

PACIFIC ENVIRONMENTAL MIGRATION IN A WARMING WORLD: IS THERE AN OBLIGATION BEYOND STATE BORDERS?

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INTRODUCTION

The impacts of environmental changes are steadily being felt in various regions of the world. As sea and air temperatures rise, hurricanes and floods are occurring in some areas while droughts and disruption to rainfall are felt in others. In the polar and high mountain regions there is the melting of glaciers and ice caps.¹ The Intergovernmental Panel on Climate Change (IPCC) projects that the greatest single impact of environmental change will be on human migration and displacement.² Yet international migration, as an adaptive response to minimize the adverse impacts of environmental threats, has rarely reached national and regional agendas. Often countries and regions are silent on legal and policy frameworks relative to potential

1. RICHARD Z. POORE, RICHARD S. WILLIAMS JR. & CHRISTOPHER TRACEY, SEA LEVEL AND CLIMATE 1 (2011), *available at* http://pubs.usgs.gov/fs/fs2-00/pdf/fs002-00_williams_508.pdf.

2. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC 1990 AND 1992 ASSESSMENTS 103 (1992).

environmental resettlements of vulnerable populations, among them the low-lying Pacific atoll states.

This paper asks whether states have obligations beyond their borders, particularly towards environmentally vulnerable countries whose populations may require international resettlement. Using the juristic writings of Pufendorf, Vattel, and Kant as lens of inquiry, three diverse viewpoints are pursued: (1) states do not have an obligation, their primary concern being self-protection; (2) the decision to aid affected populations is optional, the primacy of the states' freedom to choose who, or who not to admit within their territories being the main concern; and (3) an obligation exists based on a universal duty of beneficence. Pufendorf, Vattel and Kant were chosen based on their influence in the fields of legal, moral, and political philosophy all of which survive to the present. This paper posits that current environmental challenges are a global concern, and thus require global responses. Pufendorf and Vattel's views, while sound within the logic of a bounded state paradigm, are too self-interested and territorially circumscribed to adequately respond to the global and transnational reach of climate change. The paper concludes that states not only have moral, and arguably legal, obligations to provide humanitarian assistance and hospitality towards populations beyond borders, but that such obligations require both states and their citizens to do far more than current practices suggest.

I. ENVIRONMENTAL MIGRATION IN THE PACIFIC

Environmental migration is not new in the Pacific. Pacific Islanders have moved great distances in the past, environmental threats being among the triggers.³ Recent events and processes, however, suggest that environmental migration is expected to increase significantly in the coming years.⁴ The Pacific Region, with its low-elevation island nations dispersed in a vast ocean setting, is particularly vulnerable to challenges from the physical environment.⁵ The region is predicted to be among those where the adverse effects of environmental changes can be felt the most.⁶ Campbell estimated that by mid-century there could be “between 665,000 and

3. Justin Locke, *Climate Change-Induced Migration in the Pacific Region: Sudden Crisis and Long-Term Developments*, 175 GEOGRAPHICAL J. 171, 172 (2009).

4. INT'L ORG. FOR MIGRATION, MIGRATION, CLIMATE CHANGE, AND THE ENVIRONMENT: ASSESSING THE EVIDENCE 14–15 (Frank Laczko & Christine Aghazarm eds., 2009), available at http://publications.iom.int/bookstore/free/migration_and_environment.pdf.

5. MATT MCINTYRE, PACIFIC ENVIRONMENT OUTLOOK 21 (Sherry Heileman ed., 2012), available at http://www.unep.org/geo/pdfs/Pacific_EO_final.pdf.

6. Locke, *supra* note 3, at 172.

1,750,000 climate migrants in the Pacific region” when the total population is expected to exceed 18 million.⁷ Though tentative, the prediction is nonetheless daunting, taking note of an increasing number of people displaced worldwide due to environmental factors.

Coastal flooding due to unusually high tides displaced a number of people in the Marshall Islands, Kiribati, and the northern coast of Papua New Guinea in December 2008.⁸ Already people are relocating due to saltwater inundation and contamination.⁹ The first batch of Carteret islanders had resettled in Bougainville Island, Papua New Guinea in 2009 on a plan that will ultimately transfer 1,700 residents.¹⁰ Other vulnerabilities include coral bleaching, soil erosion, and increased salinization of water reserves. For example, if Tuvalu and Kiribati’s fresh water lens reserves become contaminated with sea water, then the islands would become uninhabitable.¹¹ The I-Kiribatis and Tuvaluans would have no choice but to relocate. Sea water intrusion into farmlands and freshwater aquifers have been reported in the Solomon Islands.¹² A study showed that increased salinity in the coastal areas of Thailand killed off the coconut trees, as in fact “no crops will gain from increased salinity.”¹³

While the extent of the impacts of environmental changes are still subject to debate, plans for proactive migration of human populations are emerging, particularly among small island states.¹⁴ In 2005, President Anote Tong of Kiribati spoke before the 60th Session of the United Nations

7. John Campbell, *Climate Change and Population Movement in Pacific Island Countries*, in CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 29, 38 (Bruce Burson ed., 2010), available at <http://igps.victoria.ac.nz/publications/files/t25928e2182.pdf>.

8. U.N. Office for the Coordination of Humanitarian Affairs, *Kiribati: Pacific Islands: Abnormally High Sea Levels OCHA Situation Report No. 1*, RELIEFWEB (Dec. 13, 2008), <http://css.static.reliefweb.int/report/kiribati/pacific-islands-abnormally-high-sea-levels-ocha-situation-report-no-1>.

