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**The American University in Cairo  
School of Global Affairs and Public Policy**

**BECAUSE WE CANNOT WALK ON WATER**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Meriam Rizkallah**

**June 2017**

The American University in Cairo  
School of Global Affairs and Public Policy

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The American University in Cairo  
School of Global Affairs and Public Policy  
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## BECAUSE WE CANNOT WALK ON WATER

Meriam Rizkallah

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### ABSTRACT

Climate induced migration became a recognized phenomenon. Due to the adverse effects of climate change, populations in certain affected areas will start to move either as a form of adaptation or because of failure to adapt thereof. The main questions raised are concerned with the rights of the people displaced. On the other hand, what obligations do states and the international community have to provide protection for these populations. This paper argues that climate migrants are not protected from both the causes and effects of climate change. The international environment governance system does not seem to have regulated the process that guarantees global environmental protection. On the other hand, if people start to move due to the effects of climate change, they will fall from the existing gaps in the international protection system. This paper also specifically looks at the moral dimension of the phenomenon of climate change, and presents why moral questioning is of value when dealing with such contentious issue. It also speaks to the no-harm principle being a fundamental principle in international law and specifically to environmental law. Despite its importance, this principle is usually neglected when formulating policies on climate change. It argues that the no-harm principle was missing from the context of Paris Agreement, and thus kept the prospects of harm in place. It does this by its commitment to industrial growth and avoiding having emission reduction targets. As well, this paper discusses how climate migrants are not adequately addressed in Paris Agreement due to certain geopolitical settings, sustaining the possibility of them remaining highly vulnerable. This paper highlights legal and moral failure of the international society towards climate change at large and towards climate migrants in particular.

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## **I. Introduction**

Climate change is a major concern to the international community. Its impact on migration is increasingly becoming a matter of concern for researchers and policy makers. Even though the nexus between climate change and migration is still under scrutiny due to its nonlinear nature, and complexity of its relations. Climate change movement can be seen as a form of adaptation to a new situation, or because of failure to adapt. This movement is not clearly acknowledged in the international legal system. While the world has recognized other forms of movements such as the movement of economic migrants and refugees', and coined international legal instruments to deal specifically with them. However, international law does not specifically recognize this movement induced by climate change. Nevertheless, climate migrants can still get ad hoc protection under international human rights law. As for litigation, it does not seem to have worked in their favor; accessing courts was not much of a success due to the need of resources that might not be available for climate migrants. Although human mobility is highly bound to international laws, climate migrants struggle to make an appearance in it.

Climate change, as a phenomenon presents us with distinct challenges. The first one involves coping with the changing climate itself; for the societies who do not have the capacity to adapt to the new changes, the effects will be devastating. The effects will have ramifications in their social, economic and political systems; and could seep into the international system as well.

The second challenge is climate change being seen a moral issue poses dramatic challenge to moral consciousness. What is of relevance to this paper is the connection to self-interest at one end and harm at the other end. Climate change is linked to the no harm principle on two levels: first is the theoretical, ethical and moral level, second is the international law level. Although the no-harm principle is reflected on both, it has rarely been invoked when shaping policies tackling climate change.

From this stand, a brief assessment of the main aspects of the Paris Agreement will be carried out since it is the most recent international agreement concerning climate change. The assessment focuses on the absence of the no-harm principle from the agreement and how this will affect the endurance of the climate change problem, and will also have an effect on climate migrants. The paper highlights the legal and moral failure of the international society towards climate change at large and towards climate migrants in particular.



It is important to mention that this paper does not aim to propose what could be possible solutions to the climate migration problem. For the reason that the perception towards it is arguably one-sided, being in fact produced by the causers of climate change not the affected ones. After all, migration might not be the solution sought by the victims of climate change.

## **II. Climate Migrants and their place in the International Legal System**

The history of humankind is one of continuous migration; the environmental and climatic changes have been some of the reasons for peoples' movement since the beginning of time.<sup>1</sup> This chapter covers the broader issues of climate change and its related movement, and where this movement is positioned in the international legal system. It analyzes the existing international legal instruments that could provide protection to climate migrants. Under the assumption that this specific population has fallen through the protection nets of international law. It examines international refugee law, international law on migration, statelessness laws and customary international law. It also problematizes the aspect regarding the production of knowledge and the construction of the climate change problem, its related movement and the proposed solutions. It also examines the labelling of "climate refugees" and how this naming is perceived by the concerned people.

### **A. The Effects of Climate Change**

It is now generally accepted that climate change will have widespread impact on both people and the environment, and that people will have to find adaptive measures to survive <sup>2</sup> including migration. In spite of it being widely discussed, there is, as yet, no solid forecast on the potential scope and the magnitude of the phenomenon.<sup>3</sup> Predictions range from 200 to 250 million people on the move, rocketing to possibly a billion people moving by the middle of the 21<sup>st</sup> century for the more nightmarish predictions.<sup>4</sup> It is believed that the least developed countries are going to be the first affected and the worst impacted in terms of climatic changes and production of migrants. Regions expected to produce the most climate migrants include Africa, heavily populated Asian mega delta areas, and small island nations located in the Pacific.<sup>5</sup>

For the purpose of understanding the scope of the climate change phenomenon and its entailing, multifaceted problem of climate induced migration, it is important to provide background on the effects of climate change.

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<sup>1</sup> Map of Human Migration, Genographic Project, *available at*: <https://genographic.nationalgeographic.com/human-journey/> (last visited Dec 21, 2016).

<sup>2</sup> Rafael Leal-Arcas, Climate Migrants: Legal Options, 37 *Procedia - Social and Behavioral Sciences* 86-96 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

There are three main effects of climate change: an increase in temperatures, an increase in precipitation, and a rise in sea levels. Firstly, the total temperature increase from 1850–1899 to 2001–2005 was 0.76°C (IPCC), and scientists expect that the average global surface temperature could continue to rise by 1-3.5°C by 2100, with significant regional variation.<sup>6</sup>

Most of the warming is believed to have been caused by human interference and industrialization activities such as the burning of oil, coal and other fuels that release carbon dioxide, as well as other Greenhouse Gases (GHG). As a consequence, the mass of ice in the Northern Hemisphere and in the Arctic Ocean are shrinking.<sup>7</sup> The anthropogenic interference is mainly important because it associates the responsibility for the changes to the developed nations as major contributors to the problem, and thus obliged to provide adequate reparations for the harm done.

Secondly, as the climate warms, evaporation will increase, which will increase average global precipitation, with ranges of variation by region. Soil moisture is likely to decline in many regions, and intense rainstorms are likely to become more frequent.<sup>8</sup>

Thirdly, globally, sea levels have risen 4-10 inches over the past century as a consequence of global warming, due to the melting of glaciers. There are variations on the effect of rising sea levels depending on the region. It could contaminate the aquifers that supply drinking water to the Caribbean islands, while entire Pacific island nations might simply disappear under the sea.<sup>9</sup>

As a result of these climate changes, people have already begun to move, and this movement is likely to increase in the future. This climate induced displacement has serious consequences on many levels as will be discussed in the coming pages. Most of the movement is likely to be an internal one. However for the ones who have no option but to move from their own country to another, will have no right to enter host countries.

Looking at the leading causes of climate induced migration helps to clarify the phenomenon. Five types of problems have been identified: sudden-onset disasters such as flooding or storms, slow-onset disasters such as rising sea levels and increased salination of freshwater, sinking small island States which are perhaps a special case of a slow-onset disaster, governments designating areas as

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

high-risk zones too dangerous for human habitation on account of environmental dangers, and unrest seriously disturbing public order, violence or even armed conflict resulting from the depletion of natural resources due to the effects of climate change.<sup>10</sup>

Generally, it is the extremely poor who will be the most severely impacted by climate change. Their vulnerability arises by virtue of their own poverty; poverty affects their resilience and highly affects their adaptability. It also affects their ability to move, since movement needs access to resources whether monetary or access to information. Usually, it is the worst off who become stuck in a depleting environment.<sup>11</sup> It is also worth mentioning that even if we lived in an equal world, the impact of climate change will still have distinct regional variations; making certain areas more prone to experience more adverse effects of climate change than others.

### **B. Climate Change, climate induced migration and legal contestation**

There have been many options under international law that were proposed to deal with peoples' movement. These include Refugee Convention of 1951, international law on migration, statelessness laws and international human rights law. However, arguably none of them seem adequately designed to fit the protection of people moving due to the effects of climate change.

Some commentators have suggested that the existing treaties and institutions suffice to address climate adaptation; however these treaties arguably will not solve the humanitarian issue.<sup>12</sup> If victims of climate change are forced to resettle, some argue that they should be able to recover damages for harms received.

There are several possible legal bases for the establishment of a violation of international law, nevertheless not necessarily guaranteeing results. These include breaches of treaty claims under the UNFCCC, the human right of self-determination, the duty under the Convention Concerning the Protection of the World Cultural and Natural Heritage to preserve natural and cultural heritage, and UNCLOS protections against ocean acidification.<sup>13</sup> Under customary international law, every state has an obligation not to knowingly allow its territory to be used for acts that are contrary to

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

the rights of other states. This requires states to refrain from using their territory in a way that causes environmental harm beyond their borders.<sup>14</sup>

### **C. What protection?**

My interest in this topic was sparked by the implications of climate change that my hometown Alexandria, Egypt is experiencing. Like many delta systems, the coastal zone of the Nile delta has been designated as a vulnerable zone to a rising sea level as a consequence of expected climate changes combined with geological and human factors.<sup>15</sup> Risks of displacements are likely to occur as well.<sup>16</sup>

Nonetheless, the main focus of this paper is concerned with the protection of climate migrants in case they cross an international border. For the reason that, if they are internally displaced they would still have some options of protection from normative frameworks like protection as an internally displaced person or under humanitarian aid modalities. On the contrary, if displacement occurs across an international border, the protection options will arguably not be applicable to this specific situation; identification of a duty holder to a population moving due to the effects of climate change will not be easily recognized by states.

Before proposing protection options under international law towards climate change induced migrants, it is useful to identify, what kind of protection there is. Ideally, protection would happen in three stages: before, during and after displacement.<sup>17</sup>

Protection, can be defined as both a material commodity such as shelter and a set of processes or actions which may be responsive; reducing imminent, life-threatening risks, remedial; restoring rights after a disaster or displacement, and proactive; enhancing dignity of treatment and advocacy for environmentally displaced people. Protection as a process or action intrinsically derives from, and is underpinned by, law and legal concepts.<sup>18</sup>

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<sup>14</sup> Jane McAdam, *Climate change, forced migration, and international law* (Oxford University Press) (2012).

<sup>15</sup> J. McInnis, S. Singh & I. Huq, *Mitigation and Adaptation Strategies for Global Change* (2016), <http://link.springer.com.libproxy.aucegypt.edu:2048/article/10.1007%2Fs11027-015-9682-8> (last visited May 2, 2017).

<sup>16</sup> H. ElSharkawy, I. Rached & H. Rached, *Climate Change: The Impacts of Sea Level Rise on Egypt* (2009).

<sup>17</sup> Roger Zetter, *Protecting environmentally displaced people: developing the capacity of legal and normative frameworks* Rsc.ox.ac.uk (2017), *available at* <https://www.rsc.ox.ac.uk/publications/protecting-environmentally-displaced-people-developing-the-capacity-of-legal-and-normative-frameworks> (last visited Mar 25, 2017).

<sup>18</sup> *Id.*

#### **D. Conceptual framework of climate migration phenomenon**

It is important to highlight a distinct feature of climate change related movement; Jane McAdam among other scholars stress on the fact that it is inherently fraught to speak of climate change as “the” cause of human movement, even though its impacts may exacerbate existing socioeconomic or environmental vulnerabilities. Rather, climate change will have an incremental impact adding to existing problems and compound existing threats.<sup>19</sup>

Migration can be a strategy of adaptation to climate change. The complexity of migration decision and the interconnectedness of environmental economic, social and political factors make it virtually impossible to provide an accurate estimate of people who actually “move” because of climate change.<sup>20</sup> Although the exact number of people that will be on the move by mid-century is uncertain, the scope and scale could vastly exceed anything that has occurred before.<sup>21</sup>

The growing body of empirical research shows that in most cases, climate change related movement is likely to be predominantly internal and/or gradual. This accords with migration patterns generally, which indicate that while there are around 200 million international migrants, there are approximately 740 million internal migrants.<sup>22</sup>

There will be some cross border movement on account of the climate change impacts, however not in the magnitude often predicted. Since the bigger mass of movement is internal, is it likely to remain an invisible phenomenon in bureaucratic and international legal terms. The construction of the problem substantially shapes the legal and policy interventions. Basically, migration can be seen either way; a sign of adaptation or failure to adapt.<sup>23</sup>

Although some communities have turned to migration in order to cope with climatic changes, nowadays it is particularly troubling because of its speed, frequency and scale and needless to say the number of people it is poised to affect. What is particularly troubling is that this phenomenon is affecting primarily developing countries; the rate and scale of climate induced migration will exhaust the traditional adaptive capacity of many human communities, placing them in vulnerable

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<sup>19</sup> *Supra note 14*

<sup>20</sup> *Id.*

<sup>21</sup> Michel Prieur et al., Draft convention on the international status of environmentally- displaced persons (2008).

<sup>22</sup> *Supra note 14*

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

positions and with limited mobility options. The irony confronting developing states is that, though they have contributed the least to greenhouse gas emissions, they will ultimately bear the bigger chunk of the burden.<sup>24</sup> For those facing environmental displacement, migration has become a “survival mechanism of last resort.”<sup>25</sup>

The affected people face a two-fold injustice; they have not primarily contributed to the problem of climate change, however they are paying the price of the development of other countries. Yet, they do not have a protection mechanism if a decision to migrate is taken.

