

WET FEET MARCHING: CLIMATE JUSTICE AND SUSTAINABLE DEVELOPMENT FOR CLIMATE DISPLACED NATIONS IN THE SOUTH PACIFIC

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INTRODUCTION

At the first United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP) held in Berlin in 1995, Atiq Rahman of the Bangladesh Centre for Advanced Studies gave an impassioned speech to the delegates and warned, “If climate change makes our country uninhabitable . . . we will march with our wet feet into your living rooms.”¹ Climate change related impacts such as floods, tsunamis, hurricanes, and drought have already caused millions of people around the globe to relocate, both temporarily and permanently, within and without their home countries.² Never before, however, have climate change related impacts resulted in the disappearance of a nation and forced its population to resettle in a foreign country without any possibility of returning to its homeland. Yet the permanent displacement of a nation due to anthropogenic climate change may soon become a reality. Despite numerous mitigation efforts, including building sea walls and planting mangrove trees, rising sea levels and storm surges have left numerous families on the Carteret Islands

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1. J. TIMMONS ROBERTS & BRADLEY C. PARKS, *A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY 2* (2006).

2. GLOBAL HUMANITARIAN FORUM, *HUMAN IMPACT REPORT: CLIMATE CHANGE—THE ANATOMY OF A SILENT CRISIS 48* (2009), *available at* <http://www.eird.org/publicaciones/humanimpactreport.pdf>.

of Papua New Guinea homeless and without adequate food and fresh water supplies.³ The islands are predicted to be underwater by 2015, earning the people of the Carterets the notorious distinction as the world's first climate "refugees."⁴

The inevitable prospect of an entire nation becoming inhabitable due to climate change and its population permanently relocating raises concerns that go far beyond immediate humanitarian needs, such as food and shelter, to broader concerns, such as sovereignty, citizenship, and cultural identity. The practical, legal, and ethical consequences of climate change displacement in the South Pacific raise several important questions. First, how and where should relocation occur, and what are the immediate humanitarian needs as well as long-term development needs of displaced nations? Second, who and what caused or contributed to the relocation, and who is responsible for aiding these most vulnerable nations? Third, if responsibility can be assigned and allocated, is there an obligation to act, and what form should such actions take? Fourth, should such actions be based on human rights, the right to development, the right to a sustainable environment, climate justice, or all of the above? In order to answer these questions, it is necessary to (1) evaluate the causes and consequences of climate change displacement; (2) identify the needs of the people and nations permanently displaced; (3) review the current legal and policy frameworks that attempt to mitigate the causes of climate change, adapt to its negative impacts, and address the needs of those suffering from such impacts; (4) explore the normative principles underlying the concepts of climate justice and sustainable development; and (5) analyze whether such principles can be incorporated into existing frameworks, or whether new ones should be developed.

This paper seeks to identify the legal, political, and ethical implications of nations permanently displaced by climate change and evaluate whether the current legal and policy frameworks that attempt to address climate change and human displacement adequately incorporate the principles of climate justice and sustainable development. The scope of this paper is limited to the group of Pacific Small Island Developing States (PSIDS) and explores their options to achieve climate justice and promote sustainable

3. Neil MacFarquhar, *Refugees Join List of Climate-Change Issues*, N.Y. TIMES, May 28, 2009, <http://www.nytimes.com/2009/05/29/world/29refugees.html?scp=1&sq=Refugees%20Join%20list%20of%20Climate%20Change%20issues&st=cse>.

4. *Id.*

development in the face of permanent displacement due to climate change.⁵ Part I illustrates the particular vulnerability of the PSIDS to climate change due to their geographical location and developmental status. Part II reviews the current legal and policy frameworks in the realms of climate change, human displacement, sustainable development, and climate justice. Part III discusses the policy challenges facing the PSIDS as they confront climate displacement, including recognition of climate-displaced persons under international law, the causal link between climate change and human displacement, and the integration of the climate change and human rights based frameworks. Part IV analyzes the four main strategies used to address the unique needs of the PSIDS that face climate change displacement: mitigation, adaptation, relocation, and litigation. Part V explores how climate justice and sustainable development may be incorporated into new or existing frameworks that attempt to address climate change displacement. Finally, Part VI reviews strategies taken and proposed at the international, regional, and local level to address climate change displacement in the South Pacific and proposes an integrated, multilateral approach based on furthering sustainable development and promoting climate justice.

Global climate change is the seminal issue of our contemporary world because it sets the interdisciplinary stage for a variety of political, social, and economic issues, and incorporates normative discussions about responsibility, equity, and fairness. The driving forces behind the negative impacts of global climate change illustrate a disparity between those countries that have developed and profited on cheap fossil fuels and those countries that now bear the burden of paying the externalized costs of such development. Discussions concerning the human aspects of global climate change are inextricably linked to the related concepts of climate justice and sustainable development. Indeed, any law or policy that attempts to address the causes and consequences of climate change on the human environment must necessarily include both normative principles and practical solutions that underlie and advance climate justice and sustainable development.

The most effective way for the international community to fulfill its obligations to the vulnerable nations of the South Pacific, meet the unique needs of climate-displaced persons, further sustainable development, and

5. *About the Pacific SIDS*, PACIFICSIDS.ORG, <http://www.pacificsids.org/memberstates/index.html> (last visited Nov. 11, 2012) (The Pacific Small Island Developing States (PSIDS) was established in 2007, and comprises the eleven Permanent Missions of Fiji, Micronesia, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu).

promote climate justice is to first develop a legally recognized definition of a person displaced by climate change. First, such a definition would take into account the cause and type of displacement; the collective movement of large numbers of people and not just individuals; and the need for long-term development assistance as well as short-term humanitarian assistance.⁶ Second, the international community must improve mitigation measures by developing legally binding greenhouse gas emission reduction targets that attempt to stabilize global temperature at 1.5°C above preindustrial levels.⁷ Third, it will be necessary to create a new convention for persons displaced by climate change that combines elements of the climate change, refugee, human rights, sustainable development, and climate justice agendas. Included in the convention could be a new institutional body that would operate as an “intergovernmental panel on the human impacts of climate change.”⁸ Such an institutional body could help conduct vulnerability assessments, and work with communities in the South Pacific to improve their adaptive capacity and enable participation at all levels of the policy-making process.⁹ Lastly, the new convention must contain a funding mechanism that would take binding contributions from countries based on their historical “luxury”¹⁰ emissions and the “beneficiary pays” principle¹¹ in order to offer grants and other technical assistance for climate change adaptation strategies.¹²

6. Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVTL POLITICS 60, 63 (2010), available at http://www.bupedu.com/lms/admin/uploaded_article/eA.603.pdf (The cause and type of displacement may be voluntary versus forced, temporary versus permanent, and transnational versus inland.).

7. Alliance of Small Island States (AOSIS), New York, Sept. 21, 2009, *Declaration on Climate Change*, http://www.un.org/esa/dsd/dsd_aofw_sids/sids_pdfs/AOSISSummitDeclarationSept21FINAL.pdf.

8. Tracey King, *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 GEO. INT'L ENVTL. L. REV. 543, 559–60 (2006).

9. *Id.*

10. Sujatha Byravan & Sudhir Chella Rajan, *The Ethical Implications of Sea-Level Rise Due to Climate Change*, 24 ETHICS & INT'L AFF. 239, 244 (2010) (explaining that “Luxury” emissions refer to those associated with wasteful lifestyle choice, as distinct from “survival” emissions that are associated with subsistence living).

11. *Id.* at 254 (noting that the beneficiary pays principle requires those countries that undertook and benefited from emissions activities to be held liable for the costs of combating their negative externalities).

12. Benito Müller, *An FCCC Impact Response Instrument as part of a Balanced Global Climate Change Regime*, OXFORDCLIMATEPOLICY.ORG 3 (2002), <http://www.oxfordclimatepolicy.org/publications/documents/iri.pdf> (proposing a Disaster Relief Fund under the auspices of the UNFCCC and calling for “binding up-front contributions from the industrialized country parties to the [UNFCCC] . . . to cover the costs of the international relief effort for climate related disasters”).

I. CLIMATE CHANGE AND ITS UNIQUE IMPACTS ON SOUTH PACIFIC ISLAND NATIONS

In order to develop a new definition and convention for people displaced by climate change, one must have an understanding of the particular vulnerability the PSIDS face due to anthropogenic climate change. The 2007 Intergovernmental Panel on Climate Change (IPCC) Summary for Policymakers concluded that global warming is “unequivocal” due to “increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.”¹³ Sea levels are expected to rise between two to nine millimeters per year and are “very likely [to] due to the increase in anthropogenic greenhouse gas concentrations” over the past fifty years.¹⁴ Even if greenhouse gas concentrations were to stabilize at current levels, the long time scales associated with thermal expansion of the oceans means the earth is due for centuries of rising sea levels.¹⁵

For small island nations and coastal populations, rising sea levels will result in saltwater intrusion, flood and storm damage, wetland loss, and erosion, which, in turn, will cause loss of available land for cultivation, declining freshwater supplies, and, in many cases, will reduce the ability of a nation and culture to exist in their original homeland.¹⁶ In 1990, the IPCC predicted that “the gravest effects of climate change may be those on human migration.”¹⁷ Based on a range of emissions scenarios, the accepted figure estimates that climate change impacts will displace anywhere between fifty and two hundred million people within their country or across international borders on a temporary or permanent basis by 2050.¹⁸ Loss of land due to climate change and sea level rise exacerbate many other human development issues as well, including the ability of a nation to produce its

13. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 5 (Solomon, S. et al. eds., Cambridge Univ. Press 2007) [hereinafter IPCC]

14. *Id.* at 10; EMMA L. TOMPKINS, ET AL., SURVIVING CLIMATE CHANGE IN SMALL ISLANDS: A GUIDEBOOK 120 (2005), available at http://www.issse.ucar.edu/moser/california/pdf/Surviving_Climate_Change_Guide_Book.pdf.

15. IPCC, *supra* note 13, at 16.

16. Byravan & Rajan, *supra* note 10, at 239–41.

17. Office of the U.N. High Comm’r for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law*, May 20, 2009, at 1, available at <http://www.unhcr.org/4a1e4d8c2.html>.

18. See Norman Myers, *Environmental Refugees: An Emergent Security Issue*, EF. NGO/4/05, May 22, 2005, at 1, available at <http://www.osce.org/eea/14851> (estimating that as many as 200 million environmental refugees when global warming takes hold).

own food, access fresh water, and provide for the education, health, safety, and welfare of its population.¹⁹

The impacts of environmental degradation due to climate change are “socially and spatially constructed” and must be understood in the “broader political and cultural context of a region or country.”²⁰ The PSIDS are developing nations that contribute less than one percent to global greenhouse gas emissions and yet are among those that will suffer the most from its adverse effects.²¹ Risks posed to the PSIDS will vary according to the magnitude and severity of a given climate “hazard,” the likelihood of the hazard occurring, and the island’s particular vulnerability, which includes existing economic, social, and physical conditions.²² Factors influencing an island’s vulnerability also include the inhabitants’ culture, traditions, gender, social networks, equity, and governance.²³

Displacement due to sea level rise requires permanent relocation to a new country and consequently raises questions of a population’s refugee status and national sovereignty.²⁴ In this respect, the PSIDS are in a unique and dire situation.²⁵ The Carteret Islands are a stark example of what other South Pacific nations and low-lying coastal populations will face in the coming decades. The Carterets originally consisted of six atolls at the northeast end of Papua New Guinea. During the past twenty years, one of the atolls, which sits only 1.2 meters above sea level, has been divided due to rising sea levels.²⁶ The approximately 3,300 Carteret islanders estimate

19. Steve Lonergan, *The Role of Environmental Degradation in Population Displacement*, ENVTL. CHANGE AND SECURITY PROJECT REP. 5, 9–10 (Spring 1998), available at <http://www.wilsoncenter.org/sites/default/files/ACF26C.pdf>.

20. *Id.* at 8.

21. United Nations Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, April 25–May 6, 1994, *Programme of Action for the Sustainable Development of Small Island Developing States*, 4, U.N. Doc A/CONF.167/9 (Oct. 1994) [hereinafter *Programme of Action*]; Alexander Gillespie, *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL’Y 107, 113 (2004).

22. TOMPKINS, ET AL., *supra* note 14, at 29 (“Hazard” is defined as climate change impacts such as “intense storms, flooding or extreme temperatures”); *Id.* at 32 (Economic factors include small, domestic markets, dependence on imports, and high transport costs; social factors include population size, density, and distribution, poverty, and community involvement; and geo-physical conditions include size, elevation, location, and physical infrastructure).

23. *Id.* at 23.