9. JULIE WEBB, ENGAGING YOUNG PEOPLE IN THE SOLOMON ISLANDS FOR RED CROSS ACTION ON CLIMATE CHANGE 3 (2008), available at <http://www.climatecentre.org/downloads/File/articles/SIRC%20YOUTH%20case%20study%20web.pdf>.

10. Adam Morton, *First Climate Refugees Start Move to New Island Home*, THE AGE (July 29, 2009), <http://www.theage.com.au/national/first-climate-refugees-start-move-to-new-island-home-20090728-e06x.html>.

11. Richard Bedford & Charlotte Bedford, *International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu*, in CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 91 (Bruce Burson ed., 2010), available at <http://igps.victoria.ac.nz/publications/files/d7e9c96ba3c.pdf>.

12. WEBB, *supra* note 9.

13. Peter Roy & John Connell, *Climatic Change and the Future of the Atoll States*, 7 J. COASTAL RES. 1057, 1069 (1991).

14. Kalkot Matas Kelekele, President of The Republic of Vanuatau, Address at the U.N.G.A. (Sept. 26, 2008); Marcus Stephen, President of the Republic of Nauru, Address at the U.N.G.A. (Sept. 24, 2008).

General Assembly on the need of atoll countries to consider the relocation of their populations. In 2008, during the 63rd UN General Assembly session the President of Vanuatu noted the possibility that “some of our Pacific colleague nations will be submerged”.¹⁵ Nauru’s President argued about the necessity to review the “implications to sovereignty and international legal rights from the loss of land, resources and displacement of people.”¹⁶ Should relocation become necessary, what is ensured is not only the physical survival of the inhabitants, but the continuation of their cultural and traditional legacies.

II. OBLIGATION BEYOND STATE AND REGIONAL BORDERS

Do states have legal and moral obligations beyond national or regional borders? Extraterritorial obligations arise from various sources, among them historical ties and treaties. For instance, colonialism has left the Pacific region with a “complex legacy of legal and political associations.”¹⁷ Under New Zealand’s Citizenship Act of 1977, residents of New Zealand’s former colonies, the Cook Islands and Niue (now self-governing countries in free association with New Zealand), are considered to be New Zealand citizens with open migration access to New Zealand and access to its social services.¹⁸ Under the same act, inhabitants of Tokelau, a New Zealand territory, are *ipso facto* New Zealand citizens.¹⁹ This agreement has implications for environmental migration and has facilitated the movement of former colonial peoples to New Zealand following devastating environmental events. In 1990, Hurricane Ofa nearly necessitated an evacuation of the island Niue to New Zealand.²⁰ Additionally, Hurricanes Val (1992) and Percy (2005) destroyed most of Tokelau’s agriculture and led to “severe food shortages” such that New Zealand had to relocate Tokelauans to New Zealand.²¹

Due to past association and perhaps continuance of strategic military and economic interests in the Pacific, the United States bound itself by treaty by giving migration rights and privileges under the Compact of Free Association (COFA) to citizens of Micronesia, Palau and the Marshall

15. Kelekele, *supra* note 14.

16. Stephen, *supra* note 14.

17. Brian Opeskin & Therese MacDermott, *Resources, Population and Migration in the Pacific: Connecting Islands and Rim*, 50 ASIA PACIFIC VIEWPOINT 353, 363 (2009).

18. Citizenship Act 1977, art. 1, § 29 (N.Z.).

19. *Id.*

20. Judith Baker, *Hurricanes and Socioeconomic Development on Niue Island*, 41 ASIA PAC. VIEWPOINT 201 (2000).

21. E.J. Moore & J.W. Smith, *Climate Change and Migration from Oceania: Implications for Australia, New Zealand, and the United States of America*, 73 POPULATION & ENV’T 105, 115 (1995).

Islands.²² Likewise, the arrangement would have implications for environmental migration in terms of access to U.S. social services in disaster situations and would guarantee entry rights to the U.S. mainland, should extreme conditions occur. Under Article IV, section 141(a) of the COFA, citizens of the Marshall Islands and the Federated States of Micronesia “may be admitted to, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States and its territories.”²³ Further, the citizens of the associated states have access, within their home states, to U.S. social services including the disaster response and recovery and hazard mitigation programs under the Federal Emergency Management Agency.²⁴ Obligation beyond state border with implication for environmental migration, thus, is not new in the Pacific.

States generally cooperate and enter obligations with other states when it is in their interest to do so. The benefit may be direct or accruing in the future; conversely, cooperation may be terminated when it becomes apparent that its continuance becomes detrimental or burdensome for the state. The Trans-Tasman Travel Arrangement, allowing citizens of Australia or New Zealand to travel, live, and work in each other’s state,²⁵ cannot be explained only in light of past historical ties, but also the economic benefits of a hassle-free exchange of visits and workers from English speaking nations with a similar level of development. Papua New Guinea, which was formerly part of the Australian commonwealth in the early 1900s, but whose economy is deemed lagging behind that of Australia,²⁶ does not have similar privileges. An exception, due to close cultural and geographical ties, are Torres Strait islanders who, by treaty, are given visa-free access to travel to Australia’s northern islands under the 1985 Torres Strait Treaty between Australia and Papua New Guinea.²⁷

Pursuing the question further, do states have an obligation towards countries with which they have neither historical ties nor a reasonable expectation of economic benefits? This paper offers divergent views

22. Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720 (codified at 48 U.S.C. § 1921 (2006)).

23. *Id.* § 141(a).

24. *Id.* § 221(a)(6).

25. *The Trans-Tasman Travel Arrangement*, N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE, <http://www.mfat.govt.nz/Foreign-Relations/Australia/0-trans-tasman-travel-arrangement.php> (last updated Nov. 29, 2010).