### **E. Is leaving a choice?**

There is another aspect regarding climate induced migration that generally relates to choosing and/or shaping legal or policy discourse that is the nature of the movement itself. It involves whether the migration is voluntary or forced, temporary or permanent and whether this movement is internal or across an international border. Of these, the first is especially complex in relation to slow-onset climate change.<sup>26</sup> A progressive form of rights protection norms is advocated to take account of the transition from migration which may start as a voluntary process, however may become involuntary or forced where permanent depletion of resources render livelihoods impossible.<sup>27</sup>

Human movement is theorized as continuum, with two almost indistinguishable splits of forced migration at one end, and voluntary migration at the other. The degree of compulsion or choice is what pushes people to take the decision to move. However, international protection regime will arguably favor those who move involuntarily and their protection is premised as the responsibility of other states, extending legal protection under international law, possibly under non-refoulement obligations.<sup>28</sup>

Voluntary migration by contrast does not activate international legal duties beyond the states' obligation under human rights law. The state basically owes protection to all of the people within

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<sup>24</sup> *Id.*

<sup>25</sup> Xing-Yin Ni, A Nation Going Under: Legal Protection for “Climate Change Refugees”, 38 B.C. Int'l & Comp. L. Rev. 329 (2015), available at <http://lawdigitalcommons.bc.edu/iclr/vol38/iss2/7>

<sup>26</sup> *Supra note 14*

<sup>27</sup> *Supra note 17*

<sup>28</sup> *Supra note 14*

its territory falling under its jurisdiction; however it does not have an obligation to extend it further.<sup>29</sup> In other words, they can still be deported if the state demands so.

This neat categorization of movement reveals an enormous degree of complexity in decision making. Slow onset impacts of climate change, in particular, pose a challenge to the traditional understanding of “forced” migration. People may have no prospect of a sustainable livelihood if they remain in their home, as they may not appear to be facing an imminent harm.<sup>30</sup>

It can be said that the nature of the movement stands on highly fluid grounds. Categorically, it is not exactly forced yet not entirely voluntary either. The availability of options erodes. Leaving them with the plausible option of migration to preserve their existence and possibly provide them with another opportunity to establish a livelihood elsewhere.

These conceptual issues result in the lack of uniform terminology used to describe people who move in response to impacts of climate change. The fact that there is still no internationally agreed-upon definition of what it means to be an environmental migrant, refugee or displaced person makes it difficult to systematically progress deliberations about appropriate multilateral legal and institutional responses.<sup>31</sup> It seems that the international legal system has imposed legal recognition indeterminacy upon this population. Whether this is deliberate or not, the consequences of “ad hoc” protection will continue to leave this population in this legal and physical limbo.

## **F. An invisible population**

Generally, there is no international consensus on the definition of people on the move. Climate migrants are no different, since there is no consensus on the definition of “climate” or “environmental migrants.”<sup>32</sup>

In 2001, Richard Black complained that there are abundant typologies of “environmental refugees” and “environmental migrants” however there is no agreement, nor concrete understanding of what these categories really mean. Some literature have attempted to clarify the definitions during the

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Benoît Mayer, *International Law And Climate Migrants: A Human Rights Perspective* (2011).



last ten years, however it remains unclear because of the lack of an official or a widely accepted definition.<sup>33</sup> Generally, the notion of “climate migrant” coexists with that of “environmental migrants.” However, the IOM defines environmental migrants as those who:

for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.<sup>34</sup>

Adopting a pragmatic approach, this definition indiscriminately includes people displaced by climatic events as well as by climatic processes, moving permanently or temporarily, those who have made the choice to move and the ones who were forced to move; it puts all the effects and those affected in one basket.<sup>35</sup>

The focus of this paper is on those moving as climate migrants and not environmental migrants, people only moving due to the effect of global climate change as opposed to those moving due to any changes in the environment. This nuance is important because climate migration inflicts responsibility upon the international community that has caused climate change, and sometimes even stays silent on its proliferation.<sup>36</sup>

On the other hand, there is another term that is used to describe people displaced due to climate changes: climate refugees. McAdam states that it was first used in an international bureaucratic discourse in a report to the UNEP by El-Hinnawi in 1985. This term was to describe people forced to leave their traditional habitat temporarily or permanently because of marked environmental disruption whether natural/and or triggered by people that jeopardized their existence or seriously affected their quality of life.<sup>37</sup> El-Hinnawi used the language of refugee to draw attention to the damaging effects of anthropogenic climate change on human settlement rather than to advocate for the extension of the international protection regime to people displaced by it.<sup>38</sup>

Karen McNamara, on the other hand, states that the emergence of the term “environmental refugee” can be dated back to nuclear testing in the post Second World War. The first document

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<sup>33</sup> *Id.*

<sup>34</sup> Definitional Issues, International Organization for Migration, *available at* <https://www.iom.int/definitional-issues> (last visited May 2, 2017).

<sup>35</sup> *Supra note 32*

<sup>36</sup> *Id.*

<sup>37</sup> *Supra note 14*

<sup>38</sup> *Id.*

found explicitly identifying “climate refugees” was published by the Worldwatch Institute in 1988. This Institute is an NGO that conducts research into the interactions between environmental, social and economic issues. In that document it was explained that local disruptions such as avalanches or earthquakes, chemical contamination, land degradation, climate change and sea level rise all cause refugee movements.<sup>39</sup>

There is no doubt that the term “refugee” is of an alarming weight in the international arena because of the history behind it and the legacy it carries. This maybe the reason why this term has been chosen to describe these people rather than any other one. From McAdam’s point of view El-Hinnawi was not trying to mount any legal or even ethical argument about the extension of refugee law to people displaced for environmental reasons, rather it was to highlight the potential devastation caused by anthropogenic climatic changes and the resulting movement. Thus, refugee language was used as a tool for advocacy.<sup>40</sup>

The misplacing of the term “refugee” to a population that does not necessarily fall under this category, for advocacy reasons is rejected by forced migration scholars. While it might generate attention and mobilize action, it can also contribute to misunderstanding about the likely pattern, timescale and nature of climate change related movement.<sup>41</sup>

### **G. Problematizing the notion of climate refugees**

Before turning to the existing legal instruments available to climate migrants, it is important to shed light on how different individuals, organizations and media perceive and translate information on this subject into their own thinking. Thus, it could be relevant to pay critical attention to the way climate change is portrayed and fed to the masses.<sup>42</sup>

As stated before, a lot of labels and discursive categories have been associated with climate change and its related movement in which processes, people and phenomenon has been squeezed to fit.

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<sup>39</sup> Karen Elizabeth McNamara & Chris Gibson, ‘We do not want to leave our land’: Pacific ambassadors at the United Nations resist the category of ‘climate refugees’, 40 *Geoforum* 475-483 (2009).

<sup>40</sup> *Supra note 14*

<sup>41</sup> *Id.*

<sup>42</sup> *Supra note 39*

“Polluter”, “problem”, “adaptation”, “climate friendly”, “mitigation”, “clean coal” and “solutions” are just some examples; and the long list goes on.<sup>43</sup>

Some of these categories have quickly come to assume “common sense” or “naturalized” meaning. Understanding the emergence of these categories and their underlying cultural and political meanings is thus crucial, not just for the “truth-claims” they may support (or alternative truths they shroud from view). Rather, understanding the etymology and effect of these categories makes a difference because they generate their own altered realities, set the terms of debates, change political landscapes and shift power relationships among people, institutions and non-human entities.<sup>44</sup>

The category of “climate refugees” is a particular discursive category into which certain groups of people have increasingly been placed as the climate change debate has escalated, although it has no legal basis. What is important, is how leaders from the Pacific Islands who represent some of the affected populations responded to such categorizations, by untangling the multiple threads of geopolitical meaning about the future associated with it.<sup>45</sup>

The position of the populations severely affected by climate change, and the exposure of the geopolitical meaning of their arguments can be seen in interviews conducted with Pacific small islands states ambassadors in 2004. These interviews reveal the views of the endangered Pacific island states towards the term they were being called by: “climate refugees”. Not surprisingly, the subject category of “climate refugees” was strongly resisted by Pacific ambassadors; adamant and articulating their own identities as sovereign people<sup>46</sup> in spite of risking possible future legal recognition of their human rights.<sup>47</sup> It is a case that highlights the fluidity of meanings surrounding climate change categories and the perils of constructing political arguments based on discourses of victimhood.<sup>48</sup> The dominant view of the Ambassadors was different from those of the mainstream discourse.

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

For the Ambassadors, climate change must be controlled to prevent them from having to leave their lands. Exodus was simply not part of an acceptable future scenario for them.<sup>49</sup>

The subtext to this narrative is that the people affected were weak, passive victims with little internal resilience to fight for much more than relocation. The geopolitical context was mainly reluctance from industrialized countries to accept climate change as a problem; hence depictions of entire countries disappearing beneath the sea performed a particular function that is contributing to a counter-discourse, problematizing inaction by western governments on climate change.<sup>50</sup> In relation to these environmental injustices, Pacific islanders ought to have been given protection and options to legally resettle elsewhere away from the apocalyptic future environmental scenario.<sup>51</sup>

Basically, Pacific Island leaders urged international leaders not to make decisions for them in their fight against climate change, stating as well that they do not want to become people on the move, neither do they want to see their lands eroded, or economies destroyed, nor their lands drown. They wanted the assistance of the more affluent nations and international community to help them in that fight.<sup>52</sup> These ambassadors avoided welcoming migration, for it would have sent the message that they had effectively given up on mitigation measures to avert future impacts of climate change.<sup>53</sup> More importantly, they wanted to stress on the fact that that they have been threatened by the effects of climate change not because of something they caused themselves, but that was caused by the deliberate actions or inactions of other countries.

They also demanded that such an imposed identity be replaced with an acknowledgement of them as citizens of sovereign, independent nations, a homeland from which people did not wish to flee by becoming “climate refugees”. This was a reaffirmation of the stance of the affected people in the face of mainstream discourses produced by organizations and people who not part of the problem and having the audacity to suggest measures of adaptation that were not adopted by the people involved.<sup>54</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

It can be concluded that at the heart of the contestation over the category of “climate refugees” is a geopolitical tension between visions of the future. The vision for the future validating the category of “climate refugees” is based on Pacific islands being perceived as weaker, marginal nations having to adapt in the most extreme way to problems created by large, polluting nations rather than those polluting nations curbing their own emissions as “The solution”. In contrast, Pacific nation ambassadors envision a future as self-determining nation-states, and thus, strongly resist policy discourses that legitimize their possible future displacement en masse.<sup>55</sup>

Although these ambassadors as an example of climate change induced migrants might not be a representation of the category of climate migrants as a whole, it does give insight into how the formulation of the problem and its categorization is inherently an inadequate representation of the viewpoint of the populations involved. It is a possibility that the islands’ situation is different because their lands are going to be uninhabitable or disappear entirely in the worst scenario. However, these ambassadors had the chance to convey the point of view of the actual people facing the reality of climate change on the ground and in its most violent mode. This proposition does not necessarily deny that migration could be a reality and a possible option when the effects of climate change make a land uninhabitable.

However, the situation of the islanders was a needed intervention to demonstrate how the shaping of the problems and proposed solutions are not necessarily in harmony with the actual problem on the ground. The following section will assess the legal instruments and identifies gaps which leave climate migrants unprotected.

## **H. International legal protection and identified gaps**

It is obvious that climate change poses significant challenges to international law. This is because issues regarding climate change permeate national boundaries, and defy the structure of how the world operates. Emissions or actions in one state can have adverse effects in other ones, areas which these states have no jurisdiction over<sup>56</sup> not to mention how climate change effects transcend

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<sup>55</sup> *Id.*

<sup>56</sup> Philippe Sands, Climate Change and the Rule of Law: Adjudicating the Future in International Law, 28 *Journal of Environmental Law* 19-35 (2016).

the time factor as well; emissions take time to materialize in the atmosphere, posing a more complex problem with both a temporal and spatial dimension as will be explained ahead.

This paper argues that the populations who will suffer the consequences linked to climate change relating to displacement do not have special legal protection under international law. However, the principles of international human rights law, refugee law, statelessness laws and general international law, principles of dignity humanity and international cooperation provide normative framework which underpin a variety of legal and policy strategies.<sup>57</sup>

In addition, there is a number of “soft laws” issued regarding internally displaced people that could be applied to climate migrants, to mention: The Guiding Principles on Internal Displacement. However, its scope of application is relatively narrow, and there is a number of obstacles that could hinder its implementation.

### **I. International law on migration**

The regulation of migration is one of the processes that affirm state sovereignty and power over a state’s borders. Arguably, because migration is an issue that invokes sensitivities, and states deal with it on its own terms. This is probably why legally binding instruments related to migration are unpopular in terms of number of signatories compared to other instruments.