24. Ryan Jarvis, *Sinking Nations and Climate Change Adaptation Strategies*, 9 SEATTLE J. SOC. JUST. 447, 454 (2010).

25. *Id.*

26. TULELE PEISA, INC., CARTERETS INTEGRATED RELOCATION PROGRAM: BOUGAINEVILLE, PAPUA NEW GUINEA PROJECT PROPOSAL 5 (2009), available at <http://ourworld.unu.edu/en/wp-content/uploads/2009/06/carterets-integrated-relocation-program-proposal.pdf> [hereinafter CARTERETS INTEGRATED RELOCATION PROGRAM].

that over fifty percent of their land has been lost to the sea.²⁷ Saltwater intrusion has also cost the Carterets the swamp taro, their staple food crop, and freshwater is increasingly difficult to come by.²⁸ Rising sea levels will also threaten many traditional practices central to Carteret culture, such as the passing of land from mothers to daughters.²⁹ The Carteret islanders tried alternative adaptation strategies, including building sea walls and planting mangrove trees, but these strategies failed to halt the sea's continuous onslaught.³⁰ Absent effective mitigation strategies to reduce greenhouse gas emissions in developed nations, the Carteret islanders are left with no other choice but to abandon their cultural homelands for an uncertain future in a new territory, where their rights to national self-determination and sustainable development are left to an ambiguous policy arena.

II. CURRENT LEGAL AND POLICY FRAMEWORKS THAT ADDRESS CLIMATE CHANGE AND HUMAN DISPLACEMENT

Climate change displacement encompasses two broad realms of international law: climate change law and refugee law. The primary laws governing climate change at the international level are the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.³¹ Regional level climate change mechanisms include the Pacific Islands Framework Convention on Climate Change and the Niue Declaration on Climate Change.³² The 1951 Convention relating to the Status of Human Refugees and its 1967 Protocol are the primary international instruments that govern the status, protection, and rights of refugees. The concepts of sustainable development and climate justice were developed in connection with meetings and documents concerning climate change and refugee law. These meetings include the 1972 Stockholm Conference on the Human Environment,³³ the 1987 World Commission on Sustainable Development, the 1992 Earth Summit,³⁴ the 1994 Global Conference on Sustainable Development of Small Island Developing States, and the 2002 World Summit on Sustainable Development.³⁵ This

27. *Id.*

28. *Id.*

29. Oxfam Austl., *The Faces of Climate Change: Ursula*, OXFAM.ORG (Oct. 21, 2010), <https://www.oxfam.org.au/2010/10/the-faces-of-climate-change-ursula/>.

30. CARTERETS INTEGRATED RELOCATION PROGRAM, *supra* note 30.

31. *See* discussion *infra* Section II. A, at 10.

32. *See* discussion *infra* Section II. A, at 10–11.

33. *See* discussion *infra* Section II. C, at 12.

34. *See* discussion *infra* Section II. C, at 13.

35. *See* discussion *infra* Section II. C, at 14.

section will provide a review of these instruments and their benefits and limitations with respect to meeting the needs of climate change displaced nations in the South Pacific.

A. Climate Change Agreements at the International and Regional Level

The UNFCCC was created to stabilize “greenhouse gas concentrations in the atmosphere” at a level that would “prevent dangerous anthropogenic interference with the climate system.”³⁶ The Parties to the Convention recognized that low-lying and other small island countries are “particularly vulnerable to the adverse effects of climate change,” and noted that developed countries produced the largest share of historical and current greenhouse gas emissions.³⁷ The UNFCCC concluded, on the basis of equity and common but differentiated responsibilities, that developed countries should “take the lead in combating climate change and the adverse effects thereof,” and provide new and additional resources, both financial and technical, to developing countries to help implement the Convention.³⁸

The 192 original signatories (194 as of April 2010) pledged to meet the “specific needs of and special circumstances of developing countries.”³⁹ Scientific consensus translates this goal into an eighty percent reduction in greenhouse gas emissions by 2050 in order to prevent a maximum 2°C rise in global temperature.⁴⁰ At the fifteenth Conference of the Parties (COP 15) held in Copenhagen in 2009, the Alliance of Small Island States (AOSIS) proposed a maximum increase in global temperature of 1.5°C because the stated goal of 2°C is not enough to prevent some South Pacific nations from going underwater.⁴¹ Tuvalu pushed for a legally binding commitment to this number; however, the international community failed to produce any binding agreement on greenhouse gas reductions.⁴² The lack of progress, voluntary nature, and dominance of developed countries’ voices in the international climate policy debate render the goals of the UNFCCC mere rhetorical aspirations rather than legally binding commitments to prevent dangerous anthropogenic climate change. The disadvantages of the

36. United Nations Framework Convention on Climate Change art. 2, May 9, 1992, 107 U.N.T.S. 1771, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

37. *Id.* Preamble.

38. *Id.* art. 3(2).

39. *Id.* art. 3(1).

40. IPCC, *supra* note 13, at 20.

41. Alliance of Small Island States, *supra* note 7.

42. *Id.*

UNFCCC include its focus on prevention and mitigation rather than adaptation, its “reluctance” to incorporate human rights issues, and its “history of inaction.”⁴³ There are, however, some advantages of a global agreement like the UNFCCC, which include a broad mandate to address a wide variety of issues related to climate change, a body of scientific experts, and a funding mechanism.⁴⁴

The Kyoto Protocol was created in 1997 in order to set binding targets for Annex I (developed) countries to reduce greenhouse gas emissions by five percent below 1990 levels between 2008 and 2012.⁴⁵ Thus far, thirty-seven industrialized countries, excluding the United States, and the European Union have ratified the Protocol.⁴⁶ The Protocol is primarily a mitigation mechanism that places emissions caps on Annex I countries. The Protocol is controversial because it exempts large, developing countries that produce vast amounts of greenhouse gas emissions, such as China and India, from any emissions caps.⁴⁷ In addition, market-based mechanisms that allow the trade of emission reduction units and programs like the Clean Development Mechanism (CDM) permit the largest emitters to continue in the hope that their emissions will be offset by some future program or project.⁴⁸ By the time the Protocol went into effect in 2005, a prominent study revealed that full compliance would only reduce global warming by 0.03°C by 2100.⁴⁹

A new global agreement for climate displaced persons will need to take the advantages and disadvantages of the UNFCCC and Kyoto Protocol into account in order to ensure that the agreement continues to address a wide variety of climate change issues as they relate to the human environment. Remembering lessons learned from UNFCCC and Kyoto is also critical to better utilizing scientific assessments in predicting, and effectively responding to, the adverse impacts of climate change. The new agreement should include adaptation as well as legally binding mitigation measures and provide adequate funding for such measures.

43. Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 394 (2009).

44. *Id.*

45. Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 3, Dec. 11, 1997, 148 U.N.T.S. 2303, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

46. U.N. F.C.C.C., *Fact Sheet: The Kyoto Protocol*, FCCC/SBI/2007/INF.7, at 1 (2011), http://unfccc.int/files/press/backgrounders/application/pdf/fact_sheet_the_kyoto_protocol.pdf [hereinafter *Kyoto Protocol Fact Sheet*].

47. WILLIAM D. NORDHAUS & JOSEPH BOYER, WARMING THE WORLD: ECONOMIC MODELS OF GLOBAL WARMING 3 (2001).

48. *Kyoto Protocol Fact Sheet*, *supra* note 45.

49. NORDHAUS & BOYER, *supra* note 49, at 152–153.

Regional climate change instruments include the Pacific Islands Framework for Action on Climate Change (“Pacific Framework”) and the Niue Declaration on Climate Change (“Niue Declaration”). The Pacific Framework timeframe runs from 2006 to 2015 and includes six main objectives: “implementing adaptation measures; governance and decision-making; improving understanding of climate change; education, training and awareness; contributing to global greenhouse gas reduction; and partnerships and cooperation.”⁵⁰ The Pacific Framework does not create legal rights or impose obligations under international law, but is meant to promote an integrated, multi-stakeholder approach to climate change issues.⁵¹

The leaders of the Pacific Islands Forum developed the Niue Declaration to request that the international community take the following steps: (1) strengthen meteorological services, mitigation, and adaptation measures; (2) consolidate and distribute information on climate change; (3) increase Pacific island countries’ engagement in the UNFCCC; and (4) secure new and additional financial and technical resources for climate change mitigation, adaptation, and relocation.⁵² Both regional instruments are beneficial in that they highlight the needs of South Pacific island nations, namely, the need for greater information and awareness about climate change, involvement in the planning and decision-making process, and financial and technical assistance to strengthen mitigation and adaptation programs. The primary limitation of these instruments is their minimal ability to influence action on the part of industrialized nations during international climate negotiations.

B. International Refugee Law and Human Displacement

The 1951 United Nations Convention relating to the Status of Refugees (“Refugee Convention”) is the primary instrument for international refugee protection. The Refugee Convention defines a refugee as “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality,

50. Secretariat of the Pacific Regional Environment Programme, *Pacific Islands Framework for Action on Climate Change 2006-2015*, at 11, available at <http://www.sprep.org/attachments/Publications/PIFACC-ref.pdf> (2d ed. 2011).

51. *Id.* at 3-4.

52. 39th Pacific Islands Forum, Niue, Aug. 19–21, 2008, *The Niue Declaration on Climate Change*, Annex B, at 24, available at http://www.sprep.org/att/irc/ecopies/pacific_region/463.pdf.

membership of a particular social group, or political opinion.”⁵³ Although the Refugee Convention was originally developed to protect refugees related to the events of World War II in Europe, the 1967 Protocol gave it universal coverage. The Refugee Convention is both a status-based and rights-based instrument with the underlying principles of non-discrimination as to race, religion, or country of origin; non-penalization for illegal entry or stay; and non-refoulement, which means that no refugee may be forced to return to a territory where he or she fears threats to life or freedom.⁵⁴ The Refugee Convention also establishes basic minimum standards for the treatment of refugees to include certain rights, such as access to courts, employment, education, travel documents, and some social security.⁵⁵ Thus, the emphasis of the Refugee Convention is on providing humanitarian aid for individuals facing persecution. The definition of “refugee” as it exists excludes those persons displaced due to climate change. The U.N. High Commission on Refugees (UNHCR) gives nations discretionary leave to allow refugees to stay on humanitarian or compassion grounds, but has not taken a specific stance on the legal status of climate change displaced persons.⁵⁶ The key legal and policy question is whether climate change related displacement can be characterized as a violation of civil, political, and environmental rights that trigger the obligations of non-discrimination, non-penalization, and non-refoulement.⁵⁷ The UNHCR addressed the issues of climate change, rights, and displacement at a meeting held in April 2011. It concluded that “the planned relocation of whole populations or communities may in some cases be necessary” and that “[a]ny relocation plans need to ensure the enjoyment of the full range of relevant rights and a secure status for those relocated.”⁵⁸ These relevant rights include the right to access information about the reasons and procedures for movement, to participate in the planning and management of

53. Office of the U.N. High Comm’r for Refugees, *Introductory Note, Convention and Protocol Relating to the Status of Refugees*, at 3, (2010), available at www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf.

54. *Id.*

55. *Id.* at 20–30.

56. JANE MCADAM, U.N. HIGH COMM’R FOR REFUGEES, CLIMATE CHANGE DISPLACEMENT AND INTERNATIONAL LAW: COMPLEMENTARY PROTECTION STANDARDS 18 (2011), available at <http://www.unhcr.org/4dff16e99.html>.

57. *Id.* at 44.

58. U.N. High Comm’r for Refugees, *Summary of Deliberations on Climate Change and Displacement*, at 7 (April 2011), www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf [hereinafter UNHCR *Summary of Deliberations*].

the movement, to practice one's own culture and traditions, and to enjoy their rights to life, dignity, liberty, security, and self-determination."⁵⁹

C. Sustainable Development, Intergenerational Rights, and Environmental Governance

The 1972 U.N. Conference on the Human Environment in Stockholm declared that man has a "fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."⁶⁰ Principle 11 of the Stockholm Declaration states that "[t]he environmental policies of all States should enhance and not adversely affect the present or future development of developing countries."⁶¹ The Stockholm Declaration urges the international community to "take into account the circumstances and particular requirements of developing countries" and to develop "international law regarding liability and compensation for victims of pollution and environmental damage."⁶² The International Court of Justice (ICJ) echoed this sentiment in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "[T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."⁶³

Currently, international law does not offer standing to future generations, nor is there any treaty that refers to a right to a "decent" environment.⁶⁴ The 1987 World Commission on Environment and Development created the universal definition of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their needs."⁶⁵ The Earth Summit held in Rio de Janeiro in 1992 established Agenda 21, which has been lauded as "the most important step yet taken toward environmental rights protection."⁶⁶ The Summit committed to guaranteeing the "right of every person of present and future generations to live in an environment adequate

59. *Id.* at 8.