26. JOHN FALLON, CRAIG SUGDEN & LYNN PIEPER, *THE CONTRIBUTION OF AUSTRALIAN AID TO PAPUA NEW GUINEA’S DEVELOPMENT 1975–2000*, at ix (2003), available at http://www.ausaid.gov.au/Publications/Documents/qas34_contribution.pdf.

27. Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters, Austl.-Papua N.G., art. 11, Dec. 18, 1978, 1985 ATS 4.

expressed on this issue, reflecting three principal approaches: (1) states do not have an obligation, their primary concern being self-protection; (2) obligation is optional or a matter of charity, the primacy of the states' freedom to choose who or who not to admit within their territories being the main concern; and (3) an obligation exists based on a universal duty of beneficence.

A. Self-Protection as a Primary Obligation

There are those who maintain that, far from being a source of humanitarian concern, cross-border environmental migration is in fact a security threat to the world's states. As migratory pressures increase so do instability and conflict. The Oxford Research Group foresees the likelihood that "the protection of national and maritime borders and the detention of illegal immigrants is likely to become an increasing priority" for military and border patrol agents.²⁸ As fears were expressed about Bangladesh's vulnerability to flooding, India decided to build a "2,100-mile high-tech 'separation barrier'" in 2003.²⁹ While likely infiltration of extremists was cited as reason for the fence's construction, Indian officials were "increasingly inclined to cite climate change refugees, rather than the Islamist threat, as a concern."³⁰ The ASEAN Regional Forum (ARF) Defence Officials Dialogue in 2008 identified "climate change as a threat multiplier," a "non-traditional threat" from which the military would need to "continuously prepare itself."³¹ At the 2011 International Organisation for Migration (IOM) workshop on Climate Change, Philippine Ambassador Manalo reported a "general agreement among ARF member states that forced migration was among the transboundary threats presented by climate change."³²

According to the securitized view of climate change, tensions will ensue between those displaced and their destination states. Cultural, ethnic, and racial differences will beget "fearful reactions" and "inflammatory politics" from the receiving society, as migrants compete for jobs and

28. Lorraine Elliot, *Climate Change and Migration in Southeast Asia: Responding to a New Human Security Challenge* 4 (Asia Sec. Initiative & MacArthur Foundation, Working Paper No. 20, 2012), available at www.rsis.edu.sg/nts/resources/research_papers/MacArthur_Working_Paper_Lorraine_Elliott3.pdf.

29. GREGORY WHITE, CLIMATE CHANGE AND MIGRATION: SECURITY AND BORDERS IN A WARMING WORLD 71 (2011).

30. *Id.*

31. Elliot, *supra* note 28, at 5.

32. *Id.* at 6.

limited resources.³³ Discourses in climate security and migration “conjure up an image of processes that are likely to [spin] out of control,” and are therefore highly threatening.³⁴ The situation is similar to what 17th-century German jurist Pufendorf envisioned as a state of nature where self-protection is a primary obligation. While aliens are not necessarily enemies, they do not deserve full trust either. In their “desire to preserve themselves” aliens “rush to arms,” and spur “men on to injure others.”³⁵

[A]ny man who is not our fellow-citizen . . . is to be regarded, not indeed as an enemy, but still as an inconstant friend. The reason for this is that men are not only perfectly able to injure each other, but for various reasons very often willing to do so. For in some cases perversity of nature, or the passion for ruling and possessing superfluities, spurs men on to injure others. Other men, though of modest temper, rush to arms in the desire to preserve themselves³⁶

For Pufendorf, man is too selfish to consider other people’s welfare. He argues, reminiscent of Hobbes, that such self-interest propels man to act violently towards his fellowmen, although unlike Hobbes, Pufendorf believes man is not exclusively selfish by nature.³⁷ To protect individual and collective interests, mankind needs to enter into covenants and agreements. By extension, states sign treaties with benefit and self-preservation in mind:

The duties thus set forth derive their force from the common relationship which nature established among all men even before any act was exchanged between them. But it is not enough to confine within such a circuit the duties which men owe each other. For not all men are so constituted that they are willing to do

33. DAN SMITH & JANANI VIVEKANANDA, A CLIMATE OF CONFLICT: THE LINKS BETWEEN CLIMATE CHANGE, PEACE AND WAR 3 (2007), available at http://reliefweb.int/sites/reliefweb.int/files/resources/16A12BCAEAD0E411852573AE007570A3-International%20Alert_Climate%20of%20Conflict_07.pdf.

34. Elliot, *supra* note 28, at 3–4 (discussing other authors, such as Kurt Campbell, who “worry about ‘massive migrations . . . potentially involving hundreds of millions of people . . . perhaps billions of people’ and ‘a significant portion of humanity on the move,’” thereby suggesting that “‘uncontrolled migration’ would be ‘more likely to overwhelm the traditional instruments of national security (the military in particular) and other elements of state power and authority’”).