Despite migration issues being under the international spotlight currently and despite all of the crises taking place, there is still no uniform definition of what a migrant is. However, the IOM has formulated a definition that describes a migrant as:

any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.<sup>58</sup>

One of the conventions that is turned to for protection of climate migrants is The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. However, this instrument is not adequate for the protection of climate migrants because it mainly

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<sup>57</sup> *Supra note 14*

<sup>58</sup> Who is a migrant? International Organization for Migration, <https://www.iom.int/who-is-a-migrant> (last visited May 3, 2017).

recalls internationally recognized human rights in the specific case of migrant workers or aliens. Its low rate of ratification shows that few states are keen to recognize and protect even the basic human rights in the case of economic migrants. In other words, the status of “migrant” does not provide climate migrant with any additional protection.<sup>59</sup>

The Convention restates many of the rights provided under other, more general human rights instruments, including the right to life and freedom from torture or to cruel, inhuman or degrading treatment or punishment in Part III. Article 64 of The Convention requires that ‘the States’ Parties concerned shall as appropriate consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families’.<sup>60</sup>

On the other hand, the same convention under article 79 gives the right to state parties over the control of the admission process to set criteria that govern admission of the migrants and their families. This broad protection could have far reaching consequences for those who migrate to find employment from a place made uninhabitable by climate change.<sup>61</sup>

Similarly, Article 22 controls the expulsion process; migrant workers cannot be collectively expelled, and if they are to be expelled it has to be undertaken by a competent authority and in accordance with the rules of procedural fairness, unless compelling reasons of national security suggest otherwise. In such a procedure, a migrant worker could potentially raise the environmental conditions in their country of origin as a factor to be taken into account by the decision-maker considering their expulsion.<sup>62</sup>

In spite of these indications, the Convention is silent as to the weight that may be given to such consideration. It is unlikely that this Convention would provide protection for many, if any, of those who flee internationally because of environmental factors and who arrive in another state because of their employment.<sup>63</sup>

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<sup>59</sup> *Supra note 32*

<sup>60</sup> *Id.*

<sup>61</sup> *Supra note 17*

<sup>62</sup> *Supra note 17*

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

## J. International Refugee Law

Some consider turning to the Refugee Convention of 1951, to seek protection for displaced people from climate change. However, many have argued against this proposition. Some have raised historical reasons; stating that this Convention responds to the post-war context, and ecological catastrophes were not on the agenda, even if there had already been natural disasters, it does not even appear in the Travaux Préparatoires of the Convention.<sup>64</sup>

Most importantly, there are insurmountable legal barriers to invoke this Convention. The environment does not appear as a cause of migration, and Article 1 requires that the person claiming refugee status be the victim of “persecution”; and to establish an argument that proves well-founded fear of persecution on account of race, religion, nationality, social group or political opinion. It is exceptionally difficult to assimilate natural disasters into a new form of persecution, even if some have made the effort to do so.

The term “refugee” is a legal term with highly specific features. The Refugee Convention sets out all the rights and the entitlements of a refugee.<sup>65</sup> Article 1(A) (2) of the 1951 Convention defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

First, as per the definition, a refugee is recognized as someone who has crossed an international border. As stated before, the movement caused by climate change is going to be mostly internal, not necessarily moving and crossing an international border, thus this requirement arguably will not be fulfilled by most of the people moving due to climate change. However, this does not deny the right of protection for the fewer numbers that are going to be internationally displaced, who are the main focus of this paper.

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<sup>64</sup> *Supra note 32*

<sup>65</sup> UN High Commissioner for Refugees (UNHCR), *Climate Change Displacement and International Law: Complementary Protection Standards*, 1 May 2011, PPLA/2011/03, *available at*: <http://www.refworld.org/docid/4fdf20022.html> [accessed 5 May 2017]



The second is the matter of proving an occurrence of persecution. There is difficulty in the characterization of climate change as such. Persecution entails violations of human rights and is sufficiently serious because of their inherent nature or because of their repetition (accumulation of breaches that are not individually serious however, by putting them together constitute a serious violation).<sup>66</sup>

Even if the impact of climate change could be considered as persecution, the Refugee Convention has set requirements on their account an individual's race, religion, nationality, political opinion or membership of a particular social group. In other words, persecution alone is not enough; discrimination must also be present. This is unlikely, as climate change impacts are indiscriminate; and not targeted at a certain background, belief or race.

Even the argument that some have put forward that the people affected by its impact could constitute a "particular social group" would still be difficult to establish, because the law requires that the group must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.<sup>67</sup>

There are two other points that arise in the context of a refugee as identified in the Convention. First is the point of the state as a persecutor and the second is the motivation or intent. In the flight of a refugee outside his/her country, it is because of a situation of persecution done by the state and inflicted on a person. On the other hand, the climate as "persecutor" is indiscriminate in its "persecution"; it does not recognize who is against the state and who is not; it affects in an undifferentiating manner.

One might argue that the "persecutor" in cases of environmental displacement in developing countries, is the "international community", and industrialized countries in particular, whose continuous emissions have led to the problem being faced; these are the very countries in which movement might be sought if the land becomes unsustainable.<sup>68</sup>

As McAdam states, that it is considered as a complete reversal of the traditional refugee paradigm, whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not

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

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

<sup>68</sup> *Id.*

escaping his or her government rather is seeking refuge from and yet within countries that have contributed to climate change, or possible any other country that is nearest to them. This presents yet another problem in terms of the legal definition of “refugee” in the case of countries severely affected such as Tuvalu and Kiribati, the government remains willing to protect its citizens, although the extent of its ability to do so over time is unclear.<sup>69</sup>

The assessment of the future harm in the Refugee Convention to the climate induced migration might be another aspect that hinders the application of the 1951 Convention. This assessment of risk of potential future harm requires evidence of an actual threat even though it is not a requirement for a refugee claim to be substantiated; it is an anticipatory flight. However, refugee jurisprudence has clear limits on how preemptive flight may be. The plausibility and reasonability of fear is a must in all circumstances, while the assessment of the risk of persecution is prospective with the risk of harm being even less than a fifty percent chance.<sup>70</sup> This includes consideration for the relation between the nature of persecution feared and the degree of likelihood of its happening. It is this element of time that poses particular difficulties for preemptive movement away from the slow onset impacts of climate change.<sup>71</sup>

Consequently, protection is premised on the fact that the person is compelled to leave because of it. This preemptive protection like the one provided here is limited in cases of environmental or climatic changes that stretch over long intervals of time like desertification.<sup>72</sup>

What poses even a greater difficulty in extending this instrument to populations affected by climate change, is the impossibility of isolating underlying stressors and identifying climate change as a cause of an individual extreme weather event. This is why it is almost impossible to establish a link between climate change and the reason for individual flight.<sup>73</sup>

Lastly, there remain limited exceptions where exposure to climate impacts or environmental degradation might amount to persecution for a Convention reason. If a government specifically targets a certain population by using for example induced famine by destroying crops or poisoning

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<sup>69</sup> *Id.*

<sup>70</sup> *Supra note 14*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

water, or contributed to environmental destruction by polluting the land and/or water. In this case the affected people might argue for protection based on a Convention reason.<sup>74</sup>

It is important to include how courts have dealt with the issue of climate change related displacement. Superior courts around the world have explained that the Refugee Convention does not extend or cover individuals looking for better living conditions, nor the victims of natural disasters whose states are unable to provide them with assistance, even though they seem to deserve international sanctuary.<sup>75</sup>

The High Court of Australia has stated that the requirement of “persecution” limits the Convention’s “humanitarian scope” and does not afford universal protection to asylum seekers. The devastation caused by such natural disasters, famine or an epidemic is not relevant; a person fleeing such circumstances is not considered a refugee within the terms of the Convention; they fall outside the scope.<sup>76</sup>

People from climate change affected places like Tuvalu and Kiribati have tried to file court cases albeit small in number in Australia and New Zealand, arguing to receive refugee protection from climate change impact. Applicants from Tonga and Bangladesh have sought protection on the basis of natural disasters. Apparently, they have all failed, this paper will demonstrate an example of these failed cases; as will be shown ahead from the famous case of Teitiota from Kiribati.<sup>77</sup>

Similarly, The House of Lords observed the limited scope and objectives of the Convention not providing protection in cases of threats to life due to famine, civil war or isolated acts of violence. Even if the applicant may have a well-founded fear of the previously mentioned threats, no matter how well-founded the fear is, it does not entitle the applicant to the status of a refugee.<sup>78</sup>

In conclusion, international refugee law is a cumbersome framework for addressing flight from climate change related impact. Its design and the original context it was made for in most cases is

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<sup>74</sup> *Supra note 65*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

inadequate for responding to climate change induced movement.<sup>79</sup> What stands out is, first, that the bulk of the movement is going to be internal not crossing an international border, and second, it does not fit adequately in the time dimension of preemptive movement.<sup>80</sup>

### **K. Statelessness Conventions**

Even though it might look like a far-fetched option, some have turned to the international legal system for the protection of the cases of statelessness, in the hopes that it could be applied to some climate migrants.<sup>81</sup> This option raises many questions on the nature of “statehood” itself having to have a territory, a population and a government to enter with relations with others. The question is whether the state ceases to exist if any of these is missing. It is uncertain whether these conditions must be respected continuously after the state has been recognized.<sup>82</sup>

It is likely that the populations who are going to invoke these Conventions are the Pacific Islands states that are foreseen to be eventually submerged under the sea or at least to be uninhabitable. Without going into detail of the legal dimensions of what constitutes a , and whether it may still virtually exist even after it is submerged, the important thing to mention is that international law does not provide stateless persons with a plethora of rights and in particular does not grant the right to enter a territory.<sup>83</sup>

The Convention relating to stateless persons ratified by only 66 states, prohibits the expulsion of stateless persons except on the grounds of national security or public order; however this is only under the condition of lawful stay in the territory.<sup>84</sup> At the same time, the notion of the reduction of statelessness may provide the affected climate migrants with an argument for naturalization. For these reasons this instrument might not be the foreseen tool for the protection of climate migrants.

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<sup>79</sup> *Supra note 14*

<sup>80</sup> *Id.*

<sup>81</sup> *Supra note 32*

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

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

## **L. International Human Rights Law**

Another potential source of international legal protection for climate migrants is found in international human rights law. The reason why it is important to the present analysis is because it, firstly, sets out minimum standards of treatment that states must accord to individuals residing within their territory or jurisdiction. Secondly, if the rights of these populations are violated, the human rights law may provide a legal basis on which protection might be sought in another state. Lastly, if relocation occurs human rights law requires minimum standards of treatment in the host state.<sup>85</sup>

Obviously, submersion of one's entire country, flooding, desertification, or a significant increase of natural hazards have consequences on fundamental, widely recognized threats to rights such as the right to life, but also economic and social rights and possibly third generation human rights, such as the right to security. However, if climate migrants' rights are well established, there are obstacles to the identification of the corollary duty holders. Under international human rights law, a state has the responsibility to protect the fundamental rights of its citizens and any other person within its jurisdiction. States do not have any human rights obligations to other countries' citizens who are not under their "effective control."<sup>86</sup> Therefore, crossing out another potential source of international protection for climate migrants.

## **M. Non-refoulement**

Non-refoulement is a concept which prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. This does not mean that this concept relates only to refugees, since there are, other contexts in which Non-refoulement is relevant, notably, in the more general law relating to human rights concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment.<sup>87</sup>

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<sup>85</sup> *Supra note 14*

<sup>86</sup> *Supra note 32*

<sup>87</sup> Sir Elihu Lauterpacht & Daniel Bethlehem, The scope and content of the principle of non-refoulement: Opinion, available at: <http://www.unhcr.org/419c75ce4.pdf> (last visited May 2, 2017).

This principle is defined in a number of international instruments relating to refugees, both at the universal and regional levels. On the universal level mention should first be made of the 1951 United Nations Convention relating to the Status of refugees, which, in Article 33(1), provides that:

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>88</sup>

What is of relevance, is the protection that can also be given outside the Refugee convention, as prescribed in human rights treaties under international human rights law. States are bound not to transfer any individual to another country if this would result in exposure to human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment as prescribed in the Convention Against Torture and the International Covenant on Civil and Political Rights. However, proving that climate change displacement would result in deprivation of life, or can amount to a threshold of torture or inhuman or degrading treatment is arguably key to ensure non-refoulement.

The absence of formal instruments creating legal rights for climate-induced migrants has led scholars to look into numerous avenues. Another possible source of protection lies in custom. Needless to mention that customary international law is legally binding, created through the pattern and practice of states over time and motivated by *opinio juris*; a sense of legal obligation.<sup>89</sup>

In fact, custom can form at a regional level and become binding but only for states in that region. Hence, the practice of “specifically affected states” is of particular significance. Just as a series of harms can rise to the level of persecution under refugee law, a series of actions by Pacific states for example to protect environmentally displaced individuals could rise to the level of regional custom.<sup>90</sup> However, this limits the protection by region and does not necessarily endow protection to the populations outside of it.

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<sup>88</sup> United Refugees, Note on Non-Refoulement (Submitted by the High Commissioner) UNHCR, *available at* <http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> (last visited May 1, 2017).