60. Gillespie, *supra* note 21, at 122–23.

61. Jarvis, *supra* note 24, at 456.

62. *Id.*

63. Gillespie, *supra* note 21, at 123.

64. *Id.* at 123–124.

65. Rep. of the World Comm'n on Env't and Dev, *Our Common Future*, 42d Sess., Aug. 4, 1987, at 54, U.N. Doc. A/42/427 (1987) [hereinafter *Our Common Future*].

66. STEVE VANDERHEIDEN, *ATMOSPHERIC JUSTICE: A POLITICAL THEORY OF CLIMATE CHANGE* 244 (Oxford Univ. Press 2008).

to his or her health and well-being.”⁶⁷ Principle 6 of the Rio Declaration recognized “[t]he special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable,” and that such countries should be given “special priority.”⁶⁸ Principle 7 established the important principle of “common but differentiated” responsibilities, which are based on differing contributions to environmental degradation.⁶⁹ Additionally, Principle 15 established the precautionary principle, where “lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁷⁰ Thus, the right to an environment that meets the needs of present and future generations and the obligation of developed nations to help developing nations achieve sustainable development are well-established policy goals, but the Principles lack adequate implementation and enforcement mechanisms.

The Global Conference on the Sustainable Development of Small Island Developing States (SIDS) was held in Barbados in 1994 and was the first global conference on sustainable development for the purpose of implementing Agenda 21. The Barbados Program of Action (“Barbados Program”) recognized that “while small island developing States are among those that contribute least to global climate change and sea level rise, they are among those that would suffer most from the adverse effects of such phenomena.”⁷¹ The Barbados Program also recognized that South Pacific developing nations have a limited capacity to respond to and recover from such disasters and therefore need financial and technical assistance under the UNFCCC for mitigation and adaptation efforts. Part Two, Section I of the Barbados Program declares that:

Based on the principle of the right to development, small island developing States should . . . endeavor to achieve the goals of sustainable development by . . . formulating and implementing policies, strategies and programs that take into account development, health and environmental goals, strengthening national institutions, and mobilizing

67. *Id.*

68. *Jarvis, supra* note 24, at 456.

69. *Id.*

70. *Id.*

71. *Programme of Action, supra* note 21, at 4.

all available resources . . . aimed at improving the quality of life.⁷²

Essentially, the environmental, economic, and political vulnerability of the PSIDS limit their ability to pursue a path of sustainable development on their own terms. In 2002, the World Summit on Sustainable Development (WSSD) promoted the idea of good environmental governance, which includes sound economic policies, solid democratic institutions responsive to the needs of people, and improved infrastructure as essential for sustainable development.⁷³ Other essential aspects of good environmental governance include freedom, peace and security, domestic stability, respect for human rights, rule of law, gender equality, market-oriented policies, a commitment to just and democratic societies, and the right to development.⁷⁴ Good environmental governance is exactly what the PSIDS need from the international community for the purpose of strengthening their own domestic environmental governance.

D. Climate Justice and the Duty of Developed Nations

The multiple vulnerabilities facing the PSIDS and their inability to address them without depending on the very nations that caused their current predicament are at the heart of climate injustice. The U.N. Non-Governmental Liaison Service issued a book entitled *Climate Justice for a Changing Planet: A Primer for Policy Makers and NGOs*, describing climate justice as building on a “platform of equitable development, human rights, and political voice.”⁷⁵ In the international realm, climate justice arguably has reached the “degree of relevance” where governmental authorities should establish the normative statement as an explicit policy goal.⁷⁶ For example, in 1998 the Aarhus Convention declared its objective to be the “protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-

72. *Id.* at 5.

73. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *Plan of Implementation of the World Summit on Sustainable Development*, ¶ 138, available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.

74. *Id.*

75. BARBARA ADAMS & GRETCHEN LUCHSINGER, UNITED NATIONS, *CLIMATE JUSTICE FOR A CHANGING PLANET: A PRIMER FOR POLICY MAKERS AND NGOS* xii (2009), available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.

76. J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?*, 8 DUKE ENVTL. L. & POL'Y F. 273, 284-85 (1998).

being,” and that each Party “shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.”⁷⁷ Several years later, the Barbados Program made explicit reference to the inherent injustice arising from the fact that the States which contribute the least to anthropogenic climate change suffer most from its effects, while those same States have the least capability to adapt to such effects.⁷⁸ Global climate change reveals the disparities and inequities of resources, development paths, and emissions contributions between rich and poor nations. Climate justice has emerged as a way of encapsulating aspects of justice, human rights, effectiveness, and efficiency to reduce these disparities and create a sustainable planet.⁷⁹

International climate treaties thus far only suggest moral and legal responsibilities to assist the PSIDS in their adaptation efforts; there are no binding commitments or methods of enforcement that can guarantee adaptation assistance, including relocation, in the pursuit of climate justice. Understanding climate change displacement in the context of climate justice is important because developed nations, as the primary drivers of climate change, owe developing nations a duty to internalize the burdens created by the adverse effects of climate change by mitigating greenhouse gas emissions and compensating developing nations by providing them with appropriate financial and technical assistance.

III. CLIMATE DISPLACEMENT POLICY CHALLENGES FOR THE PSIDS

The threat of climate change displacement facing the PSIDS is the result of both environmental degradation and a failure of governance from the regional to the international level to “heed the warnings of science and the voices of the vulnerable.”⁸⁰ In an address to the Royal Commonwealth Society, the former President of the Republic of Maldives classified efforts to stabilize the climate as a series of “failed promises and missed opportunities.”⁸¹ The failure of governance at both the regional and

77. 4th UNECE Ministerial Conference, Aarhus, Denmark, June 25, 1998, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, art. 1, U.N. Doc. ECE/CEP/43, available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

78. *Programme of Action*, *supra* note 21, at 5.

79. ADAMS & LUCHSINGER, *supra* note 75.

80. Edward Cameron, *Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach*, 38 GA. J. INT'L & COMP. L. 673, 675 (2010).

81. *Id.*; Maumoon Abdul Gayoom, President of the Republic of Maldives, Address at the Royal Commonw. Soc'y: Is There a Right to a Safe Environment? 4 (July 17, 2007), available at

international levels to take precautionary measures and limit greenhouse gas emissions highlights the inequality and injustice of the situation facing the Carterets and other South Pacific island nations. Three main features of this inequality and injustice include (1) the disproportionate accumulation of greenhouse gas emissions by the few at the expense of the many; (2) the delayed effects of climate change such that the harmful effects of present development and growth will be experienced by future generations; and (3) the asymmetrical impacts of climate change, where the poor and those living in developing countries will experience far worse consequences than the wealthy and those living in developed countries.⁸² These three features result in a climate of injustice whereby the wealthy, industrialized countries were able to develop by indiscriminately burning fossil fuels and producing greenhouse gas emissions so that the majority of the world's population, currently experiencing poverty and underdevelopment, must develop in a climate of limited resources and remain within sustainable limits.⁸³ The fundamental ethical question for policy development in this current climate of injustice is whether humanity has an obligation toward the estimated millions who will be displaced due to climate change and sea level rise.⁸⁴

The obligation to act on behalf of climate change displaced persons poses three primary policy challenges for the PSIDS. Their first challenge is gaining recognition under international law of their people as either climate “refugees” or some similar, new designation. The second challenge is their administrative, technological, and financial incapacity to develop and implement mitigation and adaptation strategies. The third challenge is the general lack of acknowledgment, in both a normative and legal sense, of the fundamental right to live and develop in a healthy and sustainable environment.

A. Recognition

The debate concerning the existence, numbers, and characteristics of climate change displaced persons raises the following key issues: whether such persons constitute an identifiable or distinguishable category; whether it is possible to predict the number and distribution of persons displaced by climate change; whether such persons require a distinct definition, and if so

http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Speech_by_President_Gayoom_to_Royal_Commonwealth_Society_July_07.pdf

82. Byravan & Rajan, *supra* note 10, at 245–46.

83. *Id.*

84. *Id.* at 239.

how they should be defined.⁸⁵ The term “ecological refugee” was first defined by Essam El-Hinnawi in an U.N. Environmental Program (UNEP) report in 1985 as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.”⁸⁶ Ecological refugees tend to fall into three main categories: (1) “people temporarily displaced due to a temporary environmental stress but who return once the area has been rehabilitated;” (2) people “permanently displaced who have resettled elsewhere due to permanent environmental change;” and (3) “people who have migrated (either temporarily or permanently) in search of a better quality of life as a result of progressive degradation of environmental resources.”⁸⁷ However, such refugees do not meet the “well-founded fear of being persecuted” standard required under the 1951 Refugee Convention.⁸⁸ A key legal and policy question for the international community is whether the definition should be expanded to include climate-displaced persons or whether a new convention should be created.⁸⁹ Incorporating “environmental” into the definition of “refugee” is controversial because a direct causal link between climate change—as something independent from political and economic changes—and displacement is not easily discernible.⁹⁰ The impetus to respond to the needs of climate-displaced persons is thus susceptible to being lost in a semantic debate with no clear answer.

Several scholars argue that the global nature of the climate change problem and the unique characteristics of persons displaced by climate

85. Tess Burton & David Hodgkinson, *Climate Change Migrants and Unicorns: A discussion note on conceptualising climate displaced people* (draft), available at <http://www.hodgkinsongroup.com/documents/PeopleDisplacedByClimateChange.pdf>; Hodgkinson et al., *Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses*, THE NEW CRITIC (2008), <http://www.ias.uwa.edu.au/new-critic/eight/?a=87815>.

86. Docherty & Giannini, *supra* note 43, at 363 (“Environmental disruption” is defined as any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it temporarily or permanently unsuitable to support human life.).

87. Angela Williams, *Turning the Tide: Recognizing Climate Refugees in International Law*, 30 L. & POL’Y 502, 506 (2008).

88. See Docherty & Giannini, *supra* note 43, at 393–94 (articulating that the Convention does not explicitly cover victims of environmental displacement, but rather focuses on individuals with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”).

89. Burton & Hodgkinson, *supra* note 85, at 11.

90. Williams, *supra* note 87, at 506.

change require recognition apart from the Refugee Convention.⁹¹ Since nearly every person and every country emits at least some greenhouse gases, and these greenhouse gases circulate and impact the entire globe regardless of where they originated, the international community is needed to respond to the multivariate impacts of global climate change. Climate change refugees may be viewed as distinct from traditional political, economic, or war refugees because the international community, in contrast to a country, is responsible for aiding them.⁹² Climate change refugees also differ from traditional refugees because they may be (1) unable to return to their homes; (2) likely to migrate in large numbers as a collective group; and (3) are somewhat predictable given the slow onset of some climate change impacts.⁹³

The international community has attempted to define a climate change refugee or climate change displaced person. For example, the International Organization for Migration (IOM) defines climate change displaced persons as:

Persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment as a result of climate change 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 own country or abroad.⁹⁴

A draft proposal for a Convention on the International Status of Environmentally-Displaced Persons defines “environmentally-displaced persons” as “individuals, families, and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions, resulting in their forced displacement from their habitual residence.”⁹⁵ The definition created by Frank Biermann and Ingrid Boas includes “people who have to leave their habitats, immediately or in the near future, because of sudden or gradual climate changes such as sea level

91. See Docherty & Giannini, *supra* note 43, at 393–94 (arguing that the Refugee Convention is too restrictive to embrace essential components of the climate change refugee instrument); Biermann & Boas, *supra* note 6.

92. Docherty & Giannini, *supra* note 43, at 367.

93. Biermann & Boas, *supra* note 6, at 75.

94. KNIVETON ET AL., INT’L ORG. FOR MIGRATION, CLIMATE CHANGE AND MIGRATION: IMPROVING METHODOLOGIES TO ESTIMATE FLOWS 31 (2008).

