for building resilience for climate change (which is additional to development assistance) versus funding for building resilience to climate variability more generally (which could be included in development assistance contributions) . . . in order to prevent industrialized countries from incorporating adaptation funding into development assistance and thereby avoiding providing new and additional funding for adaptation under the climate convention”); Ayers & Huq, *supra* note 90, at 680 (same); *id.* at 682 (discussing the history of the World Bank’s Pilot Programme on Climate Resilience).

Ayers & Huq also raise the possibility that developing countries might be concerned about industrialized countries “earmarking aid for adaptation purposes and the imposition of ‘new conditionalities’.” *Id.*

<sup>259</sup> Ayers & Huq offer a possible way of addressing the concern that developed countries provide additional funds to compensate for climate change impacts: specifying that “new development funds relevant to climate-change adaptation should be used to fund what the UNFCCC cannot; namely, broader resilience building, necessary for ‘additional’ adaptation to be successful.” *Id.*

<sup>260</sup> Thank you to Bryce Rudyk for bringing this point to my attention.

<sup>261</sup> See, e.g., Ayers et al., *supra* note 39, at 272–75 (tracing the history of the Least Developed Countries Fund, the Special Climate Change Fund and the Kyoto Protocol Adaptation Fund).

cussed above, these proposals for special rights and funding for climate migration raise a host of issues.

Fundamentally, the recent discussion about climate migration underscores that many parts of the world are vulnerable to climate change and that it is necessary to address this vulnerability given the inevitability of climate change. This article has identified a series of legal and policy responses aimed at increasing resilience that would not require a new binding multilateral instrument focused on climate migration. These non-treaty proposals may not initially be as attractive as the proposals for new binding multilateral regimes, but these non-treaty proposals stand a better chance of addressing the root causes of concerns about climate migration. While contentious in certain respects, these proposals also are likely to be less vulnerable to the moral, practical, and political limitations undermining the proposals for a new legally binding multilateral instrument.