<sup>89</sup>*Supra note 25*

<sup>90</sup>*Id.*

It remains a source of controversy whether states have obligations under custom to protect individuals who fall outside the Refugee Convention. A number of scholars contend that the principle of non-refoulement, which prohibits the forced return of individuals to countries in which they are at risk of serious human rights violations, has developed into a customary international norm.<sup>91</sup>

Meanwhile, others criticize such contentions as “wishful legal thinking” and argue that non-refoulement does not exist under customary international law. Even if recognized as custom, it remains to be seen whether the non-refoulement obligation would offer protection to individuals fleeing climate change.<sup>92</sup>

#### **N. Complementary protection**

This section examines the standards of complementary protection and whether it offers protection options to those forcibly displaced across international borders as a result of climate change induced events.<sup>93</sup>

Complementary protection is a generic term that describes the protection that results from an international legal obligation not to return a person to serious ill-treatment such as torture, cruel, inhuman or degrading treatment or punishment. This protection is accorded to a person that is not considered under the Refugee Convention, but still cannot be returned to his country of origin under the expanded notion and obligation of non-refoulement under international human rights law.<sup>94</sup>

Judicial bodies have found that obligations to grant complementary protection arise under Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR), among other instruments.<sup>95</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Supra note 65*

<sup>94</sup> *Supra note 17*

<sup>95</sup> *Id.*

Displacement due to climate or environmental changes do not meet the international definition of torture, which is defined as the intentional infliction of severe pain or suffering by a public official for an enumerated purpose such as punishment or obtaining a confession.<sup>96</sup>

Virtually, there is no doubt that the movement of people due to climate changes is a horrendous event by its mere nature. However, it is legally difficult to define these climatic events that are causing people to migrate as cruel, inhuman, or degrading treatment or punishment. This is because it requires actual bodily coercion or intense physical or mental suffering. Degrading treatment means the humiliating or debasing of an individual and his or her human dignity. This treatment requires a motive, on the contrary, climate changes are a completely different case; the effects of climate changes are intent-free and indiscriminate. Due to the inexistence of such factors the case of people moving due to climatic factors, the complementary protection by non-refoulement might not apply.<sup>97</sup>

Courts have carefully circumscribed the meaning of “inhuman or degrading treatment” so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical care except in the most exceptional circumstances.<sup>98</sup>

The key rights to consider in the complementary protection context are: the right to life sometimes expressed in the removal context as the right not to be subjected to arbitrary deprivation of life; and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment. While these are not necessarily the only rights which encompass a non-refoulement obligation, they are the two which are clearly recognized in international law as giving rise to such an obligation, and which have been incorporated into a number of domestic complementary protection regimes.<sup>99</sup>

Similarly, Article 7 of the ICCPR which enshrines additional protection might be difficult, even in the events of severest and most destructive environmental catastrophe, as it is unlikely to amount to torture. This places protection from refoulement out of the reach in all but the most exceptional

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<sup>96</sup> Louise Olsson, *Environmental Migrants in International Law: An assessment of protection gaps and solutions* (2015).

<sup>97</sup> *Id.*

<sup>98</sup> *Supra note 65*

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



cases. Furthermore, a State's general lack of resources cannot be used to justify a breach of Article 3.<sup>100</sup>

### **O. Guiding Principles on Internal Displacement as an internally displaced person (IDPs).**

The Guiding Principles on Internal Displacement as an internally displaced person (IDP) was developed by the UNHCR in 1998. For those who face violent conflicts, gross violations of human rights and related causes in which discrimination features significantly, displacement generates conditions of severe hardship and suffering for the affected populations. The Guiding Principles were also evoked to protect those internally displaced by environmental disasters. Principle 15 provides that IDPs have:

(a) The right to seek safety in another part of the country; (b) The right to leave their country; (c) The right to seek asylum in another country; and (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk. Although they are formally recognized by many international organizations and appear in a number of international agreements, the Guiding Principles, as a soft-law instrument, are not binding under international law.

Although the said guiding principles may seem like an adequate instrument for the protection of climate change induced persons, there are a number of factors that impose difficulty on such a proposition.

The first difficulty is that the guiding principles as such are not a binding instrument that could be ratified by States. At the same time, they reflect and are consistent with international human rights law and international humanitarian law, as set out in the Annotations to the Guiding Principles. To the extent that States have ratified the human rights and humanitarian instruments upon which the Guiding Principles are based, they are bound by the corresponding principles. States also can opt, as some have done, to make them binding by incorporating them into their domestic law.<sup>101</sup>

The second difficulty involves the national authorities that have the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction. As seen in Guiding Principle 3(1) International humanitarian organizations and other appropriate actors have

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<sup>100</sup> *Id.*

<sup>101</sup> Guiding Principles on Internal Displacement, Law.georgetown.edu, *available at*: [http://www.law.georgetown.edu/idp/english/id\\_faq.html](http://www.law.georgetown.edu/idp/english/id_faq.html) (last visited May 5, 2017).

the right, and many argue the responsibility, to offer protection of and assistance to the internally displaced where their state is unwilling or unable to.<sup>102</sup> Since most displacements are expected to take place within developing states they are usually unable to extend this protection due to their lack of capacity and resources.

Although the Guiding principles are accepted as being a valuable tool for protection, there are several significant limitations that hinder their application. The most important limitation is them being non-binding, as well there being no effective measures of international enforcement mechanism that ensures their proper application.<sup>103</sup>

### **P. Taking climate refugees to court**

The visibility of climate migration as a phenomenon is still relatively new in the international arena. Therefore, only few cases have actually forced their way into the court system arguing for the need of protection. One well-known case is the one of Teitiota; a Kiribati citizen who argued for refugee status in New Zealand on the basis of environmental factors.

This New Zealand case that involves an application for refugee status based on the effects of climate change in the Pacific Island nation of Kiribati has received media attention around the world. The proceedings in the case came to an end in July 2015 when the Supreme Court of New Zealand, the highest court in the country, dismissed an application for leave to appeal the Court of Appeal's decision in which it ruled against the applicant.<sup>104</sup>

Mr. Teitiota and his wife moved to New Zealand from Kiribati in 2007, and resided illegally after the expiration of their visas. In order to avoid deportation, Mr. Teitiota filed for refugee status under Part 5 of the Immigration Act 2009, on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change.<sup>105</sup> Not surprisingly, after lengthy procedures between the Immigration and Protection Tribunal, and The High Court and finally to the Supreme Court, Mr. Teitiota's application was dismissed.<sup>106</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Supra note 17*

<sup>104</sup> Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment, (2015).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

The identification of the persecutor as climate, as the cause of the displacement in this case was the initial challenge. The Refugee Convention requires an identifiable, human actor to cause the harm. In addition, the persecutor must be a government actor or a non-state actor that the government is unwilling or unable to control. It is difficult to fit climate change into the persecutor mold.<sup>107</sup>

Significantly, Teitiota identified the international community particularly the industrialized states as the persecutor responsible for causing two centuries of carbon emissions that contributed to rising seas and changing weather patterns. Rejecting this argument, the High Court found that the international community simply lacked any element of motivation to harm low-lying states like Kiribati.<sup>108</sup>

As for domestic protection, it is unlikely that their home governments will have abandoned them to the effects of climate change; in fact, governments are likely to assist them in coping with the impacts. Although it was acknowledged that the government of Kiribati was taking measures to adapt to climate change, he persisted in arguing on the inability and powerlessness of the state to stop the sea rise.<sup>109</sup>

These arguments did not bring Teitiota under the Refugee Convention, however, because he failed to present any evidence that the government of Kiribati did not take adequate steps to protect him from such harm.<sup>110</sup>

Dismissing Teitiota's argument that he was entitled to protection as an IDP, both the Tribunal and the High Court stated that the Guiding Principles do not apply once an individual has crossed international borders. Furthermore, the Refugee Convention by definition does not apply to IDPs simply because they are not "outside their country of nationality". The Tribunal also pointed out that even if Teitiota had migrated within Kiribati instead of to New Zealand, he would not have been an IDP. Although there was "some degree of compulsion in his decision to migrate" Teitiota's move was "a voluntary adaptive migration" and not "forced" as required by the Guiding Principles.

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<sup>107</sup> *Supra note 25*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

Although Teitiota's claim ultimately failed, the High Court did not hold that Refugee Convention protections could never be extended to climate induced migrants. This leaves open the possibility that future claims brought by individuals fleeing climate change might prove successful.<sup>111</sup>

### **Q. The Limitations of Judicial Responses**

Although litigation might be a tool that paves the way for future change, however in the meantime it is not considered a feasible option for most climate change-displaced persons. Not only is litigation a lengthy process with no guarantee of relief, it requires significant financial resources. Although Teitiota had access to an attorney who specialized in human rights law, that level of representation is scarce and costly to attain.<sup>112</sup>

Even if litigation were to be successful, the legal weight of a judicial holding is not unqualified. Judicial interpretation may lead to the expansion of the interpretation of law, however, they should not be relied upon to provide protection for climate induced migrants.<sup>113</sup>

In conclusion, the international legal system turns porous when it deals with climate migrants crossing an international border, protection is clearly absent, however complementary or humanitarian protection could arguably still be beneficial tools but lack coordination and more importantly sustainability.

This chapter conceptualizes the problem of climate change, its related migration and the legal dilemma it imposes; the available options are nondurable. The international refugee law, the law on migration, international human rights law and customary law do not withhold the burden of protecting internationally displaced people due to climate change.

From another angle, the following chapter will explore the ethical dimension of climate change. This phenomenon arguably invokes some ethical considerations when confronting man-made environmental changes; to mention considerations of fairness, equity, and justice.

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<sup>111</sup> *Id.*

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

<sup>113</sup> *Supra note 17*

The chapter will also present the different arguments that moral philosophers have articulated to support their proposition on why climate change is ought to be seen through a moral and an ethical lens. As well, it will explore the moral questions that climate change poses and most importantly, why this moral questioning is important.

### III. Ethics, morality and climate change

#### A. The Anthropocene revisited

Recent study <sup>114</sup> published in *Nature* proposed an unsuggested date for the start of the Anthropocene that is way before the Industrial Revolution. The climate scientists, Simon L. Lewis and Mark A. Maslin suggested the year 1610 to mark the human interference with the climate. Tying that human intervention to this year may appear unusual, since it might not have certain significance and not necessarily connected to events that could have a relation to climate change.<sup>115</sup>

However, for them, the year 1610 holds the potential to reshape the way we conceive the Anthropocene.<sup>116</sup> Geologists use a global marker; which they call the “Golden Spike” or “Global Boundary Stratosphere Section and Point” (GSSP) that marks a recognized division in the geological timescale by pinpointing the planetary material that justifies this divide.<sup>117</sup>

The year 1610, was particularly chosen as it was the lowest point in a decades-long decrease in atmospheric carbon dioxide. This change was caused by the death of over 50 million indigenous residents in the Americas, as a result of “exposure to diseases carried by Europeans, plus war, enslavement and famine”<sup>118</sup>, during the first century after the European contact.<sup>119</sup> By the mid-seventeenth century with the survival of only 6 million on both continents; a significant drop in farming, fire burning and human activities affected the carbon dioxide levels in the atmosphere.<sup>120</sup> The proposal is unusual because of its uncommon suggestion of genocide as a golden spike for epochal division.<sup>121</sup> While the Anthropocene debates may seem irrelevant; the

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<sup>114</sup> Simon L. Lewis & Mark A. Maslin, *Defining the Anthropocene* (2015), available at <http://www.nature.com/nature/journal/v519/n7542/full/nature14258.html> (last visited Mar 28, 2017).

<sup>115</sup> Dana Luciano, *The Inhuman Anthropocene* Avidly (2015), available at <http://avidly.lareviewofbooks.org/2015/03/22/the-inhuman-anthropocene/> (last visited Mar 28, 2017).

<sup>116</sup> *Id.*

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

<sup>118</sup> *Supra note 114*

<sup>119</sup> *Supra note 115*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

debate is highly alive because it concerns what kind of story to tell about the human impact on the planet.<sup>122</sup>

On the other hand, there are also claims that suggest that climate change is simply too big to be seen. This is what eco-critic Timothy Morton terms a “hyperobject” which describes something that cannot be realized in any specific instance. The Anthropocene offers climate change a narrativity; a story rather than periodicity, and like any well-told story, it relies on conscious plotting and manipulation of feelings.<sup>123</sup>

Some<sup>124</sup> insist that we are naming this story incorrectly, that “Anthropocene” obscures vital social and historical facts that must be addressed in any proposed solution. Not all “humans” are equally responsible for causing the messy situation we are currently in; nor are they perpetuating it at equal rates. They argue that naming a crisis after the species hides social histories of exploitation of both humans and nature, not merely geological histories.<sup>125</sup>

In sum, it would probably seem unfair if a phenomenon like climate change is linked to the human species as a whole. The Industrial Revolution arguably occurred because of the empire; a domain that was also connected to genocide, slavery and massive exploitation. Concluding that, the perpetuation of harm was not the same from all humans, but rather emanated from a small subset of the human species.

## **B. Morality and climate change**

This chapter does not intend to propose answers to ethical questions that climate change poses. Rather it will carve out a space for this issue to be seen from a wider angle, and will also consider what could be the questions to ask when examining this conundrum.

This chapter tries to explore how climate change does not only constitute a scientific phenomenon; rather also shed light on the ethical and a moral aspect to it. It will also discuss how climate change is related to the no harm principle on two respects: the first is of a theoretical nature that concerns individual ethics and morality and the second is of a legal one; looking at the no harm principle

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

<sup>123</sup> *Id.*

<sup>124</sup> See Jason Moore Capitalocene and Jussi Parikka Anthrobscene

<sup>125</sup> *Supra note 115*

within the international legal framework and its relation to climate change. Both aspects focus on the negative duties relating to the no-harm principle rather than the positive ones.

Over the past twenty years, a number of moral philosophers have begun to wrestle with some profound ethical dilemmas over the phenomenon of climate change. They explore how anthropogenic climate change involves questions of good and bad, right and wrong and responsibility and blame.<sup>126</sup> The interests in climate change as an ethical issue derives partially from the fact that morality is a key driver for human behavior both as individuals and collectives whether as families, communities, nations; it is what lies behind our actions and responses. We are concerned with right and wrong and about the intentions we see in the actions of others'. More importantly it looks at implications of our actions and the others' behaviors with respect to questions of harm and justice.<sup>127</sup>

From this stand, if climate change is perceived and recognized as an ethically-bound issue, it could be a chance, and arguably a good reason to believe that people will consider, and maybe, confront the causes of this problem. On the other hand, if people fail to identify the problem as such, this might be a significant barrier to effectively respond to the issue, both individually and collectively.<sup>128</sup>

### **C. How is climate change seen as a moral issue?**

Those who see climate change as a moral issue have arguments to support this proposal. Moral philosophers propose two main arguments: the first sees that the atmosphere is one of the global commons, shared by all humans and provides life sustaining services to everyone on the planet. However, this resource is limited, and subject to depletion under certain circumstances.<sup>129</sup>

The second argument acknowledges the limited capacity of the atmosphere to absorb our waste gases. This second claim is especially important because, as Singer<sup>130</sup> suggests that the distribution

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<sup>126</sup> Ezra M. Markowitz, Is climate change an ethical issue? Examining young adults' beliefs about climate and morality, 114 *Climatic Change* 479-495 (2012).