95. Julien Bétaille et al., *Draft Convention on the International Status of Environmentally-Displaced Persons*, 4 REVUE EUROPÉENNE DE DROIT DE L’ENVIRONNEMENT 395, 397 (2010).

rise, extreme weather events and drought and near scarcity.”⁹⁶ Another definition proposed by Bonnie Docherty and Tyler Giannini encompasses persons experiencing forced migration, temporary or permanent relocation, movement across national borders, disruption consistent with climate change, sudden or gradual disruption, and a “more likely than not” standard for human contribution to the disruption.⁹⁷

However valuable these discussions over the causal nexus between climate change and human displacement, and the necessary elements of a new definition for persons displaced by climate change, basing policy responses and actions on an ambiguous, semantic debate can be dangerous. Indeed, waiting for a clear definition is neither an effective nor just strategy for addressing the needs of climate change displaced people. Walter Kalin writes in “The Climate-Change-Displacement Nexus”:

We should not be distracted by semantic discussions with little practical meaning about whether to call affected persons ‘climate change refugees,’ ‘environmental migrants,’ or something else. Instead, what is needed is a thorough analysis of the different contexts and forms natural disaster induced displacement can take.⁹⁸

At the same time, moral responsibility and enforceable, legal liability for the aid and welfare of climate refugees is generally lacking in part because recognition of climate refugees is lacking.⁹⁹ Yet there exists a “strong moral connotation” for societal protection that should be afforded to persons forced to leave their homes and relocate across national borders due to climate change.¹⁰⁰ One of the more flexible approaches to recognition for climate-displaced persons would identify climate refugees along a graduated scale to allow for differing degrees of protection depending on the severity of the situation.¹⁰¹

96. Bierman & Boas, *supra* note 6, at 67.

97. Docherty & Giannini, *supra* note 43, at 372.

98. Walter Kalin, Rep. of the Sec’y-Gen. on the Human Rights of Internally Displaced Persons and Co-Dir., The Climate Change-Displacement Nexus, in BROOKINGS INSTITUTION July 16, 2008, at 2.

99. Bierman & Boas, *supra* note 6, at 74-75.

100. *See id.*, at 67.

101. Williams, *supra* note 87, at 522.

B. Capacity

The PSIDS depend on the surrounding sea for their subsistence and livelihood, and they depend on the existence of island territory for economic, political, social, and cultural viability. Without the help of the international community, the adaptive capacity of the PSIDS to respond to a changing climate is limited when rising sea levels, storm surges, floods, and drought impact the people's ability to produce food, access fresh water, operate the tourist industry, or maintain a home and practice cultural traditions. However, the international response thus far has been slow and ineffective, pushing the PSIDS to pursue legal strategies as a last, desperate call for assistance.¹⁰²

In an attempt to increase their collective presence during international climate negotiations, a number of low-lying, small island developing states formed the Alliance of Small Island States (AOSIS) in 1990.¹⁰³ AOSIS is recognized as a group with first speaking rights in the UNFCCC due to their most vulnerable status.¹⁰⁴ In 2009, the AOSIS signed a Declaration on Climate Change, which voiced its concerns over the effects of climate change on its countries and its disappointment in the lack of progress being made at the international level.¹⁰⁵ The Declaration called on the international community to address climate change immediately.¹⁰⁶ In June 2009, the SIDS also introduced a draft resolution expressing their deep concern and urging the U.N. to intensify its efforts to address climate change.¹⁰⁷ Unfortunately, the COP 15 Copenhagen Declaration declined to make any of the changes called for by AOSIS and the SIDS and directed Annex I countries to implement their non-binding emissions targets by 2020.¹⁰⁸ By 2020, however, the Carterets may already be underwater, and

102. See U.N. GAOR, 66th Sess., 16th plen. mtg. at 27-28, U.N. Doc. A/66/PV.16 (Sept. 23, 2011) (citing Joseph Toribiong, President of Palau, calling upon the U.N. General Assembly to seek an advisory opinion from the International Court of Justice on the "responsibilities of States under international law to ensure that activities emitting greenhouse gases that are carried out under their jurisdiction or control do not damage other States").

103. About AOSIS, *Alliance of Small Island States* (last visited Nov. 11, 2012), <http://aosis.org/about-aosis/>.

104. Gillespie, *supra* note 21, at 120.

105. Alliance of Small Island States, *supra* note 7.

106. *Id.*

107. Press Release, Gen. Assembly, Expressing Deep Concern, Invites Major United Nations Organs to Intensify Efforts in Addressing Sec. Implications of Climate Change, U.N. Gen. Assembly GA/10830 (June 3, 2009), available at <http://www.un.org/News/Press/docs/2009/ga10830.doc.htm>.

108. Copenhagen Accord, United Nations Climate Change Conference 2009, -/CP.15, (Dec. 18, 2009), available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf.

the international community will be faced with yet another tragic failure of inaction.¹⁰⁹

Financial capacity is another major limiting factor for developing nations trying to adapt to the adverse impacts of climate change. The estimated price for sustainable development in the Third World was \$625 billion per year; however, developed nations have delivered less than one-fifth of that promise.¹¹⁰ SIDS are “at the front of the queue” for financial assistance for capacity building and are the primary beneficiaries of a fund to help develop National Adaptation Programs of Action (NAPAs).¹¹¹ Despite these mechanisms for financial assistance, external factors threaten their effectiveness, such as a lack of coordination among donor-funded programs and donor-driven preferences taking precedence over local implementation and community-based development needs.¹¹² A more effective funding model may be a Climate Refugee Protection and Resettlement Fund, where communities direct the planning, regulation, and implementation of adaptation programs.¹¹³

C. Human Rights Approach

The lack of recognition of climate change displaced persons under the Refugee Convention and their limited capacity to adapt to displacement raises some issues concerning the rights of climate-displaced persons. There is a recognized duty of each nation to protect the right to life of its people, which includes the right of displaced persons to remain or relocate.¹¹⁴ Beyond the fundamental right to life lie other human rights such as access to humanitarian assistance, education, employment, protection from violence, and restitution or compensation for lost property.¹¹⁵ Displacement caused by climate change raises the question of whether there should be a right to develop in a stable, healthy, and sustainable environment that spans across generations. The right to develop should promote long-term human and economic viability in a socially, economically, and environmentally

109. Neil MacFarquhar, *supra* note 3.

110. ROBERTS & PARKS, *supra* note 1, at 3.

111. Conference of the Parties, U.N. FCCC, 7th Sess., Decision 28/CP.7: *Guidelines for the Preparation of National Adaptation Programmes of Action*, at 12, U.N. Doc. FCCC/CP/2001/13/Add.4 (2001), available at <http://unfccc.int/resource/docs/cop7/13a04.pdf>.

112. Dr. Justin Rose, *Domestic Legal Implications of Climate Change in Pacific Island Countries*, presentation at the Threatened Nations: Legal Implications of Rising Seas and a Changing Climate Conference 10 (May 23-25, 2011) (powerpoint presentation).

113. *Id.* at 4.

114. UNHCR *Summary of Deliberations*, *supra* note 58, at 9.

115. *Id.* at 8.

sustainable manner. The right to climate stability poses sustainability as a moral and legal obligation to future generations.¹¹⁶ The right to develop should also promote climate justice while limiting greenhouse emissions by imposing on all nations a negative duty to refrain from emitting greenhouse gases and a positive duty to assist developing countries in human and economic development.¹¹⁷

Attempts to move the climate change policy debate in the human rights direction have already begun among the indigenous communities of the United States. On December 7, 2005, Sheila Watt-Cloutier, an Inuk woman and Chair of the Inuit Circumpolar Conference, submitted a petition to the Inter-American Commission on Human Rights (IAHCR) on behalf of all Inuit of the United States and Canada seeking relief from “violations resulting from global warming caused by acts and omissions of the United States.”¹¹⁸ The petition argued on the argument that the United States, as the world’s largest emitter of greenhouse gases, bore the greatest responsibility for causing global warming, which violated the Inuit’s fundamental human rights as protected by the American Declaration of the Rights and Duties of Man and international law.¹¹⁹ The petition emphasized that Inuit culture is inseparable from its physical surroundings and the environmental degradation caused by climate change violated Inuits’ right to practice their subsistence way-of-living and cultural identity.¹²⁰ Since most Inuit settlements are located in coastal areas, they are vulnerable to storm surges, permafrost melt, and erosion, which threaten the very existence of their culture. The petition requested that the Commission order the United States to “[a]dopt mandatory measures to limit its emissions of greenhouse gases and cooperate in efforts of the community of nations . . . to limit such emissions at the global level.”¹²¹ The IAHCR rejected the petition in November 2006, stating “the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation

116. VANDERHEIDEN, *supra* note 66, at 251.

117. *Id.* at 250.

118. Sheila Watt-Cloutier et al., Inuit Circumpolar Conference, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 1 (December 7, 2005), available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> [hereinafter Petition to the Inter-American Commission].

119. *Id.* at 5. These rights include the “rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home.”

120. *Id.*

121. *Id.* at 7.

of rights protected by the American Declaration.”¹²² Following the rejection, the Commission agreed to hold a hearing at the request of the petitioners to “acquire a better understanding of the relationship between global warming and human rights.”¹²³ While neither the petition nor the hearing forced immediate action from the U.S., the petition is significant in its attempt to connect global climate change and human rights.¹²⁴ As Rebecca Tsosie writes in “Indigenous People and Environmental Justice: The Impact of Climate Change”:

We must open our collective minds to a notion of justice that is truly intercultural in nature. Such a notion of justice must incorporate an indigenous right to environmental self-determination that allows indigenous peoples to protect their traditional, land-based cultural practices regardless of whether they also possess the sovereign right to govern those lands or, in the case of climate change, prevent the practices that are jeopardizing those environments.¹²⁵

The Inuit in the Arctic and the Carteret islanders in the South Pacific face a similar fate of permanent displacement and an inability to practice their subsistence cultural identity. Even though the Inuit were unsuccessful in proving a violation of the American Declaration of the Rights and Duties of Man, there are several international treaties that strengthen the link between climate change and human rights. The 1972 Stockholm Declaration introduced the concept of the human environment, where man’s well being is dependent on a natural environment that supports the full enjoyment of human rights. Two existing principles of international human rights law incorporate this concept: the International Covenant on Civil and

122. Sarah Nuffer, *Human Rights Violations and Climate Change: The Last Days of the Inuit People?* 37 RUTGERS LAW RECORD 191 (2010) (citing Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Inter-American Commission on Human Rights to Paul Crowley, Legal Representative Inuit Petition (Nov. 16, 2006), available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>).

123. *Id.* (citing Letter from Shelia Watt-Cloutier, Martin Wagner, and Daniel Magraw to Santiago Canton, Executive Secretary Inter-American Commission on Human Rights (Jan. 15, 2007), available at http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf).

124. See Petition to the Inter-American Commission, *supra* note 118, at 6 (arguing that impacts of climate change, caused by acts and omissions by the United States, violate fundamental human rights protected by the American Declaration of the Rights and Duties of Man and other international instruments).

125. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1652 (2007).

Political Rights, which guarantees the right to life, freedom of movement, and choice of residence; and the International Covenant on Economic, Social, and Cultural Rights, which guarantees the right to livelihood, food, water, housing, health, and an adequate standard of living.¹²⁶ A 2001 report by the International Commission on Intervention and State Sovereignty established the “responsibility to protect” (R2P) principle, which assigns responsibility to the international community to protect the citizens of a sovereign state from catastrophe if the state fails to live up to this obligation.¹²⁷ The R2P principle typically applies to situations of mass murder, rape, and starvation and has not yet become accepted as customary international law; however, some argue that it should be expanded to include natural disasters and climate displacement.¹²⁸ More recently on November 14, 2007, SIDS adopted the Malé Declaration on the Human Dimension of Climate Change.¹²⁹ For the first time in an international agreement, this Declaration stated that “climate change has clear and immediate implications for the full enjoyment of human rights,” including “the right to life, the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.”¹³⁰ Additionally, the Malé Declaration called on the U.N. to “address the issue as a matter of urgency.”¹³¹

Following the Malé Declaration, the U.N. Human Rights Council adopted two notable Resolutions relating human rights and climate change. Resolution 7/23 states that climate change poses an immediate and far-reaching threat to people and communities around the world and has

126. MCADAM, *supra* note 56, at 16.

127. Int’l Comm’n on Intervention & State Sovereignty (ICISS), *The Responsibility to Protect*, at 2, 4 (Dec. 2001); Holly D. Lange, *Climate Refugees Require Relocation Assistance: Guaranteeing Adequate Land Assets Through Treaties Based on the National Adaptation Programmes of Action*, 19 PAC. RIM L. & POL’Y J. 613, 624 (2005).

128. *Id.* (citing Jarrod Wong, *Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism*, 84 TUL. L. REV. 219, 222 (2009)).

129. Small Island States Conference on the Human Dimension of Global Climate Change, Malé, Republic of Maldives, Nov. 13-14, 2007, *Male’ Declaration on the Human Dimension of Global Climate Change* (Nov. 14, 2007), available at http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf; Marc Limon, *Benefits of Linking the Human Rights and Environment Agenda: The Example of Human Rights and Climate Change*, Presentation at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Nairobi, Kenya (Nov. 30, 2009).