35. *Id.*

36. *Id.*

37. Michael Seidler, *Pufendorf’s Moral and Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/sum2011/entries/pufendorf-moral> (first published Sep. 3, 2010).

everything, with which they can help others, out of mere humanity and love, and without assuring themselves of some hope of receiving their equivalent Moreover, it often happens that other men do not know how they may serve our interests. . . . And so, if mutual offices, the real fruit of humanity, are to be practiced more frequently between men, and by a kind of set rule, it was necessary for men themselves to agree among themselves on the mutual rendering of such services as a man could not also be certain of [or] for himself on the mere law of humanity.³⁸

While Pufendorf subscribes to mankind's basic equality and exhorts individuals to "exhibit the services of humanity," morality alone is insufficient for the long-term preservation of the state.³⁹ What Pufendorf calls "duties of humanity" does not only consist of "not to have hurt another" or "not to have deprived him of the esteem he is owed."⁴⁰ It is in conferring "something good . . . on the other" so that the minds of men may be "conjoined by a still closer bond"⁴¹ and in being "glad that others who share my nature also live upon this earth."⁴² Thus, the "affinity and kinship established among men by nature must be exercised by means of mutual duties."⁴³

In exceptional cases, and subject to the primary rule of state preservation and protection, Pufendorf admits it is lawful not only for individuals but also for "entire cities and provinces" to emigrate, if such action is being compelled by a "hostile force."⁴⁴ While Pufendorf does not define hostile force, it may include any life threatening situation facing an individual or community such as extreme environmental events:

Another way in which someone unwillingly changes states occurs when he is compelled by hostile force to subject himself to the sovereignty of another as citizen and subject, whether or not he changes his residence at the same time. This is generally admitted, is licit not only for individual citizens—at least those bound by no

38. SAMUEL VON PUFFENDORF, TWO BOOKS ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 48 (Oxford: Classics of International Law, 1927) (1682).

39. *Id.*

40. SAMUEL VON PUFENDORF, THE POLITICAL WRITINGS OF SAMUEL PUFENDORF 164–65 (Craig L. Carr ed., Michael J. Seidler trans., 1994) [hereinafter PUFENDORF POLITICAL].

41. *Id.* at 164.

42. *Id.* at 165.

43. *Id.*

44. SAMUEL VON PUFFENDORF, ON THE LAW OF NATURE AND NATIONS, BOOK 8, 126 (Basil Kennet, D.D. trans., 3rd ed. 1712).

other bond than the common bond of citizens—but also for whole cities and provinces, when there appears to be no other way of promoting their welfare.⁴⁵

In spite of this injunction, Pufendorf cautions that humanity reverts to their animalistic nature in unstable and stressful situations, from which only the state affords genuine protection.⁴⁶ For instance, under stable conditions people do not generally wish harm for other people. Insecure and uncertain situations, however, witness “great multitude[s] . . . to whom every right is worth less.”⁴⁷

There is no one who does not strive to protect himself against such persons, if he loves his own safety; and that protection cannot be had more conveniently than by help of states . . . For surely it is evident that man is an animal of the kind that loves itself and its interest to the utmost degree.⁴⁸

Extreme or prolonged environmental changes are among the conditions that spawn insecurity. Thus, for Pufendorf, it is within reason to protect the state by any means, as it is to seek out one’s personal protection within the cover of a sovereign state. Only the state can protect man from such threats. Yet, while security implications of climate change deserve consideration, it is one thing to view environmental migrants as wholesale threat, and another to regard them as vulnerable human beings deserving help. Pufendorf does include the admission of vulnerable migrants who are compelled to leave their homes by hostile forces, among the duties of humanity.⁴⁹ This duty is, however, subordinate to the paramount obligation of citizens to protect the state from being weakened in any imaginable way.⁵⁰

Ultimately, the choice to securitize borders vis-à-vis the environmentally displaced peoples raises questions such as: is it fair to be born on a continental landmass while those from atoll nations remain vulnerable when shut out at the borders? While securitizing the issue may

45. PUFENDORF POLITICAL, *supra* note 40, at 265–66.

46. SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN 104–05 (Frank Gardener Moore trans., Oxford University Press 1927).

47. SAMUEL VON PUFENDORF, ELEMENTS OF UNIVERSAL JURISPRUDENCE 104–05 (Oxford: Classics of International Law 1931).

48. *Id.* at 103, 105.

49. SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO, Vol. II, 366 (C. H. Oldfather & W. A. Oldfather trans. 1688 ed.).

50. *Id.*

be politically expedient and caters to populist anxieties about not letting strangers in, a policy that turns a nation's back against affected populations is ultimately unethical, and as unethical policies go they cannot be sustained in the long run.

B. Benevolence as Charity

Some Pacific Rim countries have admission opportunities potentially benefiting environmental migrants under their humanitarian and compassionate programs. The decision to admit migrants is, however, optional and subject to ministerial discretion. The United States, under section 212(d)(5)(a) of the Immigration and Nationality Act, grants the Secretary of the Department of Homeland Security discretion to parole an individual into the U.S. temporarily for humanitarian reasons or for significant public benefit.⁵¹ In response to the January 12, 2010 magnitude 7 earthquake in Haiti, which killed up to 230,000 people,⁵² the United States granted "humanitarian parole" to Haitian orphan children to come to the United States for inter-country adoption.⁵³ New Zealand's Immigration Act of 2009, section 61(1) empowers the Minister of Immigration with discretion to grant "a visa of any type" to any person, regardless of the status of that person's stay in New Zealand, provided no deportation order is in force.⁵⁴ The decision to grant a visa may be given at "any time" and is within the Minister's "own volition" and "absolute discretion."⁵⁵ It may be argued that the discretion may include migration opportunities for the environmentally displaced. In the case of Australia, recognizing there are humanitarian and compassionate claims that do not fit neatly into refugee or refugee-like situations, the Australian legislature granted the Minister of

51. *Humanitarian Parole Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERV., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=acc3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=acc3e4d77d73210VgnVCM100000082ca60aRCRD> (last updated Apr. 20, 2012).

52. *With More Bodies to be Counted, Haiti Raises the Earthquake Death Toll to 230,000*, ASSOCIATED PRESS (Feb. 10, 2010), available at http://articles.washingtonpost.com/2010-02-10/world/36920163_1_death-toll-quake-toll-70-magnitude-earthquake.