<sup>127</sup> *Id.*

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

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



of that resource imposes certain ethical considerations as it involves the distribution of an already scarce resource.<sup>131</sup>

In addition to these two arguments, there is a classic argument that accuses rich people of using more than their share of that global common. Overuse is not the only problem, the over-consumers harm poor people by contributing to extreme climatic events, proposes Jamieson. Jamieson slightly extends Singer's argument by suggesting that past and present distribution of atmospheric use is unjust for two related reasons.<sup>132</sup> First, some people who primarily live in developed nations have used and continue to self-appropriate more of the atmospheric commons than others have, whom he describes as poor individuals living primarily in developing nations. Second, such "atmosphere grabbing" has the very real potential to cause physical harm to many people including those who are not yet born.<sup>133</sup> In addition, the causers of harm have not compensated the harmed ones for past or present injuries caused by their actions.<sup>134</sup> These arguments rely on the scientific assumption that climate change is in some sense anthropogenic in origin.<sup>135</sup>

#### **D. Climate change, is not like any other problem**

The problem of climate change is a unique one. The combined causes for its occurrence, the long intervals of time it stretches over and the uncertainty that generally ravel climate science makes it a phenomenon with exceptional dimensions. For some of these features make the proposition of seeing climate change as a moral issue difficult to realize.

Jamieson identifies a number of features that describe this proposition. None of them is unique to climate change although they are more severe in this case than others; no other problem displays all of these features. However, packed together they show why climate change poses a one of a kind dilemma; as they pose challenge our commonsense moral notions of individual responsibility.<sup>136</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

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

<sup>136</sup> Dale Jamieson, Reason in a dark time (2014).

The first feature that makes climate change different from other problems is related to the magnifying power of technology. Our simple daily acts such as starting a car or adjusting a thermostat have broader and more extensive reach than previous forms of transportation and thermoregulation such as walking and fire building. The extensive growth of technology, especially with the production and management of energy is responsible for this. Back in the day, people disrupted their local environments, now people have the ability and the power to alter the planetary that allowed the sustainability of human life. For the first time in human history, we can take large amount of carbon buried deep beneath the earth surface, and transfer it to the atmosphere. Conceptually, this is difficult for average people to conceive, this however results in severe changes to global climate.<sup>137</sup>

The second feature is the spatial reach of climate change in relation to the acts that contribute to it. Climate change is a global phenomenon, and it is often described as location-insensitive; the location of the emissions that contribute to climate change has nothing to do with where the effects might materialize. The atmosphere does not care where the GHG emission has occurred, it responds in the same way whether it comes from the poles, the equator or somewhere in between. Although more than 90% of GHG emissions have happened in the Northern Hemisphere, some of the worst damage of climate change is expected to occur in the Southern Hemisphere.<sup>138</sup>

The third unique feature of climate change is the systematicity of the forces that give rise to it. A huge amount of attention is directed towards computing carbon footprints and arguing over the responsibility for emissions; yet the manipulation of the global carbon cycle is integral to the existing global community.<sup>139</sup>

Jamieson explains this concept in simple terms by giving an example for clarification. Coal is mined in Australia, shipped to China where it is burned in electrical generating plants, which is then used to power factories that produce products that are later consumed in Europe and United States.<sup>140</sup>

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

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

Virtually, all these agents are in one way or another involved in manipulating carbon. However, the allocation of responsibility is unclear due to this dispersal of roles, and because some of the effects are more visible than others. Each of the contributors have a ready argument to off-load responsibility to someone else. Although it will be assumed that China is responsible for those emissions, because it is where the “act” of burning of the coal has happened.<sup>141</sup>

Still, Australia acted as the extractor of the coal, and Europe and United States have both consumed the embedded-carbon products. One can argue, that the image of China as the carbon villain is a consequence of Europe and United States outsourcing manufacturing to China, consequently outsourcing their carbon emissions.<sup>142</sup>

Jamieson states that there is no clear winner in this argument; the assignment of responsibility is arbitrary and everyone in this cycle benefits in some way and in some other way suffers. Moreover this whole process is dynamic as the global economy changes. However, as long as economies are carbon based, the problem will persist regardless of which country has done what in this process.<sup>143</sup>

The fourth feature that is not a new one, being that climate change is the world’s largest and most complex action problem. It is the largest in the sense that everyone – in a way– is a climate change contributor and virtually everyone will be affected by climate change. Climate change being the most complex has many reasons; these include the high degree of connectivity in the climate system and the non-linear nature of many of its relations, so as the buffers that exist in this system with regards to the actions and effects.<sup>144</sup>

The emphasis here is on the difference of scale involved the human action and the resulting damage caused. Aside from the scientific aspect of the carbon cycle, the outcome is that the carbon released in the atmosphere results in generalized warming. This affects the global climate system, which in turn affects the distribution, frequency and intensity of various meteorological events.<sup>145</sup>

These results can radically vary as mentioned earlier; predictions foresee flooding, certain areas will even be prone to invasion by mosquitoes as a function of changed temperature and rainfall

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

regimes.<sup>146</sup> It is difficult to imagine that daily emissions travel up in the atmosphere and linger for an unknown period of time then suddenly damage something that we value. The implausibility and confusion of this scenario makes the problem itself more difficult to comprehend as it differs highly from textbook collective action problems.<sup>147</sup>

The fifth difference between climate change and other problems is the temporal scope and reach of GHG. These gases have different dwelling times in the atmosphere; some would linger for few years, others for millennia such as with some human made gases such as tetrafluoromethane. The time horizons involved in the problem of climate change are flabbergasting; it is difficult to conceive how our contemporary way of living has left a mark on the planet that will persist for such a long period of time, much less to internalize this in decision making.<sup>148</sup>

Garvey extends this thought by saying that our actions and the results of our fellow humans', our parents' and our grandparents' will still be felt hundreds of years in the future. This is why, seeing rights and wrongs in this quagmire is not easy.<sup>149</sup>

Over these long intervals of time, with millions of agents, doing millions of little actions all over the planet casually entangle and form a chain to raise sea levels and cause flooding of a village ruining crops and taking lives. There is a noticeable harm here, even though it may not be clearly seen by the average person. However, in the end whose fault is it? And who should hold the responsibility for what is happening? Who should have done otherwise? It will not be easy for people to hold themselves accountable for their microscopic contributions of those effects. Can people admit to themselves that their slow-motion contributions have caused a distant disaster to the environment? Does this action constitute a genuine wrong? Garvey, contends that maybe this declaration is exactly what we have to do: to admit our moral wrong in order to be able to take action on climate change.<sup>150</sup>

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<sup>146</sup> Jon Barnett, Security and climate change, 13 *Global Environmental Change* 7-17 (2003).

<sup>147</sup> *Supra note 136*

<sup>148</sup> *Id.*

<sup>149</sup> James Garvey, *Climate Change and Moral Outrage* (2010).

<sup>150</sup> *Id.*

### **E. Unequal share of produced harm**

Countries that have least contributed to climate change are the ones who are going to be massively harmed, yet the problem is of less gravity to the ones with major contributors. As per Jamieson, 80% of global carbon emissions are caused by ten countries who - alongside their political leaders and executives of the world's most powerful corporations - have disproportionate influence in the decision making process such as the allocation of resources available for different missions like adaptation for example.<sup>151</sup>

On the other hand, the 42 Member of the Alliance of Small Island States (AOSIS) emit about ½ % of Global GHG emissions. Yet, many of them will disappear under a rising sea.<sup>152</sup> These islands are the most visible and notorious example of the unjust harm that is inflicted by rich countries. The very existence of their homeland is being threatened because of long development processes that they have barely contributed to.

In sum, industrialized states, over a long period of time, are substantively changing the atmosphere in a way that will have tremendous effects on people in certain regions of the world. There is as well, a possibility of the extinction of the human race. In the meantime lies immense suffering. Adding to that, we are now carrying the burden of knowledge of which our ancestors were blissfully ignorant.<sup>153</sup> This knowledge does not allow us to turn a blind eye towards this problem anymore. From this stance, the duty not to harm within moral theory follows.

### **F. Thou shalt not harm other people**

To begin, it is important to mention that this paper is more concerned with the negative duties of the no-harm principle over the positive ones, because confining to those negative duties will keep the argument widely acceptable. Like that, the argument will still be accepted by the ones who reject the positive duties as they adopt only stringent negative duties not to harm. As well, the argument can still be acceptable to those who endorse imposed positive duties because, even by failing to invoke such duties, they are still not denied.<sup>154</sup>

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<sup>151</sup> Dale Jamieson, *Reason in a dark time* (2014). P 146 *see*

<http://www.npr.org/templates/story/story.php?Id=12124053> (not found) retrieved by Jamieson July 18, 2013

<sup>152</sup> *Supra note 136*

<sup>153</sup> Thom Brooks (ed) *New waves in ethics*. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan. (2011).

<sup>154</sup> Thomas Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, 18 *Leiden Journal of International Law* 717 (2006).

The idea of the duty not to harm other people is the core principle of universal morality; and it can be traced back in history to the Stoic philosophers. Modern liberal thought, however, is most usually associated with defending the harm principle.<sup>155</sup> Adam Smith addressed the no harm principle in relation to self-interest stating that even if the benefit coming out of it is greater than the harm, an act of harm is not to be carried out:

One must never prefer himself to any other individual; as to harm or injure that other to benefit himself, even though that benefit to the one should be much greater than the hurt of other.<sup>156</sup>

Mill, by the same token, promoted the centrality of the no-harm principle over any other one, when it comes to certain aspects of human relations. He insisted that the moral principles prohibiting harm between individuals are more important than those related to benefit. One might not need the benefit coming from another person, however, will always need not to be hurt by another:<sup>157</sup>

The moral rules which forbid mankind to hurt one another (in which we must never forget to include wrongful interference with each other's freedom) are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs.<sup>158</sup>

According to Smith and Mill, avoiding harm is a central notion; duties of benevolence were also important even though they were less central.<sup>159</sup>

### **G. Fault liability on moral agents**

Responsibility might be held on a moral agent's actions provided that these actions have consequences on human beings on the one hand, and that one is offered alternatives from which they are free to choose on the other. The first thread might be regarded as a sufficient condition for moral responsibility, while the latter as a necessary one. The way human beings or moral agents have chosen to deal with the environment is the main reason behind the problem of climate change

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<sup>155</sup> Andrew Linklater, The harm principle and global ethics, 20 *Global Society* 329-343 (2006).

<sup>156</sup> Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Fund, 1982), p. 138.

<sup>157</sup> Quoted in J.L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977), p. 135.

<sup>158</sup> *Id.*

<sup>159</sup> *Supra note 155*

and the problems stemming from it; these effects not only have grave effects on the environment, but also affect entire populations.<sup>160</sup>

Generally, an agent can be at fault by violating a duty that is relevant to causing the harm. This happens when an intention of harm is there; the agent acts intentionally in a way that produces harm. As well, the agent can also act out of negligence by failing to take the precautions that a reasonable person might take; the result might be imposing an unreasonable risk of harm to another person.<sup>161</sup>

Some argue that the way the world operates in, with regards to development is a main consequence of climate change; however this path is not unavoidable. Other means of progress can be employed, on the condition that moral agents feel an imperative to do so. The supporters of this opinion pose it that there is not only one way of interacting with the environment. This is debatable, since there are other patterns of progress available; this can be done by abandoning convenient lifestyles in favor of more moderate and less harmful ones. This might sound like wishful thinking; however this argument still endures. The fact that the consequences of each of these alternatives can now be estimated is the safest of grounds for moral responsibility to sprout.<sup>162</sup>

According to some theorists, we are morally responsible only for those GHG emissions that involve fault on our part.<sup>163</sup> As for the argument regarding ignorance of the effects of emissions; when our grandparents emitted GHG, they probably acted out of ignorance not out of recklessness. However, it is more difficult today to invoke this argument since we are all burdened with the knowledge of the consequences of our actions. Jamieson bluntly states that we, unlike our grandparents, are at fault for our emission.<sup>164</sup>

As for the troublesome question of who is responsible for taking action regarding the effects of climate change, Gardiner questions that if an action on climate change is morally required, whose responsibility is it? The core of the ethical issue is the allocation of the costs and benefits of GHG emissions and their abatement. On this issue, philosophers are virtually unanimously on the same page; their conclusion is that the developed countries should take the lead role in bearing the costs

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<sup>160</sup> Evangelos Manolas & Walter Leal Filho, *English Through Climate Change* (2012).