130. *Id.*

131. *Id.*

implications for the full enjoyment of human rights.¹³² The Resolution called for a study of the relationship between human rights and climate change. The study found that climate change interferes with human rights and that States have obligations under human rights law as well as an ethical imperative to mitigate and adapt to climate change.¹³³ Resolution 10/4, adopted in March 2009, recognized that climate change related impacts have both direct and indirect implications for the effective enjoyment of human rights, including the right to life, adequate food, the “highest attainable standard of health,” adequate housing, self-determination, safe drinking water, and sanitation.¹³⁴ The Resolution also recognized that those in vulnerable situations will feel these implications most acutely due to factors such as “geography, poverty, gender, age, indigenous or minority status, and disability.”¹³⁵ In December 2010, having noted Resolution 10/4, parties to the UNFCCC and Kyoto Protocol included in the Cancun Long-term Cooperative Action (Cancun LCA) language that admonished parties to “fully respect human rights” and “protect the participatory rights of affected individuals and peoples in decision-making processes.”¹³⁶

Using these resolutions and principles of international law to “humanize climate change” functions to: (1) emphasize the importance of equality and non-discrimination in the policy arena; (2) draw attention to the lack of a specific right to a safe and secure environment; (3) emphasize the difficulty of applying transnational human rights; and (4) raise questions about accountability for human rights violations caused by transnational environmental degradation.¹³⁷ The Office of the High Commissioner for Human Rights (OHCHR) has stated that “international cooperation to tackle climate change is not only expedient but also a human rights obligation.”¹³⁸ An international instrument that incorporates human rights for climate change displaced persons should include an explicit right to a

132. Human Rights Council Res. 7/23, Human Rights and Climate Change, 7th Sess., Mar. 28, 2008, A/HRC/RES/7/23, at 1 (Mar. 28, 2008), http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf.

133. Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, H.R.C., 10th Sess., U.N. Doc. A/HRC/10/61 (15 January 2009).

134. Human Rights Council Res. 10/4, Human Rights and Climate Change, 10th Sess., Mar. 25, 2009, A/HRC/RES/10/4, at 1, (Mar. 25, 2009), http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf.

135. *Id.*

136. CIEL, CLIMATE CHANGE & HUMAN RIGHTS: A PRIMER 8 (2011) (last visited Nov. 11, 2012), http://www.ciel.org/Publications/CC_HRE_23May11.pdf.

137. Limon, *supra* note 129.

138. *Id.*

healthy environment, the right to move or stay, the right to information and participation in the movement process, and all the rights common to inter-state and internally-displaced persons.¹³⁹

IV. MEETING THE NEEDS OF SOUTH PACIFIC ISLAND NATIONS FACING CLIMATE CHANGE DISPLACEMENT

For the PSIDS, The prospect of climate-induced migration and permanent displacement has serious legal, political, and ethical implications that are not addressed by current legal and policy frameworks. The “legal vacuum” created by the lack of legal recognition, definition, or protection in international law for climate-displaced persons must be addressed because, even if greenhouse gas concentrations were to stabilize at current levels, the long time-scales associated with thermal expansion of the oceans means the earth is due for centuries of rising sea levels and potentially millions of climate-displaced persons.¹⁴⁰ However, such legal discussions must involve the voices of those vulnerable to climate change displacement and treat the PSIDS as places worth preserving, not abandoning.¹⁴¹ In the words of H.E. Ambassador Marlene Moses, Permanent Representative of Nauru and Chair of the PSIDS: “[u]nder no circumstances can efforts to protect climate-displaced people be used as an excuse for inaction on mitigation and adaptation. Climate migration cannot be seen as a safety valve for a failure in political will Our survival is not negotiable.”¹⁴² In order to address the unique needs and policy challenges posed by climate change in the South Pacific, vulnerable populations have utilized four main strategies: mitigation, adaptation, migration, and litigation.

A. Mitigation

Mitigation seeks to address the causes of climate change and is defined as “human intervention to actively reduce the production of greenhouse gas emissions . . . or to remove the gases from the atmosphere.”¹⁴³ Since small

139. Bétaille et al., *supra* note 95, at 399–401 (noting rights common to inter-state and internally displaced persons include the right to assistance, water, subsistence food aid, health care, juridical personality, civil and political rights, housing, return to homeland, family, work, education and training, cultural specificity, and nationality).

140. IPCC, *supra* note 13, at 16.

141. H.E. Marlene Moses, Permanent Rep. of Nauru, Statement on Behalf of the Pacific Small Island Developing States (PSIDS), Address Before the United Nations Youth Delegates (Oct 13, 2009), <http://pacificsids.org/statements/2009-2010/20091013.pdf>.

142. *Id.*

143. TOMPKINS, *supra* note 14, at 34.

island nations collectively contribute less than one percent to the world's total greenhouse gas emissions, mitigation efforts must occur primarily in developed nations on behalf of developing countries.¹⁴⁴ However, as developing countries pursue a path of sustainable development, efforts to mitigate the production of greenhouse gas emissions must be considered. For example, former President Nasheed declared that the Maldives will be the first carbon neutral country by 2020.¹⁴⁵ Even though the Maldives is one of the most vulnerable developing nations, its government recognizes that sustainable development through carbon neutrality is necessary for the nation's future.¹⁴⁶ Given their comparably large carbon footprint, developed nations need to make a similar commitment to reduce greenhouse gas emissions, not just for the sake of national development, but for the sake of sustainable development of the global community. The adverse effects of climate change are international in scope; hence, mitigating its causes is the common, but differentiated responsibility of the international community.

B. Adaptation

Due to the already accumulated greenhouse gases in the atmosphere and the long time-scale for thermal expansion of the oceans, the earth is committed to global warming and rising sea levels that mitigation efforts alone cannot address.¹⁴⁷ Even though all of the negative impacts of climate change cannot be prevented, human society can improve the "efficiency and effectiveness" of its responses to them.¹⁴⁸ Adaptation aims to minimize the consequences of climate change, and is defined as "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities."¹⁴⁹ Adaptive capacity refers to "the regenerative ability of ecosystems and their capability in the face of change to continue to deliver resources and ecosystem services that are essential for human livelihoods and societal

144. *Id.* at 36.

145. Duncan Clark, *Maldives First to Go Carbon Neutral*, THE OBSERVER, Mar. 15, 2009, available at <http://www.guardian.co.uk/environment/2009/mar/15/maldives-president-nasheed-carbon-neutral>.

146. *Id.*

147. Robin Kundis Craig, *Stationary Is Dead—Long Live Transformations: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9, 14 (2010).

148. *Id.* at 16.

149. WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 6 (M.L. Parry et al. eds., 2007).

development.”¹⁵⁰ The overall goal of adaptation law should be to increase the adaptive capacity of the natural, human, and societal ecosystems.¹⁵¹ Increasing adaptive capacity includes conducting a vulnerability assessment and developing an adaptation strategy. A vulnerability assessment involves identifying in a particular area or country the type of climate hazard, the level of exposure and sensitivity, and the area’s ability to cope.¹⁵² Based on vulnerability assessments, an adaptation strategy determines who bears responsibility for the development and enforcement of risk management plans.¹⁵³ The strategy also requires links with other planning processes, education and communication, support networks, science, and financing.¹⁵⁴ The three main goals of an adaptation strategy are to provide the affected population with a place to live, to keep families together, and to protect cultural practices.¹⁵⁵ Climate change adaptation law must be both flexible when dealing with climate change impacts and committed to precautionary regulation.¹⁵⁶ In other words, adaptation law must be able to respond to local impacts while remaining consistent with global ecological and social goals.¹⁵⁷ Any adaptation strategy must balance the interests of the decision-makers, the risk-bearers, and the cost-bearers for the following reasons: those who decide are often removed from the risk, those who bear the risk are often excluded from the decision-making process, and those who pay often do not face the risk.¹⁵⁸

There are some existing frameworks in international law that address adaptation strategies. The UNFCCC created the National Adaptation Programmes of Action (NAPAs) with funding from the Global Environment Facility (GEF).¹⁵⁹ Countries may stipulate their immediate needs to adapt to the pressing challenges posed by climate change through NAPAs and request funding for technical support and project-specific funding.¹⁶⁰ The NAPA program is only available to the 49 identified least developed countries (LDCs) and involves an eight-step application process.¹⁶¹ As of

150. W. Neil Adger et al., *Socio-Ecological Resilience to Coastal Disasters*, 309 SCIENCE 1036, 1036 (2005).

151. Craig, *supra* note 145, at 10.

152. TOMPKINS, *supra* note 14, at 43.

153. *Id.* at 50.

154. *Id.* at 52.

155. Jarvis, *supra* note 24, at 461.

156. Craig, *supra* note 145, at 9.

157. *Id.* at 17.

158. TOMPKINS, et al., *supra* note 14, at 52.

159. NAT’L ADAPTATION PROGRAMME OF ACTION, <http://www.napa-pana.org> (last visited Nov. 11, 2012).

160. *Id.*; Lange, *supra* note 127, at 636.

161. See NAT’L ADAPTATION PROGRAMME OF ACTION, *supra* note 159.

February 2011, 45 LDCs have submitted NAPAs, including the South Pacific nations of Kiribati, Maldives, Tuvalu, Vanuatu, Samoa, and the Solomon Islands.¹⁶² Holly D. Lange suggests that a new treaty regime, independent of the UNFCCC and based on the NAPA model, is needed to meet the needs of populations permanently displaced by climate change.¹⁶³ This is especially true in terms of funding and local stakeholder participation in order to provide for adequate relocation assistance and land rights provisions.¹⁶⁴ The scope of the NAPA program would need to be expanded from short-term projects to permit permanent land rights, allow for long-term assistance for gradual climate changes, and offer some assistance to host countries—even if they fall outside the LDC category.¹⁶⁵ In sum, the focus of climate change displacement policy needs to shift from mitigating the causes of climate change to adapting to its negative effects.

An effective adaptation strategy must strengthen the adaptive capacity of developing nations, have “principled flexibility” that meets general human rights obligations as well as the specific needs of local populations, and engage multiple stakeholders from the local to the international level. To accomplish this, Benjamin Sovacool draws a distinction between “hard” and “soft” climate adaptation paths.¹⁶⁶ While a “hard” adaptation path relies predominantly on technology and infrastructure that is capital-intensive, large, complex, and inflexible, a “soft” adaptation path prioritizes natural capital, community control, simplicity, and appropriateness in order to address the “locally and contextually specified nature of climate change.”¹⁶⁷ “Hard” and “soft” adaptation paths are not necessarily mutually exclusive. Depending on the time frames, scales, and goals of particular projects or measures, an optimal adaptation policy for a particular nation or community may involve elements of both.¹⁶⁸

C. Relocation

Relocation strategies involve a number of technical and rights-based issues. Technical issues include, but are not limited to: securing new

162. *Id.*

163. Lange, *supra* note 127, at 638.

164. *Id.*

165. *Id.* at 639.

166. Benjamin K. Sovacool, *Hard and Soft Paths for Climate Change Adaptation*, 11 CLIMATE POLICY 1177 (2011).

167. *Id.* at 1179 (citing J. Ayers & T. Forsyth, *Community-based Adaptation to Climate Change: Strengthening Resilience Through Development*, 51 ENVIRONMENT 4, 22–31 (2009)).