53. *Special Humanitarian Parole Program for Haitian Orphans Draws to a Close at Request of Haitian Government*, U.S. CITIZENSHIP AND IMMIGRATION SERV., www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3e1cd474cb9d7210VgnVCM100000082ca60aRCRD (last updated Apr. 7, 2010).

54. Immigration Act 2009, §61(1) (N.Z.) ("Grant of visa in special case: (1) The Minister may at any time, of the Minister's own volition, grant a visa of any type to a person who (a) is unlawfully in New Zealand; and (b) is not a person in respect of whom a deportation order is in force.")

55. *Id.*

Immigration wide discretionary powers for reasons of “public interest.”⁵⁶ The Minister, through his or her “intervention powers,” is allowed to override unfavorable decisions of review bodies and make a decision more favorable to the applicant.⁵⁷ However, unlike in the United States and New Zealand, where the ministerial discretion may be invoked at first instance, Australia’s ministerial discretion provisions may only be exercised at post-review levels and as an applicant’s final avenue of appeal.⁵⁸

There are downsides to this benevolence as charity approach. Firstly, the non-compellable and non-reviewable nature of the discretionary decisions does not give rise to rights and entitlements. Secondly, the interest and well being of vulnerable populations may, in theory if not in practice be thrown out of the consideration any time. The virtually unbounded latitude of ministerial power subjects applicants to the minister’s personal whim and changing political climate of the times. For instance, at any time a securitized approach which brings with it highly restrictive admission policies may be imposed irrespective of the situation. Thirdly, in the case of Australia, preventing the invocation of the power until the last tier of the administrative process makes the process more cumbersome, if not unjust.

As earlier stated, the non-compellable and non-reviewable power of ministerial discretion does not guarantee any definite legal right or protection for environmental migrants. In the *Ozmanian* case, the Australian Federal Court stated that the nature of the discretionary power “makes it clear that the Minister is not under a duty to consider whether to exercise the power under § 417(1) in respect of any decision, whether or not the Minister is requested to do so by the applicant or any other person, or in any other circumstances.”⁵⁹ The “no duty to consider” provision was likewise affirmed in *Bedlington*,⁶⁰ triggering criticisms about the “unsettling implications” of discretionary powers and how they are “almost

56. Report by Senate Select Committee on Ministerial Discretion in Migration Matters 2004, at xi, 41 (Austl.) (quoting Ms. Biok, Legal Aid Commission of New South Wales, to the Committee Hansard on September 22, 2003).

57. *Ministerial Intervention*, AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, http://www.immi.gov.au/refugee/ministerial_intervention.htm (last visited Mar. 28, 2013) (discussing the prerequisite that there be a prior review tribunal decision on an applicant’s case before the minister can intervene and exercise his public interest powers and defining review tribunal as any of the three appellate bodies reviewing the eligibility applications of refugees or migrants: Refugee Review Tribunal (RRT); the Migration Review Tribunal (MRT); or, in certain circumstances, the Administrative Appeals Tribunal (AAT)).

58. *Id.*

59. *Minister for Immigration and Multicultural Affairs and Another v Ozmanian* (1996) 46 A.L.J. 244, 16 (FCR) (Austl.).

60. *Bedlington and Another v Chong* (1998) 87 FCR 75,78 (Austl.).

ungovernable by the courts.”⁶¹ The near absolute nature of the Minister’s personal judgment in exercising such “discretion” on the one hand, coupled with the “no duty to consider” provision has brought about charges of the Minister “playing God”; the “Minister is under no obligation to consider a request to exercise discretion, no matter how strong a case may be.”⁶²

According to eminent Swiss jurist Vattel, under the “eternal and immutable law of nature,” a “state owes to another state whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties it owes to itself.”⁶³ Every state ought to act “for the preservation of others, and for securing them from ruin and destruction . . . as far as it can do this without exposing itself too much.”⁶⁴ Thus, if “a nation is afflicted with famine, all those who have provisions to spare ought to relieve her distress, without, however, exposing themselves to want.”⁶⁵

Whatever be the calamity with which a nation is afflicted, the like assistance is due to it. We have seen little states in Switzerland order public collections to be made in behalf of towns or villages of the neighbouring countries, which had been ruined by fire, and remit them liberal succours; the difference of religion proving no bar to the performance of so humane a deed. The calamities of Portugal have given England an opportunity of fulfilling the duties of humanity with that noble generosity which characterizes a great nation.⁶⁶

The motivating impulse for such a deed is twofold: the noble fulfillment of the duty of humanity, and the mundane possibility of a quid pro quo when helping states may “stand in need of assistance” in the future.⁶⁷ Yet, for Vattel, while nations have the duty the same is optional. Each nation ultimately determines whether to carry out its obligation, in effect, converting what was otherwise an extraterritorial duty to one of charity. While nations are obliged to “lend each other mutual assistance” for their improvement and perfection, they remain “free and independent of

61. Savitri Taylor, *Sovereign Power at the Border*, 16 PUB. L. REV. 55, 75–76 (1995).

62. Mathew Zager, *Playing God—Ministerial Discretion in Migration Law*, 22 LEGALDATE 3, 14 (2010).

63. EMERICH DE VATTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE* 135 (Philadelphia: T. & J.W. Johnson & Co., Law Booksellers, 1867).

64. *Id.*

65. *Id.* at 136.