<sup>161</sup> *Supra note 136*

<sup>162</sup> *Supra note 160*

<sup>163</sup> *Supra note 136*

<sup>164</sup> *Id.*

of climate change, while the less developed countries should be allowed to increase their emissions in the foreseeable future.<sup>165</sup>

Shue departs from “ideal theories” whose focus is on emissions in the abstract. His position stems from the observation that less developed countries need energy not emissions. He states that what we should do, is to alter the way we produce energy; fossil fuels do not have to be the dominant source. This cycle can be broken by competitive price alternatives for example; making fossil fuel an avoidable necessity.<sup>166</sup>

### **H. To whom are moral agents accountable?**

Virtually, in the context of climate change and in broader terms, moral agents are morally responsible to every other person, and also everything that is negatively affected by its consequences. Since the continuation of emissions of GHG is a strategic and a moral decision that aims to specific gains; by the same token, the actual or potential losses should also be equally considered. Therefore, the real question should be who is affected or burdened by climate change, or who might be so in the future.<sup>167</sup>

Some have argued that agents are morally responsible to their fellow humans, including future generations. Currently, entire populations live in areas that are extremely prone to submersion under sea water and losing their place of residence. As repeatedly stated, the worst affected countries with repercussions related to climate change are the least well off.<sup>168</sup>

As for the responsibility towards future generations, some argue that future generations - by the mere token that they still do not exist - cannot be considered as rights bearers, and they cannot partake as claimants of rights, by the same logic that they cannot be bound by any kind of duty to anyone. However, this does not mean that they can be excluded from moral consideration.<sup>169</sup>

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<sup>165</sup> Stephen M. Gardiner, *Ethics and Global Climate Change* (2004).

<sup>166</sup> Gajevic Sayegh Alexandre, Henry Shue, *Climate Justice: Vulnerability and Protection. Ethical Theory and Moral Practice* (2016).

<sup>167</sup> *Supra note 160*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*



On the contrary, there are reasons behind why moral agents might consider making space for the future generations on the basis of the principles of respect of dignity, equal opportunity and overall wellbeing of the not yet born generations. Considering future generations is obviously an inherent feature and tendency of human beings and their behavior. Any moral statement that runs contrary to those tendencies is not what people would normally do. After all, there is a tendency in human beings to want to secure better opportunities and conditions for their off-spring.<sup>170</sup> However, the question remains whether this argument can still endure when it comes to securing the wellbeing of the children of others, whoever they might be. Jamieson as well questions this argument stating that we may care about our children or our children's children because we see them as our own, at the same time, although this concern may extend for a generation or two, it will rapidly give out.<sup>171</sup>

Expanding on this idea, future generations are actually at the mercy of the decisions taken by this generation, and cannot do anything about it. They do not have a say in what their world will be like, thanks to our actions. We are inflicting harm on future generations by making the environmental conditions they face more difficult and more threatening. Arguably, the conditions for future generations will be worse than they are for us.<sup>172</sup> This reflects severe unfairness from our side; we inflict this grief on people who are utterly at our mercy because they live beyond us in time.<sup>173</sup>

### **I. Why do not we start morally judging people?**

Generally speaking, we do not subject people's actions to moral evaluation. This could be because we consider what people do as "their business" and belonging to their private sphere which is beyond our own moral reach.<sup>174</sup> However, there are still times when our moral thinking is engaged when something strike as not quite right. Some other acts grab our attention because they are morally exemplary or beyond our call of duty. This may appear to moral theorists as naïve or

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

<sup>171</sup> *Supra note 136*

<sup>172</sup> Henry Shue, *Climate Justice: Vulnerability and Protection*. Oxford University Press (2014).

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

<sup>174</sup> *Supra note 136*

superficial and they would like to dislodge this way of seeing things, however this is more or less how most of people see things most of the time.<sup>175</sup>

People may believe that harm inflicted on others by the effects of climate change is perpetuated by previous generations or by other people living elsewhere. Thus, it does pose a moral dilemma, however it is not “our” moral dilemma. Recent findings<sup>176</sup> suggest that individuals work to avoid feeling responsible for climate change; by blaming others either for their contribution to it or inaction.<sup>177</sup>

By the same token, there seems to be processes of socially constructed denial that allow life to proceed normally despite the devastating knowledge of harm to others by our very own conscious actions. Diffusion of responsibility, feelings of inefficacy and information processing, and countless psychological and sociological mechanisms may also be at play. As for people who deny the entire phenomenon of climate change, there is little or no reason for them to look into the ethical ramifications of the issue in the first place.<sup>178</sup>

Recent work by psychologists such as Daniel Gilbert and Jonathan Haidt have shown that our moral conceptions are only loosely associated with the infliction of harm. There is no surprise in the fact that many people are morally appalled by harmless acts such as consensual gay sex or flag burning, however their moral compass seems to breakdown and they are unmoved by deaths caused in war or by environmental pollution.<sup>179</sup>

Haidt and his colleagues have claimed that considerations involving fairness and reciprocity, authority and respect, purity and sanctity in addition to considerations about the causation of harm are at the foundation of morality as conceived by many people. Since these considerations come apart, people deny that particular harm causing activities are within the moral domain, while also considering behavior that does not cause harm as bearing moral importance.<sup>180</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> See Gardiner 2006; Kunda 1990; Lord et al.1979; Swim et al.2009

<sup>177</sup> *Supra note 126*

<sup>178</sup> *Id.*

<sup>179</sup> *Supra note 136*

<sup>180</sup> *Id.*

Daniel Gilbert graphically brings these considerations to bear on the question of climate change in his discussion of these incongruences:

Global warming doesn't put our brains on orange alert is that it doesn't violate our moral sensibilities. It doesn't cause our blood to boil (at least not figuratively) because it doesn't force us to entertain thoughts that we find indecent, impious or repulsive. When people feel insulted or disgusted, they generally do something about it, such as whacking each other over the head, or voting. Moral emotions are the brain's call to action. Although all human societies have moral rules about food and sex, none has a moral rule about atmospheric chemistry.... global warming is bad, but it doesn't make us feel nauseated or angry or disgraced, and thus we don't feel compelled to rail against it as we do against other momentous threats to our species, such as flag burning. The fact is that if climate change were caused by gay sex, or by the practice of eating kittens, millions of protesters would be massing in the streets.<sup>181</sup>

To a great extent the difficulty in addressing these moral aspects of climate change is due to the novelty of such a problem and arguably the frailty of our moral consciousness. Viewing these aspects in moral terms requires revising our everyday understanding of moral responsibility as Jamieson states.<sup>182</sup> However it can be argued that for decades we have avoided exactly the same collective action on moral issues with regards to other problems. Climate change is arguably a replay of other unresolved problems such as poverty. We have known about the horrendous effects of both and we chose not to adequately address them. Thus, it is not a matter of the problem being new; it is probably how our moral systems militate against recognition<sup>183</sup> of how social arrangements create danger, disease, and death.<sup>184</sup>

When it comes to actions to be made, the fundamental distinction in the prevailing moral consciousness is between those who are morally suspect and those who are not. In addition, we see most people's action – as stated earlier – outside of the domain of moral evaluation.<sup>185</sup> A paradigm of an act that is morally suspect is the one described as an individual acting to

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<sup>181</sup> Daniel Gilbert, *If only gay sex caused global warming* *latimes* (2006), *available at* <http://articles.latimes.com/2006/jul/02/opinion/op-gilbert2> (last visited Mar 28, 2017).

<sup>182</sup> *Supra note 136*

<sup>183</sup> Anne Orford & Florian Hoffmann, *The Oxford handbook of the theory of international law* p. 998

<sup>184</sup> Paul Farmer, *Never Again? Reflections on Human Values and Human Rights* (2005 Tanner Lectures).

<sup>185</sup> *Supra note 136*

intentionally harm another individual, with both individuals identifiable and both individuals and the harm are closely related in time and space.<sup>186</sup>

However, climate change is a matter that is far from being straightforward, as well as its causes and effects. It would have been easier to judge a situation if both the perpetrator and the victim are identifiable and they are both related in time and space; where everything seems to be clear and available for a moral evaluation.<sup>187</sup>

However, if these various dimensions of the situation are altered: time, space and the surrounding conditions we might find it more difficult to place the situation on a moral scale. It might still be a candidate for a moral evaluation despite variations in the factors that contributed to a certain act. However it cannot be as clear cut as the situation with relatively constant variables.<sup>188</sup>

#### **J. A lack of moral rectitude**

Garvey, states that the developed nations' failure to do something regarding climate change actually amounts to an enormous moral wrong. The ones who can rightfully voice this view are the ones at the receiving end of the effects of climate change. Like Tuvalu, Antigua and Barbuda is one of the small island states that are in danger of being submerged with the rising sea levels resulting from climate change. Lionel Hurst, their Ambassador to the United States, gave a speech in 2002, at the International Red Cross Conference on Climate Change and Natural Disasters. He said a great deal in that speech, however those lines are worth special consideration:<sup>189</sup>

We see a lack of moral rectitude by those who are in leadership positions, who know the consequences of their inaction, and yet insist that they will not act....[the] thirst for environmental justice must be cast in moral terms....It must be seen as good versus evil.

Garvey proposes to take Hurst's suggestion seriously, and thinking seriously of the possibility that the ones who are running the West are responsible for the kinds of evil that the Ambassador is talking about.<sup>190</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Supra note 149*

<sup>190</sup> *Id.*

### **K. A moral outrage and a moral storm**

As mentioned before, what adds even more complexity to the problem of climate change is its peculiar features that in turn pose substantial obstacles to our ability to make hard choices necessary to address it. Climate change is at a junction point of a set of global, intergenerational and theoretical problems. This convergence justifies naming it as a “perfect moral storm.” One consequence of the so called storm could be that even if the ethical questions of climate change could be answered, there might be a difficulty to act, for this storm makes us vulnerable to moral corruption as Gardner states.<sup>191</sup>

The problem can also be viewed as Garvey’s articulations towards the West’s behavior as a moral outrage. This naming is justified from his point of view since they have contributed to unnecessary harm to others. This principle behind this conclusion is neither complicated nor difficult to grasp; simply, people ought to contribute to fixing something in proportion to their responsibility for breaking it.<sup>192</sup>

In his view, this conclusion is backed up by a principle as well: the greater the ability to do the right thing, the greater the obligation to do what is right. Garvey argues that this principle is uncontroversial. He gives as an example that one would have some explaining to do if one walked past a drowning child and did nothing to help. One would have even a lot more explaining to do if one were a physically fit and well-trained lifeguard.<sup>193</sup>

Practically, ethical questions are a cornerstone to the process of making policy decisions such as: where to set a global ceiling for GHG emissions and how to distribute the emissions allowed by such ceiling. The setting of this ceiling will also depend on how we are willing to weigh our interests against the ones of future generations<sup>194</sup> and how emissions are distributed given the global gap depends, in part, on various beliefs about the appropriate role of energy consumption in peoples’ lives.<sup>195</sup>

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<sup>191</sup> Stephen Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics, and the Problem of Corruption*, *Political Theory and Global Climate Change* 25–37, 25-37 (2008).

<sup>192</sup> *Supra note 149*

<sup>193</sup> *Id.*

<sup>194</sup> *Supra note 191*

<sup>195</sup> *Id.*

## L. Climate change and no-harm principle

Even though climate change is considered the most important case of anthropogenic cross boundary environmental harm. Little consideration has been given to the no harm principle throughout the 25 years of international negotiations on climate change. Nevertheless, the responsibility of states is present when causing harm to the environment of another state; for Mayer this is not a negotiable concept as it is an indispensable corollary to the structure of the current international legal order.<sup>196</sup> The no-harm notion is also a widely recognized principle of customary international law whereby a state is duty-bound to prevent, reduce and control the risk of environmental harm to other states.<sup>197</sup>

While the no harm principle has been identified in international environmental law as a fundamental principle, it is not generally recognized in international climate change governance and rarely explicitly invoked in the formulation of international responses.<sup>198</sup>

Contemporary international law provides evidence of how shared understandings of harm and suffering have made it possible for different societies to reach an agreement concerning the essential features of a cosmopolitan ethic.<sup>199</sup> Although this may be partially true, the international system has failed to realize nonlinear forms of harm that result in disasters like that of climate change and its entailing problems like displacement for example. It also provides an understanding - yet not enough understanding - to reach towards less straightforward phenomena. International legal conventions however, impose simple and straightforward responsibilities on states: compliance with prohibition of bodily or mental harm.<sup>200</sup>

It could be argued that international prohibitions of harm suggest that states are not able to reach a particular conception of what is the “good” that they should collectively try to promote, however, they have succeeded in reaching a global moral consensus of certain forms of harm that should be eradicated from the international society.<sup>201</sup>

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<sup>196</sup> Benoît Mayer, The relevance of the no-harm principle to climate change law and politics, 19 Asia Pacific Journal of Environmental Law 79-104 (2016).

<sup>197</sup> Ian Brownlie, Principles of Public International Law, 7th ed., 2008, pp.275-285; Patricia Birnie, Alan Boyle and Catherine Redgwell, International Law and the Environment, 3rd ed., Oxford 2009, pp.143-152.

<sup>198</sup> *Supra note 196*

<sup>199</sup> *Supra note 155*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

However, the climate regime was largely built on a more ambivalent principle rather than developing the no harm principle: the principle of common but differentiated responsibilities (CBDRs). At the same time, it remains unclear what the grounds for differentiation are or the nature of the responsibility; either the causal responsibility arising from a wrongful action or moral responsibility for those more well off and more capable of helping the needy.<sup>202</sup> The exclusion of the no harm principle in climate change negotiations was an unavoidable result of a certain geopolitical setting; in which the more powerful and influential states can push towards what works for their best interests.<sup>203</sup> As this principle does not have a strictly fixed content or clear status<sup>204</sup> and thus allowing room for flexible interpretation of obligations.