168. *Id.* at 1182.

territory, determining the sovereign status of the displaced nation, providing social security, employment, and health services for the displaced population, and protecting the rights of the host community. The rights of climate change displaced persons include the right to remain and re-enter the new country, to maintain cultural identity and social traditions, and to sustainable development.¹⁶⁹ Sujatha Byravan and Sudhir Chella Rajan argue that relocation should be viewed as an adaptation strategy because ignoring potential victims until they are permanently displaced is “morally indefensible as well as impractical.”¹⁷⁰ In *The Ethical Implications of Sea Level Rise due to Climate Change*, the authors propose that the fairest solution is to grant those who will be displaced by rising sea levels the individual right to migrate to safe countries and that there should be an international treaty to find potential migrants homes in advance of displacement.¹⁷¹

1. Land Purchase Programs

One relocation strategy is to purchase land elsewhere and essentially create a new homeland. Former Maldivian President Nasheed created a sovereign wealth fund for the purpose of purchasing a large parcel of land from another country and relocating the entire Maldivian population so that the Maldives may retain its sovereign status in another location.¹⁷² President Nasheed stated that while Maldivians do not want to leave their homeland, they also “do not want to be climate refugees living in tents for decades.”¹⁷³ President Anote Tong of Kiribati declared relocation necessary and urgent, and that adequate land rights must be incorporated into the international response to ensure successful relocation.¹⁷⁴ In *Sinking Nations and Climate Change Adaptation Strategies*, Ryan Jarvis argues that those countries with the highest historic pollution levels should help provide land and compensate the cost of relocation.¹⁷⁵ However, major political problems exist with this approach such as: (1) getting countries to accept responsibility for historic emissions; (2) determining the sovereign status of

169. MCADAM, *supra* note 56, at 59–60.

170. Byravan & Rajan, *supra* note 10, at 242.

171. *Id.*

172. Jarvis, *supra* note 24, 469.

173. *Id.*

174. Lange, *supra* note 127, at 619.

175. Jarvis, *supra* note 24, at 472–475.

newly relocated populations and nations; and (3) identifying the type, location, and amount of land that should be allocated.¹⁷⁶

2. Bilateral and Regional Adaptation and Relocation Programs

One bilateral agreement, the U.S.-Kiribati Friendship Treaty, and two regional programs, the Pacific Access Category (PAC) and the South Pacific Region Environment Program (SPREP), offer valuable lessons for strengthening adaptive capacity in the South Pacific and provide the possibility of relocation. The U.S.-Kiribati Friendship Treaty was signed in 1979 and relinquished U.S. claims to Kiribati's Phoenix and Line Islands.¹⁷⁷ Article 2 of the Friendship Treaty states that the U.S. will provide collaborative assistance to Kiribati "on matters of mutual concern and interest in time of need" and could include aid for relocation.¹⁷⁸ The Friendship Treaty has never been tested in a legal sense, so there is the possibility that similar treaties that specifically detail assistance for climate displacement could be developed.¹⁷⁹

The Pacific Access Category (PAC) was created in 2004 and permits an annual quota of seventy-five citizens from Tuvalu and Kiribati and 250 from Tonga and Fiji, plus their partners and dependent children, to settle in New Zealand.¹⁸⁰ Qualified citizens must meet basic residence requirements, be between eighteen and forty-five years-of-age, have an acceptable offer of employment in New Zealand, and meet a minimum level of English proficiency.¹⁸¹ Thus, the PAC remains a limited and structured migration program rather than a program to address climate-displaced persons.

The South Pacific Region Environment Program's (SPREP) mandate is "to promote cooperation in the Pacific Islands region and to provide assistance in order to protect and improve the environment and to ensure sustainable development for present and future generations."¹⁸² The SPREP has twenty-one Pacific island member countries as well as France, Australia, New Zealand, and the United States that have chosen to focus their efforts on: (1) strengthening meteorological services; (2)

176. *Id.* at 462-475.

177. Treaty of Friendship and Territorial Sovereignty, U.S.-Kiribati, art. 2, Sept. 20, 1979, 35 U.S.T. 2095.

178. *Id.*

179. Lange, *supra* note 127, at 630.

180. *Pacific Access Category*, IMMIGRATION NEW ZEALAND, <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess> (last visited Nov. 11, 2012).

181. *Id.*

182. South Pacific Regional Environment Programme Agreement, June 16, 1993, S. TREATY DOC. NO. 105-32 (1993) [hereinafter SPREP].

understanding climate change variability and sea level rise; (3) analyzing vulnerability; and (4) developing adaptation and mitigation response measures.¹⁸³ The SPREP Secretariat's 2009 annual report detailed some important regional success stories in the areas of ecosystem management, waste and pollution management, environmental governance, and communications education and knowledge.¹⁸⁴ In the environmental governance category, a major focus of the Secretariat was mainstreaming environmental concerns into Pacific island nations' National Sustainable Development Strategies (NSDS), which are coordinated and implemented with the help of a voluntary association of regional and international development organizations.¹⁸⁵ So far, Nauru has revised its 2005–2025 NSDS to focus on sustainable management of its natural resources and Niue has developed a national climate change policy.¹⁸⁶ In addition, SPREP held in-country training sessions to conduct environmental impact assessments that the nations may use as decision-making tools for environment and development planning.¹⁸⁷

Another major success story in the environmental governance category came through financial support from the Global Environment Facility (GEF), which provides grants to developing countries for projects related to climate change and other global environmental issues. Between the establishment of GEF in 1991 to 2006, Pacific island nations have received a disproportionately small amount of financial support compared to their potential to “generate global environment benefits and contribute to their environmentally sustainable benefit.”¹⁸⁸ However, since the establishment of the Pacific Alliance for Sustainability program (GEF-PAS) in 2007, Pacific island nations have managed to secure nearly \$100 million in funding for national and regional projects, with approximately forty-five million dollars going towards climate change adaptation and mitigation.¹⁸⁹ Finally, in the communications education and knowledge category, SPREP created a Pacific Environment Information Network (PEIN) to act as a clearinghouse for climate change resources.¹⁹⁰

183. *Id.*

184. Secretariat of the Pacific Regional Environment Programme, *SPREP 2009 Annual Report*, 10 (2009), available at <http://www.sprep.org/corporate-documents/annual-report-2009>.

185. *Id.* at 35.

186. *Id.*

187. *Id.* at 36.

188. *Id.* at 37.

189. *Id.*

190. *Id.* at 39.

In summary, climate change related displacement will most likely necessitate more treaties and relocation programs between home and host nations. However, such treaties and programs must have a broader mandate than the PAC and provide for the specific humanitarian needs and human rights of the displaced. The SPREP demonstrates the strength of regional level action to improve climate change mitigation, adaptive capacity, technology development, education and information exchange, and public participation. One possible relocation program may be created within the framework of the SPREP, which would provide access to resources and support from a wide variety of development-related institutions from the local to international level. In addition, the SPREP can offer guidance for South Pacific nations that seek to include a relocation program as part of their NSDS.

D. Litigation

South Pacific island nations could use litigation to draw attention to, and force action concerning, mitigation, adaptation, and humanitarian aid for climate change displacement. After the U.S. chose not to ratify the Kyoto Protocol in 2005, Tuvalu threatened to bring suit against the U.S. in the International Court of Justice (ICJ) for failing to reduce greenhouse gas emissions that threatened their ability to subsist in their island environment.¹⁹¹ One major legal obstacle Tuvalu would face if such a suit were brought is that the ICJ has never granted prospective relief.¹⁹² A second major obstacle would be proving that the U.S. should have reduced its greenhouse gas emissions even without clear scientific proof that its particular emissions, though the highest in the world per-capita, would result in the dire consequences facing Tuvalu. In order for Tuvalu to succeed in such a suit, the nation will have to argue that the precautionary principle is a rule of customary international law, that the U.S. has violated, and that the long term environmental impacts of climate change violate the rights of future generations to a homeland and their traditional way of life.¹⁹³ In her article analyzing the substantive law issues of Tuvalu's threat to sue the U.S., Rebecca Jacobs argues that Tuvalu's best argument would be to use the precautionary principle to extend liability to actions that occur

191. Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM. L. & POL'Y J. 103, 128 (2005).

192. *Id.* at 128.

193. *Id.*

prior to the damage.¹⁹⁴ Thus, the U.S. could be held liable for its policies and actions that contributed to global warming and sea level rise prior to establishing a direct correlation between them. In addition, a rule of “prior restraint” would “create liability for current actions that may cause future damages.”¹⁹⁵

Professor Eric A. Posner, on the other hand, argues that litigation under international environmental law is not necessarily the most effective approach when it comes to suing for the historical production of greenhouse gas emissions.¹⁹⁶ Posner writes that litigation targeting the U.S. for failing to regulate greenhouse gas emissions will likely fail because of sovereign immunity and suggests that a different legal approach would be to sue under international human rights law.¹⁹⁷ The advantages of suing are that most states belong to human rights treaties and many of the obligations under these treaties have become norms of customary international law.¹⁹⁸ Theoretically, individuals or groups could bring claims against their own state and foreign states in an international tribunal and prevail “if they could show that failure to regulate greenhouse gas emissions has resulted in a violation of their human rights.”¹⁹⁹ Posner points out, however, that greenhouse gases emissions by a state or corporation have limited restrictions in international law; while several international declarations and treaties refer to a right to a healthy environment, they do not create an international human right to a healthy or undamaged environment.²⁰⁰ Claims against polluters emitting greenhouse gases have the best chance of success if based on the international human rights of life, health, or freedom from discrimination, rather than the right to a healthy environment.²⁰¹

Another option that has not yet been tested in court in the context of climate change is to sue under the Alien Tort Statute (ATS), which permits

194. *Id.* at 127.

195. *Id.*

196. Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925 (2007).

197. *Id.* at 1927.

198. *Id.*

199. *Id.* at 1927–28.

200. *Id.* at 1930–1931, referencing 1972 Stockholm Convention; World Charter for Nature, G.A. Res. 37/7, Annex, ¶ 23, U.N. Doc. A/RES/37/7/Annex (Oct. 28, 1982) (providing the right for all persons to access “redress when their environment has suffered damage.”); *Hague Declaration on the Environment*, 28 INT’L LEGAL MATERIALS 1308, 1309 (1989) (“[R]emedies to be sought involve . . . the right to live in dignity in a viable global environment”); United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992) (“Human beings . . . are entitled to a healthy and productive life in harmony with nature.”).

201. Posner, *supra* note 196, at 1931.

an alien to sue for a tort that was committed in violation of the law of nations.²⁰² In *Sosa v. Alvarez-Machain*, the U.S. Supreme Court found that the ATS provides a cause of action for international law violations based on the present day law of nations and “a norm of international character accepted by the civilized world.”²⁰³ Accepted norms of international character must be alleged to be “specific, universal, and obligatory,” and a court will evaluate each alleged violation of international law separately.²⁰⁴ While the specific legal questions raised by a climate change suit brought under the ATS will not be discussed here, theoretically, a PSIDS or the group itself may bring a cause of action under any of the international climate change and human rights laws and principles discussed in previous sections.

The PSIDS may also adopt the strategy used by the indigenous people living in the Oriente region of Ecuador in their class-action suit against Chevron for the adverse environmental and health impacts caused by oil development in the region. After a failed attempt to bring the lawsuit in the United States, the case was tried in Ecuador under domestic environmental law, despite concerns about corruption in the judicial system and the fact that oil revenues comprise one-third of the government’s budget.²⁰⁵ On February 14, 2011, Judge Nicolás Zambrano ordered Chevron to pay eighteen billion dollars in damages, the largest judgment ever awarded in an environmental lawsuit.²⁰⁶ An appeals court recently upheld Judge Zambrano’s decision, but the entire nineteen-year legal struggle was infused with accusations of fraud, corruption, and misconduct.²⁰⁷ This case illustrates that a domestic lawsuit brought by a group of poor and disempowered plaintiffs against a rich and powerful defendant may take years, even decades, to resolve, and is dependent on the legitimacy of the nation’s judicial system and the strength of its environmental and human rights laws.

Litigation may not prove the best route when it comes to providing immediate assistance to climate-displaced persons while simultaneously promoting climate justice, equity, and fairness. Litigation is often lengthy,

202. Rosemary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?* 11 PAC. RIM L. & POL’Y J. 399, 405 (2002); Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

203. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

204. *Id.* at 732–33.

205. Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER, Jan. 9, 2012, at 41–42.

206. Naomi Mapstone, *Ecuador Court Upholds \$18bn Chevron Ruling*, FINANCIAL TIMES, Jan. 4, 2012, <http://www.ft.com/cms/s/0/e2404598-367c-11e1-a3fa-00144feabd00.html#axzz292ShxbJC>.

207. *See id.* (discussing controversies that arose in connection with the *Chevron* suit).

requiring financial and technical resources that may be better put toward implementing adaptation strategies. Moreover, litigation does not guarantee results or prospective relief. The question of what sort of relief or damages will adequately address climate justice and sustainable development should be part of the climate change litigation discussion. Posner acknowledges that, “the main purpose of litigation may not be to persuade courts to determine greenhouse gas emission policy, but to attract and pressure governments to reach political solutions, including treaties and domestic laws.”²⁰⁸ While this model has had some success in the U.S. in terms of tort litigation and anti-smoking policies, Posner thinks it doubtful that such a strategy will work at the international level.²⁰⁹

At the same time, the PSIDS are losing patience with the negotiation approach. In a statement to the U.N. General Assembly in September 2011, President Johnson Toribiong of the Republic of Palau noted that in the twenty years since the signing of the United Nations Framework Convention on Climate Change there is still no binding agreement to reduce emissions and address the urgent social, economic, and security threats that climate change poses to the PSIDS.²¹⁰ In the interest of determining what international law means in the context of climate change, Palau and the Republic of the Marshall Islands called upon the General Assembly to urgently seek an advisory opinion from the ICJ on “the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States.”²¹¹ Despite litigation’s limitations, the urgent need to address climate change impacts in the South Pacific and the stagnation in the policy arena are forcing the PSIDS to consider all possible avenues to safeguard their nations and livelihoods, including litigation.