66. *Id.*

67. *Id.* at 135.

each other, in the same manner as men are naturally free and independent.”⁶⁸ Thus:

As a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes to her—of what she can or cannot do—of what is proper or improper for her to do: and of course it rests solely with her to examine and determine whether she can perform any office for another nation without neglecting the duty which she owes to herself. In all cases, therefore, in which a nation has the right of judging what her duty requires, no other nation can compel her to act in such or such particular manner: for any attempt at such compulsion would be an infringement on the liberty of nations.⁶⁹

C. *Duty of Benevolence*

Kant argues for states to bestow the right of admission and hospitality to non-citizen visitors and sojourners.⁷⁰ He says that while states have the right to refuse entry of visitors, it cannot do so violently, or if the non-admission leads to the visitors’ destruction.⁷¹

[States] may refuse to receive him when this can be done without causing his destruction; but, so long as he peacefully occupies his place, one may not treat him with hostility. It is not the right to be a permanent visitor that one may demand. A special beneficent agreement would be needed in order to give an outsider a right to become a fellow inhabitant for a certain length of time. It is only a right of temporary sojourn, a right to associate, which all men have. They have it by virtue of their common possession of the surface of the earth, where, as a globe, they cannot infinitely disperse and hence must finally tolerate the presence of each other.⁷²

The grant of “hospitality” not only bestows the right of temporary sojourn, but more importantly the “right of a stranger not to be treated as an

68. *Id.* at lxi.

69. *Id.* at lxii

70. IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 82 (Pauline Kleingeld ed., David L. Colcasure trans., 2006) (1795).

71. *Id.*

72. IMMANUEL KANT, PERPETUAL PEACE 20, 21 (Lewis W. Beck ed. & trans., The Bobbs-Merrill Co. 1957) (1795).

enemy when he arrives in the land of another.”⁷³ It is a human being’s “right to associate,” with fellow human beings “by virtue of their common possession of the surface of the earth,” as “[o]riginally no one had more right than another to a particular part of the earth.”⁷⁴

The right of hospitality has deeper and wider implications than seems at first. Unlike Pufendorf and Vattel (who held that states have the last say in determining entry regardless of need or condition among migrants), for Kant admission is obligatory when failure to do so would spell “destruction” to those wanting to get in. Kant posits that states “cannot legitimately send a person back to a country where she or he will die or be killed as a result of being sent back.”⁷⁵ Kant’s imperative thus anticipated the international law principle of non-refoulement, and more. For while under existing international law asylum states are prohibited from returning victims of persecution or torture to their home states pursuant to the 1951 Refugee Convention and 1984 Convention against Torture or other Cruel, Inhuman or Degrading Treatment (CAT), Kant’s principle subsumes any one in distress who is seeking asylum.⁷⁶ While the non-refoulement right under CAT is broader in range than that spelled out under the Refugee Convention, the protection is nonetheless restricted to situations involving torture.⁷⁷ On the other hand, Kant’s right of hospitality protects any forced migrants (which potentially includes environmental migrations) from being returned to their home.

73. *Id.* at 20.

74. *Id.* at 21.

75. Pauline Kleingeld, *Kant’s Cosmopolitan Law: World Citizenship for a Global Order*, 2 KANTIAN REV. 72, 76 (1998).

76. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 176 (Article 33(1) states: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”). *See also* U.N. Convention Against Torture or Other Cruel Inhuman or Degrading Treatment, G.A. Res.39/46, art. 3, U.N. Doc. A/Res/39/46 (Dec. 10, 1984) (“(1) No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”). Article 1 of the Convention Against Torture defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” *Id.* at art 1.

77. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 17.

Kant argues that individuals, and by extension states, must “[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”⁷⁸ The maxim stems from his view of humanity as beings endowed with reason, hence are ends in themselves bound by the same universal rules.⁷⁹ Thus human beings may never be used as a means to an end. As bearers and agents of reason, humanity has a special place in Kant’s scheme of things. Another Kantian principle is to “[a]ct only according to that maxim by which you can at the same time will that it should become a universal law.”⁸⁰

To Kant, these categorical imperatives are binding on mankind without exception, simply because human beings are rational.⁸¹ To violate the categorical imperatives would be to violate the laws of reason and morality. If a person (or by extension, society) wishes to act or promulgate rules, that person cannot simply regard itself as special or superior, and take exception to moral rules. To do so is contrary to reason. For example, to Kant, a policy that obliges the state to assist populations internally displaced by natural or man-made disasters, but not those who cross international borders, would be contrary to reason.⁸² While environmental migrants (people, for example, displaced as a result of “natural or human-made disasters”) displaced within their own countries are identified as a discrete category of persons deserving protection under international law, those who cross international borders are not similarly protected.⁸³ International environmental migrants are not a “formal legal category of people in need of special protection”⁸⁴ and there is no “coordinated legal and administrative system” to relocate them in a “planned and orderly manner.”⁸⁵

78. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 47 (Lewis White Beck trans., 1959) (1785) [hereinafter KANT FOUNDATIONS].

79. *Id.* at 46.

80. *Id.* at 39.

81. *Id.* at 46.

82. The Guiding Principles on Internal Displacement of the UN Commission on Human Rights (now UN Human Rights Council), identifies “internally displaced persons [as] persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” Francis M. Deng, *Guiding Principles on Internal Displacement*, 33 INT’L MIGRATION REV. 484 (1999), available at http://go.galegroup.com/ps/i.do?id=GALE%7CA54955701&v=2.1&u=vol_r8111&it=r&p=ITOF&sw=w.

83. *Id.*

84. Jane McAdam & Ben Saul, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, in HUMAN SECURITY AND NON-CITIZENS 357, 359–60 (Alice Edwards & Carla Ferstman eds., 2010).