The reluctance of developed states to admit causal responsibility for their activities that have resulted in climate change, has pushed the climate regime towards spontaneous state initiatives ranging from voluntary funding to the Intended Nationally Determined Contributions (INDCs), rather than a strict legal regime that defines the rights and obligations as might be implied by notions of responsibility.<sup>205</sup>

The emission limitation commitments of the developed states as prescribed in the Kyoto Protocol are not defined on their historical responsibility, but rather on their capacity related criteria, in the quest to mitigate climate change. The objective of mitigation differs in terminology and in substance from the obligation of a state responsible for a continuing internationally wrongful act to “cease that act”.<sup>206</sup> By the same token, adaptation measures that consist mainly of aid projects, contrasts sharply with the restorative obligations of a state responsible for an internationally wrongful act.<sup>207</sup>

Adaptation policies are usually linked to the formulation of development policies, a matter that lies within the heart of a state’s sovereign rights. That is why the call for “country driven approach” to adaptation is not enough to protect the sovereignty of states when funding remains subject to conditions; like requirements to demonstrate the use of funds for adaptation purposes, to more

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<sup>202</sup> *Supra note 196*

<sup>203</sup> *Id.*

<sup>204</sup> Tuula Honkonen, The Principle of Common But Differentiated Responsibility in Post-2012 Climate Negotiations, 18 *Review of European Community & International Environmental Law* 257-267 (2009).

<sup>205</sup> *Supra note 196*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

specific policies on the management of “climate migration.” Mayer states that the history of European colonialism retells the story of systematic interference although usually justified with good intentions. Leading to the imposition of political and economic agendas that are – to say the least – disadvantageous to the people concerned.<sup>208</sup>

Expanding on this line of thought, Jason Hickel, describes how the rightful reparations that the West owes to the less developed nations have metamorphosed into “aid” as an act of charity and kindness towards the less fortunate ones. He states how the history of colonialism is being routinely erased. In spite of the history record of European colonialism keeps stirring up questions on this particular topic that they surely prefer to avoid.<sup>209</sup>

For Hickel it is not true that the Europeans are the ones who developed the colonies; it is actually the other way around, it is the colonies that developed Europe. The constant flows of resources from the colonies to the colonizers even contributed to the capital of the Industrial Revolution. By the early 1800s, a total of 100 million Kgs. of silver had been drained from Latin America and poured into the European economy. To get a sense for this wealth, if that deported sum of silver was invested in 1800 at 5% interest – the historical average – it would amount to the unimaginable sum of 165 trillion USD today.<sup>210</sup>

This is the parameter of the economic system that was designed over hundreds of years enriching a small portion of humanity at the expense of the majority.<sup>211</sup> This story makes the history of international development to a great extent false. Frankie Boyle sums it up by saying that even the charity we offer is patronizing. Instead of giving a poor man fish it would have been more sensible to stop poisoning the fishing water, kidnapping his ancestors into slavery and then showing back up hundreds of years later to talk nonsense about the fish.<sup>212</sup>

Hickel concludes that there is no money that could adequately compensate for the harm done. However, he suggests that we would rather stop talking about charity and start acknowledging the

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<sup>208</sup> *Id.*

<sup>209</sup> Jason Hickel, Enough of aid – let’s talk reparations the Guardian (2015), <https://www.theguardian.com/global-development-professionals-network/2015/nov/27/enough-of-aid-lets-talk-reparations> (last visited Mar 28, 2017).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*



tremendous debt that the West owes to the rest of the world. While reparations per se are not going to turn the situation around, at least they would set the story straight.<sup>213</sup>

### **M. Breach of the No-harm principle**

A breach of the no-harm principle can be invoked when three conditions are met: a cross-boundary environmental damage; a causal relation with specific activities within the jurisdiction of a state; the failure of this state to take reasonable measures to prevent the harm. A breach of the no-harm principle entails secondary obligations for the responsible state to make reparations in response to an internationally wrongful act.<sup>214</sup>

However, applying this to the context of global anthropogenic climate change does raise some technical issues. On the one hand, the parameters of the no harm principle are not clearly determined. On the other hand, issues regarding the definition of secondary obligation in case of a breach are also raised. This happens to be more complex due to the unique features of climate change previously mentioned: the simultaneous responsibility of multiple states, the scattered and indirect nature of the resulting harm, and the high complexity of the relation between greenhouse gas emissions and such harms.<sup>215</sup>

At the same time, there seems to be no good reason, at the most fundamental level, that the no harm principle cannot be applied to the GHG emissions, at least in the case of industrial states that have failed to take measures to reduce their emissions within their jurisdiction since the discovery of the human caused climatic changes decades ago.<sup>216</sup>

The consequences of climate change on individuals are not only indirect, but also remote and consequential. This is why as the no harm principle has develop in the context of transboundary environmental damages, it will be more challenging to determine the harm. How a natural disaster unfolds and, for instance, whether individuals need to migrate largely depends on a range of

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<sup>213</sup> *Id.*

<sup>214</sup> *Supra note 196*

<sup>215</sup> *Id.*

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

political, social, economic, demographic and cultural factors in the country affected by the environmental impact.<sup>217</sup>

In sum, the morally required thing to do when it comes to a duty towards the harmed ones is a question of less not more. Ceasing the continuous infliction of harm is the most basic and morally direct thing to do. Shue summed up this conflict between richer nations and poorer ones by stating the following:

Even in an emergency one pawns the jewelry before selling the blankets. . . . Whatever justice may positively require, it does not permit that poor nations be told to sell their blankets [compromise their development strategies] in order that the rich nations keep their jewelry [continue their unsustainable lifestyles]<sup>218</sup>

In other words, whatever the interpretations of justice may require us to do, Shue suggests that it should not allow poorer nations to sacrifice their necessities, and put their development on hold, so that the richer ones can keep their extravagant and overly developed lifestyles.<sup>219</sup> Poorer nations have the right to what he calls the “guaranteed minimum” when some people have less than enough for a decent human life, while others have more than they need. Ironically, the available resources are actually enough so that at least everyone has enough without stepping on the others’ turf; he stresses that it is unfair not to guarantee everyone at least an adequate minimum.<sup>220</sup>

#### **N. What is the correct “should” question to ask?**

Climate change certainly leaves us with myriad of difficult questions. Asking what we should be questioning is in itself another question. Should we be questioning, what the right thing to do is? Or should we ask what the right thing to do is, ethically? Or just what is the ethically convenient thing to do? Should we ask pragmatically what we are actually willing to do?

Broome states that not all “should” questions are actually ethical ones, although climate change has some ethical questions worth raising; especially the question of what we should do. This is

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

<sup>218</sup> Irving M. Mintzer, *Confronting Climate Change: Risks, Implications, And Responses* (1992). Henry Shue (1992, p. 397; quoted by Grubb 1995, p. 478)

<sup>219</sup> *Supra note 165*

<sup>220</sup> *Supra note 172*

because any emerging answer must first weigh conflicting interests among people. He sums this proposition up by saying that when interests conflict, “should” questions are always ethical.<sup>221</sup>

Many ethical questions as Broome states can be settled by common sense; with no need for sophisticated philosophy. To some extent, all of us face ethical questions regarding climate change. Mostly, people understand that they cannot do something to serve their own interest if it is going to harm another person; it is an elementary moral principle.<sup>222</sup>

Garvey states two approaches when looking at the ethics of climate change. The first one, which is the good news, is that human beings sometimes change course when they see that what they are doing is unbearably wrong. Thus the ethics of climate change can actually push us in the right direction. The bad news is that reflection on the ethics of climate change can get us into trouble too; mistakes are easy to make and sometimes unavoidable when thinking about right and wrong on a global scale.<sup>223</sup>

In conclusion, the accumulated layers attributed to the issue of climate change have proven highly complicated to unfold. The problem ranges from the beginning of the detection of the human intervention in the atmosphere causing climatic change, and its already complex unique features, to the legal and moral aspects of the problem which makes it uneasy to find solid ground on which to start the untangling process, not to mention to look for solutions.

The relevance of the no harm principle to climate change is to a great extent evident. As the basic duty of the wrongdoers toward the wronged is simply to cease the harm, this has been proved on the ethical, moral scale and the legal one. From an ethical and moral respect, the idea of the duty not to harm is the core principle of a universal morality. As for the legal aspect, the no harm principle is a cornerstone of environmental law. It is also stipulated in various legal instruments and recognized as a rule in customary international law. A wrongful act as well invokes further duties; reparations for the harm done however have proven largely contested.

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<sup>221</sup> John Broome, *The Ethics of Climate Change* Nature (2008), *available at* <http://www.nature.com/scientificamerican/journal/v298/n6/full/scientificamerican0608-96.html> (last visited Mar 28, 2017).

<sup>222</sup> *Id.*

<sup>223</sup> *Supra note 149*

The lack of moral imperative has been proposed as one of the reasons for inaction. Climate change is a replay of the same crises of poverty, migration and refugees that need action on a global scale. Although how climate change is different from these issues is recognized, however the way it has been tackled lacks the same component.

The reluctance to invoke the no-harm principle in previous international responses pertaining to climate change is indeed questionable. It is attributed however to geopolitical considerations and influence from more powerful countries over poorer and less influential ones.

Clearly, sacrifices are going to be a part of any action concerning a solution for climate change, however for a change, maybe it is time for the more developed to compromise; theoretically an ethical outlook in this chaos may force such a space into being.

However, as will be discussed ahead, sacrifices on the developed nations' part, have not been part of the package during the deliberations and conclusion of Paris Agreement. The new promises made have given the illusion of hope in finding actual solutions to climate change and its related problems.

#### IV. Paris Agreement, it's not what you think

This chapter provides a brief assessment of the Paris Agreement which is the most recent and nearly universal deal carried out in the hope to tackle climate change. The evaluation focuses on two points; first, whether Paris Agreement adheres to the no-harm principle. The second assesses how it has dealt with the issue of climate migration and whether it has put forward any solutions for the affected populations.

##### A. Diplomatic success?

At the 21<sup>st</sup> session of the Conference of the Parties (hereinafter COP) to the United Nations Framework Convention on Climate Change (UNFCCC) held in Paris, an Agreement was reached by the international community which involved 195 countries.<sup>224</sup> It is a legally binding treaty under international law, Paris Agreement entails an accompanying COP decision namely Paris Decision. The Agreement does not replace, rather complements the UNFCCC.<sup>225</sup>

This understanding came into being after 25 years of continued efforts of climate diplomacy envisaging climate action.<sup>226</sup> The Agreement has been celebrated by participants and the media as a turning point in policy making to address human induced climate change.<sup>227</sup>

At the same time, the Agreement – as much as it has been praised – has also been heavily criticized. In the following section, an assessment of how the agreement has failed to efficiently tackle the major issues that is said to cause climate change. Observing how an agreement with all that international weight and global consensus has been reached by removing almost all substantive issues concerning anthropogenic climate change.<sup>228</sup>

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<sup>224</sup> Clive L. Spash, This Changes Nothing: The Paris Agreement to Ignore Reality, 13 *Globalizations* 928-933 (2016).

<sup>225</sup> Bodle, Ralph, Lena Donat and Matthias Duwe (2016). *The Paris Agreement: Analysis, Assessment and Outlook*. German Federal Environment Agency (UBA) Research Paper. Dessau-Roßlau: Umweltbundesamt.

<sup>226</sup> Wolfgang Obergassel et al., *Phoenix from the Ashes — An Analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change* (1 ed. 2016).

<sup>227</sup> *Supra note 224*

<sup>228</sup> *Id.*

## B. Premature aspirations?

On the upside, the Paris Agreement introduced a new notion that stresses the fact that “any global warming is dangerous”, this is in contrast to the UNFCCC, whose objective was to avoid merely “dangerous” climate change; thus implying a shift of conception of what could constitute a tangible danger.<sup>229</sup>

The Paris Agreement negotiations witnessed the acceptance of more ambitious goals than before. These include holding “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C (Article 2).”<sup>230</sup> Not surprisingly, that pressures for 1.5°C target came mainly from the persistent pressure of Small Island States who had for years demanded that global warming be kept at 1.5°C to prevent the most severe climate change that could threaten their peoples.<sup>231</sup>

Paris agreement also earned the support of developing countries, arguably for two reasons. First, the agreement raises the standard of adaptation in the international climate regime. Actions of adaptation are going to be accelerated and to be taken under review every five years. Although there was recognition for the need for substantial adaptation finance in Paris Agreement; it still does not include collective and quantified goal for this.<sup>232</sup>

The second reason, is the agreement’s recognition that some impacts of climate change are not going to be adapted to, rather they must be dealt with. This was a contentious issue until the end. As developing countries wanted the concept of “Loss and Damage” to be included in the final text, understandably the developed countries wanted it removed. For the reason that, they feared it will impose on them liability and compensation claims (Article 8; para 52 PD).<sup>233</sup> Surprisingly, or possibly not, drafters came out with an innovative circumvention to go around this dilemma and please both parties; while the article of loss and damage of the Paris Agreement stays, the decision text also contains a clause that excludes the concept as a basis for compensation and liability

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<sup>229</sup> *Supra note 226*

<sup>230</sup> *Supra note 225*

<sup>231</sup> *Id.*

<sup>232</sup> *Supra note 226*

<sup>233</sup> *Supra note 225*

claims.<sup>234</sup> In doing so, it pulled the teeth out of this mechanism and rendering it largely benign; favoring large emitters over the ones actually harmed.

On the downside, many have pointed out shortcomings of this agreement, to state; the lack of legal binding-ness as far as national contributions relating to mitigation, adaptation and finance are concerned is one flaw.<sup>235</sup> International action on climate change adaptation consists mainly of aid projects; that contrasts sharply with the obligations of a state responsible for an internationally wrongful act, which is another shortfall<sup>236</sup> not to mention its overall ambiguity of the text and lack of timely plans to pursue actions.