V. THE INCORPORATION OF CLIMATE JUSTICE AND SUSTAINABLE DEVELOPMENT FOR SOUTH PACIFIC ISLAND NATIONS FACING CLIMATE CHANGE DISPLACEMENT

This paper has thus far demonstrated the unique set of climate change challenges facing the PSIDS and how the current climate change and refugee legal and policy frameworks fail to adequately address the needs of climate change displaced persons. Vulnerable communities have utilized a

208. Posner, *supra* note 196, at 1944.

209. *Id.* at 1945.

210. U.N. GAOR, 66th Sess., 16th plen. mtg. at 27, U.N. Doc. A/66/PV.16 (Sept. 23, 2011).

211. *Id.* at 27–28.

variety of strategies to deal with the adverse effects of climate change, including mitigation, adaptation, relocation, and litigation; however, the policy challenges associated with climate change displacement remain unaddressed. The normative principles of equity, fairness, and the right to a healthy, sustainable environment for present and future generations that underlie climate justice and sustainable development can have important implications when incorporated into policy agreements; they generate discussions about causation and responsibility for climate change. At the same time, the key obstacle to incorporating these normative principles into existing or new treaties that address climate change displacement is that they are treated more as guiding, moral principles rather than enforceable legal principles.²¹²

James MacNeill, the former Secretary of the World Commission on Environment and Development, stated that “[p]erhaps the greatest weakness of sustainable development . . . lies in the fact that we have not yet begun to invent a politics to go with the concept.”²¹³ There is currently no international institution responsible for the specific issue of climate change related migration because it involves “several areas of international governance—migration and asylum, the environment, development, human rights, and humanitarian aid and assistance.”²¹⁴ This section will review what equity and fairness mean for climate change displaced persons in the South Pacific and how the obstacles of proving causation and assigning responsibility for climate change displacement may be addressed.

A. Equity

In the book *A Climate of Injustice*, J. Timmons Roberts and Bradley C. Parks describe two ways in which inequality drives non-cooperative behavior when it comes to policy-making.²¹⁵ First is the direct path, whereby “extreme poverty . . . and relative powerlessness” leave many nations “without the capacity to negotiate effectively” and “unable to meaningfully address their emissions of greenhouse gases because of their extremely undeveloped economies and government agencies.”²¹⁶ Differences in relative income impact the ability of many countries,

212. Gillespie, *supra* note 21, at 127.

213. Cameron, *supra* note 80, at 675 (providing a quote from Brian Emmett's report to the Canadian Parliament expressing concern that agencies are deeply divided and questioning whether shared decision-making power can occur).

214. MCADAM, *supra* note 56, at 7.

215. ROBERTS & PARKS, *supra* note 1.

216. *Id.* at 8.

including the PSIDS, to attend international conferences, participate in meetings and organizations, and hire skilled negotiators.²¹⁷ Global inequality inhibits access to data and information necessary to both develop a strong bargaining position and comply with negotiated agreements.²¹⁸ For example, many of the PSIDS must hire outside consultants, scientists, and legal aid to help develop NAPAs, greenhouse gas inventories, and vulnerability and adaptation assessments.²¹⁹

The second way in which inequality creates a non-cooperative policy environment is when the experience of poorer nations breeds a “generalized mistrust and polarized expectations about how to proceed on climate issues.”²²⁰ The *Brundtland Report* from the World Commission on Environment and Development in 1987 identified global inequality as a primary cause of stress on environmental resources and ecological degradation as a primary cause of that inequality: “[G]lobal justice and climate change must be addressed simultaneously, and as manifestations of the same set of problems.”²²¹ In *Atmospheric Justice: A Political Theory of Climate Change*, Steve Vanderheiden writes that anthropogenic climate change demonstrates an exploitative relationship between the world’s affluent and the world’s poor and that allowing industrialized nations to continue to dominate the climate policy-making process “violates any defensible version of political equality.”²²² Shifting the focus to social justice increases the ability of policymakers to distinguish between “good and bad outcomes and states of affairs, to inform present and future acts and choices, and to evaluate proposed and past actions.”²²³ When evaluating the vulnerability of the PSIDS, their social, institutional, and economic vulnerability must be considered along with their more obvious environmental and geographical vulnerability.²²⁴

B. Fairness

The inequality inherent in the anthropogenic climate change crisis and the political attempts to address it tend to be viewed as an issue of “profligate Northern consumption” that the North uses to “thwart the

217. *Id.* at 14.

218. *Id.* at 18.

219. *Id.*

220. *Id.* at 8.

221. VANDERHEIDEN, *supra* note 66, at 252 (citing *Our Common Future*, *supra* note 65).

222. VANDERHEIDEN, *supra* note 66, at 63.

223. *Id.* at 48–49.

224. ROBERTS & PARKS, *supra* note 1, at 20.

economic development of poor nations.” Put in a more cynical way, the “rich nations pay for climate change with dollars and poor nations pay with their lives.”²²⁵ The lack of trust and unequal bargaining leverage in negotiating arenas have a profound impact on developing countries’ perception of the fairness of proposed solutions to address climate change impacts.²²⁶ While a nation’s understanding of “fairness” depends on its position in the “global hierarchy of economic and political power,”²²⁷ efforts to incorporate norms and principles of fairness can also create a “collaborative equilibrium and reduce monitoring and enforcement costs,” as well as “influence the costs of bargaining.”²²⁸ For the PSIDS, a “fair agreement” would “immediately stabilize the climate, forestall the complete destruction of island nations and cultures, and address their basic economic needs and extraordinary vulnerability to climate-related stress and hydro-meteorological disasters.”²²⁹ Since stabilizing the climate is not a realistic possibility of avoiding the permanent relocation of some populations of PSIDS, the policy emphasis must be placed on: (1) requiring legally binding targets for greenhouse gas reduction; (2) meeting the immediate humanitarian needs of climate change displaced persons; and (3) developing adaptation measures that effectively respond to the developmental and cultural needs of the most vulnerable nations.

C. Causation

The problem of causation refers to the ability of climate change to exacerbate other political, social, economic, and environmental inequalities, making it difficult to pinpoint climate change as a direct cause of any particular negative impact. Proving causation requires precise estimates of the geographic distribution of climate change displacement due to sea level rise and increasing severe weather events.²³⁰ Despite the lack of a direct relationship between climate change and displacement, the UNHCR issued several key messages and recommendations to State Parties to the UNFCCC that are worth noting. First, there is a clear link, if not a direct causal relationship, between the effects of climate change and displacement.²³¹ Therefore, the international community has an obligation

225. *Id.* at 37.

226. *Id.* at 62.

227. *Id.* at 137.

228. *Id.* at 64.

229. *Id.* at 136.

230. Burton & Hodgkinson, *supra* note 85, at 5–6.

231. UNHCR *Summary of Deliberations*, *supra* note 58.

to protect and assist persons displaced across international borders in a manner similar to the protection given to internally displaced persons (IDPs) and other refugees as defined under the Refugee Convention.²³² Second, an appropriate form of protection for persons who do not qualify as refugees but whose return is “not feasible or not reasonable due to circumstances in the place of origin and/or personal conditions” must be incorporated into the post-Kyoto Protocol regime.²³³ Third, the post-Kyoto Protocol regime and any other adaptation regime must cover forced displacement with the guiding principle being the “ability of States to meet the needs of the most vulnerable and those most affected by climate change.”²³⁴

D. Responsibility

According to Vanderheiden, South Pacific island nations deserve compensation for their injuries because they stand to be the most severely affected by climate change and bear the least responsibility for causing the problem. Thus, compensation costs should be assigned in proportion to each nation’s historical “luxury emissions,” with the largest polluters paying the largest amount into a fund that may be used for adaptation or relocation purposes.²³⁵ Assigning financial and moral responsibility to those nations that have benefited disproportionately recognizes that once an “ethical threshold” has passed whereby people are limited in their health, access to education and knowledge, general safety, self-respect, social recognition, and political participation, the rest of the world has a moral obligation to provide help.²³⁶ This moral obligation stems from the positive duty to treat all humans with dignity and respect and the negative duty to not cause harm.²³⁷ Responsibility for adaptation measures should be shared between home states, who bear the burden of “remedial measures;” host states, who bear the burden of implementing assistance; and the international community, who bears the burden of financial assistance.²³⁸ The U.N. Committee on Economic, Social, and Cultural Rights (CESCR) argues that states have a “joint and individual responsibility . . . to cooperate in providing disaster relief and humanitarian assistance to

232. *Id.* at 2.

233. *Id.* at 3.

234. *Id.* at 3.

235. VANDERHEIDEN, *supra* note 66, at 231.

236. Byravan & Rajan, *supra* note 10, at 250.

237. *Id.*

238. Docherty & Giannini, *supra* note 43, at 379.

refugees and internally displaced persons.”²³⁹ The more that the rich, developed nations show that they understand that climate treaty negotiations are taking place during an ongoing development crisis and that they are concerned about the disparity of labor, poverty, and structural vulnerability, the more credibility and trust is gained.²⁴⁰ The trans-boundary problem of climate change, where the policies of one state have profound effects on the welfare of others, create “overlapping communities of fate” that require new international institutions for globalized environmental governance.²⁴¹

In light of the foregoing, a proper integration of climate justice and sustainable development with climate change mitigation and adaptation schemes needs to: (1) promote equity and fairness between nations; (2) determine the responsibility of developed countries for climate change impacts caused by greenhouse gas emissions; (3) determine how much assistance developed countries should make available for developing countries and how to share the burden; (4) determine how assistance should be distributed between countries and adaptive measures; and (5) determine how planning and decision-making regarding adaptation should occur at different levels of governance.²⁴² A crucial function of any agreement concerning the relocation of climate change displaced persons is to preserve and safeguard the “practices, representations, expressions, knowledge, skills—as well as instruments, objects, artifacts, and cultural spaces associated therewith” that communities consider part of their cultural heritage.²⁴³

VI. TO SINK OR TO SWIM: POLICY AND LEGAL STRATEGIES TO MEET THE CLIMATE JUSTICE AND SUSTAINABLE DEVELOPMENT NEEDS OF SOUTH PACIFIC ISLAND NATIONS FACING CLIMATE DISPLACEMENT

There are several strategies, programs, and proposals currently in action to revise existing policy instruments or to create new policies that incorporate the principles of climate justice and sustainable development in the context of permanent displacement in the South Pacific. This final section reviews: two draft proposals for a new convention on climate

239. *Id.* at 383.

240. ROBERTS & PARKS, *supra* note 1, at 23.

241. VANDERHEIDEN, *supra* note 66, at 89 (citing David Held, *Regulating Globalization? The Reinvention of Politics*, 15 INT’L SOCIOLOGY 399 (June 2000)).

242. ROBERTS & PARKS, *supra* note 1, at 16.

243. United Nations Educational, Scientific, & Cultural Organization, Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2, ¶ 1, Oct. 17, 2003, MISC/2003/CLT/CH/14.

change displaced persons; a proposal for a new international treaty for “climate exiles;” a proposal for a new Protocol on Recognition, Protection and Resettlement of Climate Refugees under the UNFCCC; and the local relocation program developed by the Carteret Council of Chiefs (CoE).

A. Draft Convention on the International Status of Environmentally Displaced Persons

The preamble to the Federal States of Micronesia (FSM) Constitution reads:

Our ancestors, who made their homes on these islands, displaced no other people. We, who remain, wish no other home than this. . . . Micronesia began in the days when man explored seas in rafts and canoes. The Micronesian nation is born in an age when men voyage among stars; our world itself is an island.²⁴⁴

A “Draft Convention on the International Status of Environmentally-Displaced Persons,” was proposed by Julien Bétaille and others from the Center for International and Comparative Environmental Law (CIDCE) in 2008 to draw attention to the environmental harm that necessitates human displacement.²⁴⁵ The preamble to the Draft Convention notes that the growth and foreseeability of climate-induced displacement constitutes a threat to the “stability of human societies, the preservation of cultures, and world peace,” and the international community has a duty to develop an agreement on the international status of environmentally displaced persons in order to assist States that suffer from ecological disaster.²⁴⁶ The objective of the Convention is “to contribute to guaranteeing the rights of environmentally-displaced persons,” both internal and inter-state, who are defined as “individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence.”²⁴⁷ The principles underlying the Convention include the principle of solidarity, common but differentiated responsibilities, effective protection, non-discrimination, and non-

244. The Constitution of the Federated States of Micronesia, Preamble.

245. Bétaille et al., *supra* note 95, at 1.

246. *Id.* at 395–96.