85. Ilona Millar, *There’s No Place Like Home: Human Displacement and Climate Change*, 14 AUSTL. INT’L L.J. 71 (2007); see also INT’L ORG. FOR MIGRATION, WORLD MIGRATION 2008:

To Kant, the duty to help others in distress is a categorical imperative, an absolute moral law.⁸⁶ Hospitality,⁸⁷ thus, cannot be refused in times of distress or life threatening situations, such as environmental disasters or threats. The “meritorious duty to others,” arises for a person who is “going well” while “he sees that others have to contend with great hardships.”⁸⁸ It may be argued that Kant’s principle of hospitality goes beyond physical survival. Forced migrants, whose need for hospitality may be temporary or long-term, have needs beyond physical survival. For instance, when sea levels rise, making low lying islands uninhabitable, the need for resettlement may be permanent. The longer the resettlement, the stronger would be the need to protect group identity and rights, and for the migrants to retain their cultural and ethnic identity as a people.⁸⁹

Some countries and regions have, through domestic legislation or treaty, acknowledged an obligation towards victims of environmental disasters from other countries. Both the Swedish Aliens Act (2006) and Finnish Aliens Act (2009) mention “environmental disasters” as a basis for the grant of protection and residency in Sweden and Finland, respectively.⁹⁰ The Swedish Aliens Act, Chapter 4, section 2(3) defines a “person otherwise in need of protection” as an alien “unable to return to the country of origin because of an environmental disaster.” Chapter 5, section 1 entitles “persons otherwise in need of protection” to a “residence permit” in

MANAGING LABOUR MOBILITY IN THE EVOLVING GLOBAL ECONOMY 493 (Gervais Appave & Ryszard Cholewinski eds., 2008) (defining “environmental migrants” as “persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their homes or choose to do so, either temporarily or permanently, and who move either within their country or abroad”). *But see id.* at 399 (noting the difficulty in isolating the environment as a single independent variable impacting on the decision to move; hence, the IOM’s definition is not universally accepted).

86. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 32–33 (Mary Gregor trans., Jens Timmerman ed., Cambridge University Press 2011) (1785) [hereinafter *KANT GROUNDWORK*].

87. “Hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another.” IMMANUEL KANT, *PERPETUAL PEACE*, *supra* note 72.

88. *KANT FOUNDATIONS*, *supra* note 78, at 33, 39.

89. Kleingeld, *supra* note 75, at 84 (noting Kant’s strong support for refugee and individual rights over colonial powers). According to Kleingeld, Kant’s universalist arguments have greatly influenced modern day institutions, among them the League of Nations and United Nations. Article 27 of the International Covenant on Civil and Political Rights, a United Nations treaty, states: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

90. 4 ch. 2(3) § Aliens Act (2006) (Swed.); 5 ch. 1 § Aliens Act (2006) (Swed.), *available at* www.government.se/content/1/c6/06/61/22/bfb61014.pdf. 301/2004 Ulkomaalaislaki [Aliens Act] ch. 6, § 109 (1) (Fin.), *available at* <http://www.finlex.fi/fi/laki/kaannokset/2004/en20040301.pdf>.

Sweden.⁹¹ The Finnish Aliens Act, Chapter 6 section 109(1) on the other hand, grants “[t]emporary protection” to aliens in “need [of] international protection and who cannot return safely to their home country or country of permanent residence, because there has been . . . an environmental disaster.” Temporary protection may be for a “short duration,” and “lasts for a maximum of three years in total.”⁹²

In Africa, there is the regional practice of allowing those affected by natural disasters such as famine and drought to cross international borders. The practice may in part be attributed to the African Union’s expanding the UN Refugee Convention’s definition of “refugee,” to include those compelled to leave their country owing to “events seriously disturbing public order.”⁹³ While some governments are careful not to characterize the practice as an outright obligation arising from the AU treaty definition, it may be argued that the definition recognizes an extraterritorial obligation towards those affected by environmental threats, assuming these seriously disturb public order. At the very least, the definition may be seen as contributing to the development of the protection rights for the environmentally displaced on “humanitarian grounds under customary international law.”⁹⁴

III. DISCUSSION

Thus far, this paper has noted Pufendorf, Vattel, and Kant’s views on state obligations beyond borders. It has reflected on what each might have said relative to state obligations on environmental migration. As earlier said, all three were chosen based on their writings and far-reaching influence in law, morality, and political philosophy. Pufendorf, Vattel, and Kant agree on man’s fundamental equality, and the universal morality to aid people in distress, including those living beyond borders. Whether the grant

91. 4 ch. 2(3) § Aliens Act (2006) (Swed.); 5 ch. 1. § Aliens Act (2006) (Swed.), available at www.government.se/content/1/c6/06/61/22/bfb61014.pdf.

92. 301/2004 Ulkomaalaislaki [Aliens Act] ch. 6, § 109 (1) (Fin.), available at <http://www.finlex.fi/fi/laki/kaannokset/2004/en20040301.pdf>.

93. U.N. High Comm’r for Refugees, Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1 §§ 1–2, Sept. 10, 1969. Article 1(2) of The Convention Governing the Specific Aspects of Refugee Problems in Africa, states: “The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” *Id.*

94. Alice Edwards, *Refugee Status Determination in Africa*, 14 AFR. J. INT’L & COMP. L. 204, 207 (2006).

of beneficence is mandatory, or whether it admits of prior exceptions is where Pufendorf, Vattel, and Kant differ.

For Pufendorf and Vattel, the state, its needs, and its protection, assume priority over other matters including the duty to dispense hospitality and beneficence. Pufendorf particularly provided a philosophical justification for the protection of a self-enclosed and protectionist state. He regarded people as primarily self-interested. To him, as for Hobbes, denizens in the original, albeit hypothetical, state of nature due to strong conflicting interests endanger one another's well-being and security. The situation is untenable and ultimately self-defeating. Thus, people enter into covenants and establish a state, regarded as the highest protector of individual rights. It is in the context of the state as chief protector of rights that, for Pufendorf, the protection of the state itself overshadows all other concerns. Humanitarian considerations for outsiders, unless this redounds to the state's interests, take a back seat.