In other words, the Agreement's core legal obligations are mainly and merely procedural; there is no substance when it comes to actions or deadlines prescribed in the text. Nor are there specific mitigation actions or indications of which emission levels should be achieved by what deadline. Instead, the Agreement focuses on individual climate mitigation plans and the transparency framework.<sup>237</sup>

Over the five year cycle, all parties will have to prepare nationally determined contributions (NDCs), report on implementation to account for their contributions and regularly enhance the plans in light of a global stock take.<sup>238</sup> Developing countries do receive support for preparing, implementing and accounting for NDCs.<sup>239</sup>

Paris Agreement gives limited guidance on the content of those NDCs, and lacks actual plans on how to achieve the targets for emission reduction. NDCs of developed countries "should" be in the form of economy-wide absolute emission reduction targets, and other countries are as well encouraged to move towards such targets. However, there is no agreement on the specificities of the types of neither targets nor actions. Though, an interim negotiation body is mandated to develop further guidance of the features of NDCs (Article 4.4; para 26 PD).<sup>240</sup>

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<sup>234</sup> *Supra note 226*

<sup>235</sup> *Id.*

<sup>236</sup> *Supra note 196*

<sup>237</sup> *Supra note 225*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

Moreover, there is no agreement on the side of parties on a common time frame for NDCs i.e. whether NDCs should all cover the same period. However, it seems that there is a lack of harmony in the timelines of most NDCs. In the run-up to Paris, different timelines are indicated; some up to 2025 and some up to 2030, while some indicate a multiyear target others single year target. Unifying the timeline, or at least getting it close, will make the comparison process easier and will help in monitoring the collective progress towards the global temperature goal.<sup>241</sup> However this does not seem currently to be the case, leaving the matter up to the discretion of each individual state.

On the dark side, contributions submitted by countries significantly lags behind the stipulated global ambition. Even if they were fully implemented, global temperatures will still most likely increase somewhere between 2.7 °C to 3.5 °C.<sup>242</sup> This is considered a major shortfall in the Paris Agreement. Actions to strengthen these contributions – especially by large emitters– must already start in 2018 in order to keep the world on what is considered a safe track for humanity.<sup>243</sup> This shortfall was explicitly highlighted in the decision adopting the agreement, which “notes with concern” that the contributions “do not fall within the least-cost 2°C scenarios, rather these lead to a projected level of 55 gigatonnes in 2030”, while also noting that for a 2°C pathway, 2030 emissions would need to be reduced to 40 gigatonnes.<sup>244</sup>

Another shortfall of it is that an agreement concerned with climate change lacks the basic climate change causing factors. There is no mention of GHG sources, not even a remote mention of the use of fossil fuels, or the stopping of the expansion of fracking, shale oil or explorations for oil and gas in the Arctic and Antarctic.<sup>245</sup> The absence of such crucial elements from an agreement this important is worrying and cannot be taken in good faith. The identified sources causing climate change are simply areas arguably deliberately missing. Presumably, that this is one of these contentious no-go issues that will get in the way of achieving a consensus from certain parties and otherwise would have jeopardized the achievement of this Agreement.

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<sup>241</sup> *Id.*

<sup>242</sup> *Supra note 226*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Supra note 224*



Spash states that the Agreement lacks a means of enforcement; it has “no teeth”. Article 15 on implementation and compliance establishes an expert committee that will be “non-adversarial and non-punitive”, in other words, nothing will be done in the event of non-compliance.<sup>246</sup>

Due to strong opposition to the compliance mechanism that is “to facilitate implementation of and promote compliance with the Paris Agreement” it remains to be seen whether it will be put into practice and how this is going to happen.<sup>247</sup>

Not only does the Agreement offer loose terms on compliance, it also provides an easy exit for those who are no longer interested; as seen in Article 28 withdrawal from the agreement is smooth and entailing no sanctions.<sup>248</sup>

In sum, the Paris Agreement maintains the prospect of dangerous anthropogenic interference in the climatic system. This means that it also confirms the shift in the international position from prevention to risk management in contradiction of the UNFCCC’s own remit. Spash continues his criticism stating “as if insurance has ever stopped a fire” implying that Article 8’s promotion of “comprehensive risk assessment and management” and “risk insurance facilities, climate risk pooling and other insurance solutions” will not be enough of an insurance if a real disaster hits.<sup>249</sup>

### **C. Climate migrants; off the negotiations table**

While the world celebrated the conclusion of an overly ambitious agreement on climate change, there was one urgent area where it did not go far enough: climate change induced migration. Migration is often called the “human face” of climate change yet it does not receive adequate international attention or proper resources to face it.<sup>250</sup> It might be argued that climate migrants were deliberately removed from Paris Agreement as will be discussed ahead.

As previously mentioned, the Paris Agreement keeps the triggers of harm in place; the text signifies commitment to sustained industrial growth, risk management over disaster prevention, and future

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<sup>246</sup> *Id.*

<sup>247</sup> *Supra note 225*

<sup>248</sup> *Supra note 224*

<sup>249</sup> *Id.*

<sup>250</sup> Kristin Lambert, The Paris Agreement: Spotlight on Climate Migrants Yale School of Forestry and Environmental Studies (2015), available at <https://environment.yale.edu/blog/2015/12/the-paris-agreement-spotlight-on-climate-migrants/> (last visited Mar 26, 2017).

inventions and technology as saviors.<sup>251</sup> By maintaining the system that keeps the industrial growth at that rate, it sustains the continuity of harm to vulnerable populations. This can be seen in Article 10 that states: “accelerating, encouraging and enabling innovation is critical for an effective, long-term global response to climate change and promoting economic growth and sustainable development.”<sup>252</sup>

Spash on the other hand sees that the reduction of GHGs is necessary immediately; addressing climate change does not require new technology, and even if proven successful it will take decades to be well established, not to mention that time is a crucial factor in the matter of climate change, and a lot of it has already been wasted by decades of use of fossil fuel and inaction.<sup>253</sup>

The first draft of the UNFCCC negotiating text for COP 21, released in February 2015, included a proposal to create a facility with the name “Climate Change Displacement Coordination Facility” that was going to be assigned three roles: “provides support for emergency relief, assists in providing organized migration and planned relocation, and undertakes compensation measures” for persons displaced by climate change.<sup>254</sup> Not surprisingly, there was little public information on the design of this facility and the functions it would fulfill.<sup>255</sup> However, in the final text of the Agreement, the facility was absent. As Omer Karasapan justifiably questions whether this particular group of people was displaced from the Paris Agreement itself.<sup>256</sup>

It does not come as a surprise that the said facility was removed from the Agreement. This is largely due to the opposition of Australia, their proximity to low lying islands in the Pacific and these islands inhabitants’ vulnerability to these climatic changes surely played a role in their omission from the Agreement. While Australia spent millions of dollars on climate resilience projects in the Pacific and contributed 200 million dollars to the Green Climate Fund,<sup>257</sup> it could

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<sup>251</sup> *Supra note 224*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Jessica Wentz & Michael Burger, Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21, *available at* [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/unfccc\\_climate\\_change\\_displacement\\_coordination\\_facility.pdf?utm\\_content=bufferbc5b7&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/unfccc_climate_change_displacement_coordination_facility.pdf?utm_content=bufferbc5b7&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) (last visited Mar 26, 2017).

<sup>255</sup> Omer Karasapan, Refugees: Displaced from the Paris climate change agreement? | Brookings Institution Brookings (2015), <https://www.brookings.edu/blog/future-development/2015/12/07/refugees-displaced-from-the-paris-climate-change-agreement/> (last visited Mar 26, 2017).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

not afford to lose the upper hand to deal with migration issues on its own terms. Understandably, having this facility in the agreement will make this mission more difficult.

Australia is unlikely to be alone as the impact of climate change as human migration increases, the more powerful and those most responsible for global warming retreat from this facility to deal with climate change issues as they see fit.<sup>258</sup> It was argued that the removal of that facility was short sighted. As it calls for organization and coordination of the movement linked to climate change, rather than the ad hoc measures that are usually taken in these situations when a catastrophe hits.<sup>259</sup>

The Executive Committee of the Warsaw International Mechanism was mandated in Article 8.3 and 8.4; para 50 PD of the Paris Decision to establish a “task force” on this matter to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change” as mentioned.<sup>260</sup> The establishment of a permanent institution; the Warsaw International Mechanism established in 2013 by COP 19 is said to be a major success for small island states. This mechanism is to discuss questions related to Loss and Damage, as per Article 8.2; para 48 PD, now it is anchored to the Paris Agreement and made a permanent institution.<sup>261</sup>

There is little knowledge around this taskforce and its dynamics, as well as who it will be comprised of and how many states will make it up or whether groups of states will put someone forward to represent them collectively. Moreover, the taskforce was given a remit to “create recommendations” as vague as this term might be; it is still not clear how the said recommendations will be implemented or what weight they actually carry. Most importantly, the balance between vulnerable countries and high emitters is still unknown, so as the balance between sending and receiving countries.<sup>262</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> Alex Randall, Not the end for displacement in Paris / Climate & Migration Climate & Migration Coalition, available at <http://climatemigration.org.uk/not-the-end-for-displacement-in-paris/> (last visited Mar 26, 2017).

<sup>260</sup> *Supra note 225*

<sup>261</sup> *Id.*

<sup>262</sup> After Paris - what next for displacement and climate change, Climate & Migration Coalition (2017), available at: <http://climatemigration.org.uk/project/paris-climate-migration-displacement/> (last visited Mar 27, 2017).

In conclusion, George Mobinot hit the core over the propaganda made for the Paris agreement by saying that “By comparison to what it could have been, it’s a miracle. By comparison to what it should have been, it’s a disaster.”<sup>263</sup> The Paris Agreement does symbolizes a legal and moral disappointment with regards to climate change induced migration at the international level. It was a careful attempt not to fall within the pits as of previous agreements on climate change. However, because this agreement tiptoed around contentious issues, it came out with shallow content under the cover of a glamorous façade.

As far as this paper is concerned, problems with the Paris Agreement can be seen at two levels: the general context of the Agreement and the specific context regarding climate migrants. On the general level, ambiguity is used strategically in the wording of the agreement which allowed it to be passed, however to some extent it is severely lacking concrete approaches, plans and timelines, fundamental words like oil, coal or fracking related to energy use are absent. The only sentence that mentions energy is in the preamble acknowledging the need to promote sustainable energy in developing countries, in particular in Africa.<sup>264</sup>

Invocation of the no harm principle cannot be seen within the Paris Agreement, since its presence would at least presume negatives duties of ceasing the act of harm that derives from emissions and since Paris agreement is lenient in that, then the triggers perpetuating climate change still endure, thus maintaining the possibility of harm to innocent populations. This does not include the positive duties for reparations that could oblige richer states to compensate harmed nations. This is presumably one of the major issues that richer countries want to avoid.

The non-binding aspects of fundamental prospects of the agreement is a major problem; especially when it comes to the implementation of NDCs. As well as the elusive compliance mechanism and the easy exit from the agreement. It also lacks the sense of urgency that the phenomenon of climate change and its entailing repercussions demand.<sup>265</sup>

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<sup>263</sup> George Monbiot, Cop-Out George Monbiot, *available at* <http://www.monbiot.com/2015/12/15/cop-out/> (last visited Mar 26, 2017).

<sup>264</sup> *Supra note 224*

<sup>265</sup> *Supra note 250*

As for the specific issue of climate induced migration, a principal way the international community can address migration is by removing some of the triggers that make it necessary for people to flee, however it has chosen the language of adaptation and risk management over prevention.<sup>266</sup>

The least that could have been done towards climate change induced migrants is an adequate recognition. Even though the idea of legal recognition or legal assistance might seem farfetched, due to the sensitivities arising from that issue. However the choice was going around the phenomenon. The climate change coordination facility was removed and the taskforce will only help in giving recommendations, and any direct mandate or a solid approach seems to have been dropped off the negotiation tables along with climate migrants.

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<sup>266</sup> *Id.*

## **V. Conclusion**

Climate migrants seem to have materialized a legal and an ethical dilemma produced by the effects of climate change. They have given a face to long history of legal and ethical inadequacy when it comes to solving not only the problem of climate change however many other problems that require a global action.

Climate migrants have fallen through numerous existing gaps in the international legal instruments relating to human mobility. Instruments for protection in case an international border is crossed are not applicable in most cases of climate change induced displacement.

The Paris Agreement has created another protection gap for climate migrants. The displacement facility that was going to directly target them was intentionally removed, and a taskforce was placed whose structure and role remain unknown. This ends up with the same distorted and unorganized protection for these populations facing a sweeping phenomenon.

The no harm principle, being universal, governs a wide range of relations from simple human interaction to international relations between states, was discarded during the formulation of climate policies and the Paris Agreement is no different. This raises a lot of questions because although there is always contestation on what the “good” is to be done, there is consensus on what is the harm that should be refrained from.

The Paris agreement was a continuation of the legal and moral failure that characterizes the system of governance regarding climate change. The results of these failures have been endured and will be endured by many. Climate migrants will suffer immensely; in some scenarios they will lose their subsistence and livelihoods, in others they could lose their own land. At some point the adaptation measures used as painkillers will no longer hold up to the approaching waves, the real problem will present itself when a right decision is reached and it is too late to act or we simply cannot act upon it because our vision towards the problem is distorted.

Maybe the proposed painkiller might not be the remedy that the injured are looking for. Ideally, maybe it is a time for us to admit our moral wrong and stop talking about what needs to be done, and let the concerned ones on the verge-of-drowning speak for themselves.