247. *Id.* at 397.

refoulement.²⁴⁸ The specific rights guaranteed to persons threatened by displacement include rights to information and participation, displacement, and the right to refuse displacement.²⁴⁹ The rights guaranteed to persons already displaced include those common to inter-state and internally displaced persons.²⁵⁰ The Convention would include a World Fund for the Environmentally Displaced that would “provide financial and material assistance for the receipt and return of the environmentally-displaced.”²⁵¹ The Fund would be supported by voluntary contributions from states and private actors and mandatory contributions based on a tax for “the causes of sudden or gradual environmental disasters susceptible of creating environmental displacement.”²⁵²

B. Convention for Persons Displaced by Climate Change

The proposal made by David Hodgkinson and others for a “Convention for Persons Displaced by Climate Change” addresses both internal and international displacement, creates original definitions for “climate displaced persons” and “climate change event[s],” and provides for the development of SIDS.²⁵³ Their proposal defines climate change displaced persons as “groups of people whose habitual homes have become—or will, on the balance of probabilities, become—temporarily or permanently uninhabitable as a consequence of a climate change event.”²⁵⁴ The Convention would assign rights and protections through a process of “request and determination” that would be based on scientific studies and the particular situation of the community.²⁵⁵ Under the Convention, displacement would be viewed as “a form of adaptation that creates particular vulnerabilities requiring protection as well as assistance through international cooperation.”²⁵⁶ Hodgkinson and others took into consideration that climate change and human rights vulnerabilities have a common link to resource poor countries where climate change impacts populations unevenly and unequally in ways that are “de facto

248. *Id.* at 398.

249. *Id.* at 399.

250. *Id.* at 399 (explaining the rights of all environmental refugees).

251. *Id.* at 402–3.

252. *Id.* at 403.

253. David Hodgkinson et al., “*The Hour When the Ship Comes In*”: *A Convention for Persons Displaced by Climate Change*, 36 MONASH U. L. REV. 69, 93 (2010).

254. *Id.* (defining “climate change event” as a “sudden or gradual environmental disruption that is consistent with climate change and to which humans very likely contributed.”)

255. *Id.*

256. *Id.* at 89.

discriminatory” because “the private capacity of individuals to resist and adapt differs greatly.”²⁵⁷ The authors therefore incorporated the principle of common but differentiated responsibilities, which “recognizes historical differences in the contributions of developed and developing states to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems.”²⁵⁸ The Convention would also facilitate regional and local planning that recognizes both human rights and international environmental law and the Guiding Principles for internally displaced persons.²⁵⁹ Thus, the emphasis of this Convention would be on the duty of a particular state to provide protection and humanitarian assistance to climate change displaced persons within its jurisdiction and to support governments, local communities, and agencies in fulfilling that duty.²⁶⁰

C. Climate Exile Treaty

In their proposal for a new international treaty, Byravan and Rajan discuss the need to develop climate change based criteria for determining the status of climate exiles and their rights, and to provide skills and training for relocation and redevelopment elsewhere.²⁶¹ They invoke the “beneficiary pays” principle, which states that “countries that undertook and benefited from emissions activities are liable for the costs of combating negative externalities that resulted from them.”²⁶² The authors conclude that “the ethical imperative for the world to act on behalf of the victims of sea-level rise seems clear” and the response must “attempt to restore, or at least compensate for the loss of, human functionings . . . and the burden for doing so should be shared in accordance with responsibility and capacity of the countries of the world.”²⁶³

257. *Id.* at 104 (quoting International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 1 (2008)).

258. *Id.* at 102 (quoting Centre for International Sustainable Development Law, *Citing the Principle of Common but Differentiated Responsibilities: Origins and Scope*, 1, available at http://cisdl.org/public/docs/news/brief_common.pdf).

259. Hodgkinson, *supra* note 253, at 110.

260. *Id.* at 109–10.

261. Byravan & Rajan, *supra* note 10, at 253.

262. *Id.* at 254.

263. *Id.* at 250, 257 (noting that human “functionings” refer to “health, access to education and knowledge, general safety, self-respect, social recognition, and political participation”).

*D. Protocol on Recognition, Protection and Resettlement of
Climate Refugees*

Rather than create a new convention, Biermann and Boas propose a new Protocol on Recognition, Protection and Resettlement of Climate Refugees under the UNFCCC, since a network of implementing agencies already exist.²⁶⁴ This protocol would provide for the resettlement and reintegration of affected populations over a period of years; offer permanent immigrant status for climate refugees to the regions or countries that accept them; focus on the needs of entire groups of people rather than individuals; provide support for governments, local communities, and national agencies to protect people within their territories; and emphasize the need to protect climate refugees as a global problem and a global responsibility.²⁶⁵ Funding for this Protocol would come from a newly created Climate Refugee Protection and Resettlement Fund that would be based on grants in order to reimburse “refugee-protection costs fully when the sole cause of the migration is climate change and partially when it is only a contributory cause.”²⁶⁶ Parties to the UNFCCC would determine the recipients of the grants.

E. Regional and Bilateral Agreements

Whether a new treaty or Convention should be created depends on its effectiveness as more than just a climate change mitigation or human-migration instrument, but as a tool of adaptation for climate justice and sustainable development. Any new convention to address the needs of climate change displaced persons should go beyond the Refugee Convention to include basic survival needs and humanitarian aid.²⁶⁷ Williams argues that “taking into consideration the unwillingness of states to compromise their sovereignty, and acknowledging the reluctance of the United States to agree to . . . the Kyoto Protocol, it would seem unlikely that a new global agreement could be reached specifically in relation to climate change displacement.”²⁶⁸ Instead, Williams advocates for “regional

264. Biermann & Boas, *supra* note 6, at 83.

265. Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, ENV'T. SCI. AND POLICY FOR SUST. DEV. (2008), available at <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>.

266. Biermann & Boas, *supra* note 6, at 29–30.

267. Hodgkinson, *supra* note 253, at 41.

268. Williams, *supra* note 87, at 517.

cooperation and bilateral agreement[s] that build on existing geopolitical and economic relationships” and “that allow states to develop responsive policies in a timeframe appropriate to the relative capacity of the countries involved.”²⁶⁹ A bilateral or regional approach has several advantages, including the exchange of good practices between groups and engagement at various levels of negotiation depending on the individual capacity of each country and the severity of the problem in that area.²⁷⁰ The UNHCR also emphasizes the importance of pooling the limited human, technical, and financial resources of developing states through regional cooperation and institutions to achieve uniformity in providing assistance.²⁷¹ Organizations such as the UNHCR, International Organization for Migration (IOM), the International Labour Organization (ILO), and other relevant international organizations can help support these regional agreements and institutions. These organizations assist by providing relevant expertise in the design and implementation of early warning systems, vulnerability assessments, and adaptation strategies. They also assist by improving access to financial and technical resources, and strengthening the capacity of developing countries to respond to slow-onset climate related disasters, including permanent migratory regimes.²⁷²

F. Local Adaptation Programs

On the Carteret Islands, frustrated by the “empty promises” and lack of assistance coming from both the international community and the Papua New Guinea government, the CoE formed an association called Tulele Peisa in 2006, which means “sailing the waves on our own.”²⁷³ Tulele Peisa’s vision is “[t]o maintain our cultural identity and live sustainably wherever we are.”²⁷⁴ Tulele Peisa negotiated with the Catholic Church and private landowners on the mainland island of Bougainville for the voluntary relocation of 1,700 people, approximately half of the Carterets’ entire population, to three locations—Tinputz, Tearouki, and Raua—over the next ten years. The Carterets Integrated Relocation Program plans to work with both the voluntary migrants and the 10,000 inhabitants of the three host communities on Bougainville in order to help integrate the new immigrants

269. *Id.* at 518.

270. *Id.*

271. UNHCR *Summary of Deliberations*, *supra* note 58, at 8–9.

272. *Id.*

273. *Carterets Integrated Relocation Program*, *supra* note 26, at 5.

274. *Id.*

into the existing community.²⁷⁵ Activities include upgrades to health and education facilities, training programs for income generation, and exchange programs to build relationships and understanding.²⁷⁶ Other services and programs will include a sea transport service for fishing, the creation of a marine conservation and management area, the formation of a Relocation Task Force Committee, and the development of grassroots microfinance institutions to help raise local revenue. So far, Tulele Peisa has been successful in identifying community leaders on both the Carterets and Bougainville to serve on the Relocation Task Force Committee and help mobilize community support for voluntary relocation. Tulele Peisa has also organized a number of training workshops to help build the Carterets' adaptive capacity in terms of land negotiations, social mapping, and climate change campaigns. Finally, Tulele Peisa has gained credibility as an effective organization at the local as well as regional level due to an active public relations and media campaign. One of Tulele Peisa's objectives is to build an "alliance of vulnerable South Pacific communities affected by climate change that can help lobby and advocate for justice and policies that recognize and support their needs."²⁷⁷ In order to fulfill their objectives and continue implementation of the Relocation Program, Tulele Peisa needs financial support and technical assistance that can only come from the international community. Ursula Rakova, the director of Tulele Peisa and a native of the Carterets, said in a video that a fair climate change deal at the international level is necessary because in most industrialized countries, adaptation means a lifestyle change whereas in the South Pacific, adaptation represents life and death and cultural survival.²⁷⁸

Local adaptation programs like Tulele Peisa demonstrate the benefit of empowering communities to develop strategies tailored to the specific social, political, economic, environmental, and cultural needs of their societies. In order for such programs to be successful, however, there must be regional and bilateral cooperation between the host and home countries so that the rights of both climate-displaced persons and their host communities are protected, the humanitarian needs of the displaced are met, and the adaptive capacity of the host communities is strengthened. In addition, climate change displaced persons must receive political and legal recognition at the international level and be offered financial and technical

275. *Id.*

276. *Id.*

277. *Id.* at 9.

278. Ursula Rakova's, Executive Director of Tulele Peisa, Message to World Leaders for a Deal at Copenhagen (Nov. 11, 2009), available at <https://www.youtube.com/watch?v=Ch3oaqQ3qfE>.

assistance as needed during the short term relocation process and the long term resettlement process. Such recognition and assistance helps fulfill the obligation the international community owes to the most vulnerable societies in their pursuit of climate justice and sustainable development.

CONCLUSION

The policy, legal, and human rights implications of a disappearing nation due to climate change are not being seriously addressed at current negotiating sessions and climate change meetings.²⁷⁹ If the international community continues to stall on taking actions to address the needs of people permanently displaced by climate change due to continuing debates over whether to classify them as “refugees,” the direct causal link between climate change and displacement, and the level of responsibility and aid owed to the displaced, then threatened nations will start to pursue legal remedies. Richard Towle, the U.N. Refugee Agency (UNHCR) Regional Representative for Australia, New Zealand, Papua New Guinea and the Pacific, has stated that:

[I]t is clear that climate change—and the human security and development challenges it brings—adds to the scale and complexity of human movement and displacement in the region [and] we need to act now if we are to find solutions for people whose homes, lands and livelihoods are, as we speak, being destroyed by rising sea levels and violent fluctuations in weather patterns in the region.²⁸⁰

Regardless of whether the migration is internal or transnational, global environmental governance must involve the recognition, protection, and resettlement of climate-displaced-persons.²⁸¹ The UNHCR describes the elements of sustainability necessary in the development of “durable solutions to maintain the rights of the displaced” to include consultation

279. See Lisa Friedman, *If a Country Sinks Beneath the Sea, is it Still a Country*, CLIMATEWIRE, <http://www.eenews.net> (August 23, 2010) (quoting the Marshall Islands' ambassador to the United Nations as stating that “[a]t the current negotiating sessions and climate change meetings, nobody is truly addressing the legal and human rights effects of climate change.”); Press Release, United Nations Development Program, *Climate Change Threatens Human Security in the Pacific Islands* (August 6, 2009), available at <http://content.undp.org/go/newsroom/2009/august/climate-change-threatens-human-security-in-the-pacific-islands.en> [hereinafter UNDP Press Release].

280. *Id.*

281. Biermann & Boas, *supra* note 6, at 61, 63.

with and participation of affected communities for the purposes of “safety, recovery of land and property, physical needs, [and] livelihoods.”²⁸² A coherent multilateral governance framework that incorporates local, regional, and international mitigation and adaptation strategies is needed to meet the climate justice and sustainable development needs of climate-displaced persons. Practically, this includes recognition under international law, binding international agreements for mitigation and adaptation assistance, regional and bilateral migration programs, and local development strategies. Each level must emphasize equity and fairness, incorporate the principles of precaution, non-discrimination, and non-refoulement, and meet the immediate humanitarian needs of climate-displaced persons. Ethically, the framework should further recognize the human rights and rights to self-determination, cultural integrity, and development of climate-displaced persons in a healthy, sustainable environment.

282. UNHCR *Summary of Deliberations*, *supra* note 58, at 9.