Yet, the same logic goes against Pufendorf. Much like a state of nature inhabited by self-interested individuals, an international regime of protectionist, self-interested states not subject to the constraints of higher moral or legal principles, is ultimately unsustainable. Unless states cooperate and recognize extraterritorial obligations, no lasting solution to world problems may be found. Contrary to the original intent, a protectionist, state-centered viewpoint ultimately drags states to conflict, such as when migrants force their way into neighboring states rather than have the flow of migration managed through law. Vattel's view, on the surface appears benign. However, it is founded on basically the same premise of self-interest and protectionist thinking as Pufendorf's hence, equally problematic. The effects of environmental change transcend borders, hence require progressive thinking, perhaps a veering from traditional realist to more cosmopolitan modes of problem solving.

A. Law

States, as members of the United Nations, have pledged to achieve "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character."⁹⁵ To achieve this, they made a covenant to promote human rights and dignity "for all" regardless of "race, sex, language, or religion."⁹⁶ The use of "humanitarian"

95. U.N. Charter art. 1, ¶ 3.

96. *Id.* at art. 1 ¶¶ 1-3.

in this context is generic, referring to the promotion of human welfare generally, and not particularly to war or conflict situations.

Under international human rights law, everyone has the right to life.⁹⁷ The right to life is one of the foundational principles of international relations. Likewise, every person has a right to adequate food, clothing, housing, and the continuous improvement of living conditions.⁹⁸ Moreover, everyone has the right not to be deprived of his or her means of subsistence.⁹⁹ Climate change, by way of extreme weather patterns, deprives peoples' means of subsistence in a significant way. Particularly, continuous coastal flooding and inundation would render low-lying islands uninhabitable.

The obligations elaborated in various human rights treaties are traditionally regarded as duties owed by states to populations within their borders. Under this line of reasoning, state obligations do not extend to persons beyond state boundaries. The territorial scope of treaties principle under Article 29 of the Vienna Convention on the Law of Treaties is invoked to support the argument that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”¹⁰⁰ A closer reading of the law, however, reveals that no such intra-state limitation exists. The intention, suggested by the term “entire,” is to “prevent states parties from claiming that the treaty is not binding for a certain part of the territory—or to make sure that such intention is explicit beforehand.”¹⁰¹ Assuming *arguendo*, that Article 29 limits the scope within state territories, it may be argued, at least for the twin international covenants on civil and political rights, and economic, social and cultural rights, that a “different”—and universal—intention appears. Both treaties, as their preambles explicitly states, were envisaged to “promote universal respect for, and observance of, human rights and freedoms” pursuant to the United Nations Charter, and the Universal Declaration of Human Rights.¹⁰² The International Covenant on

97. Universal Declaration of Human Rights, art. 3, G.A. RES. 217 (III) A, U.N. DOC. A/RES/217 (III) (DEC. 10, 1948).

98. International Covenant on Economic, Social and Cultural Rights, art. 11, Dec. 16, 1966, 993 U.N.T.S. 3.

99. International Covenant on Civil and Political Rights, art. 1, § 2, Dec. 16, 1966 999 U.N.T.S. 171.

100. Vienna Convention on the Law of Treaties, art. 29, Dec. 16, 1969, 115 U.N.T.S. 331.

101. ROLF KUNNEMANN, FOODFIRST INT'L ACTION NETWORK, THE EXTRATERRITORIAL SCOPE OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 3 (2005).

102. International Covenant on Economic, Social and Cultural Rights, *supra* note 98; International Covenant on Civil and Political Rights, *supra* note 99. The preamble to the Convention on Civil and Political Rights states: “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of *all* members of the human family is the foundation of freedom, justice and peace in the

Economic, Social and Cultural Rights is particularly explicit relative to the obligation to provide international (hence extraterritorial) cooperation and assistance: Article 2(1) obliges state parties to “take steps, individually and through international assistance and co-operation . . . to the maximum of [their] available resources . . . including particularly the adoption of legislative measures”; Article 11(2) mandates states to recognize the “fundamental right of everyone to be free from hunger” and obligates states parties to take measures “individually and through international co-operation” to provide everyone their human right to adequate food.

Admittedly, the enforcement of the positive right to adequate food is limited in practice, a subject matter beyond the scope of this paper. Thus, while the right to life, like the right to food, is compellable as a negative right under international customary law (the right not to be killed or not to be intentionally starved as when another nations’ food supply is cut off, for example), it may not be compellable when expressed as a positive right, (for example, the right to compel delivery of bags of rice or to undergo medical treatment under ordinary situations).

Although technically not “law,” the General Comment No. 12 of the Committee on Economic, Social and Cultural Rights provides an important interpretation on the joint responsibilities of states to provide disaster relief and humanitarian aid in emergency situations, which would include extreme environmental events. It declares that “[s]tates have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.”¹⁰³ While internationally displaced environmental migrants are technically not subsumed in the above comment, they are not excluded either, hence they may be included among those requiring “disaster relief and humanitarian assistance.”¹⁰⁴

The 1992 U.N. Framework Convention on Climate Change (UNFCCC) mandates “developed country [p]arties” to “assist the developing country [p]arties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.”¹⁰⁵ While migration as a form of adaptation may not have been considered during the

world . . . Considering the obligation of States under the Charter of the United Nations to promote *universal* respect for, and observance of, human rights and freedoms . . .” International Covenant on Civil and Political Rights, *supra* note 99 (emphasis added).

103. U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 12, The Right to Adequate Food, U.N. Doc. E/C. 12/1999/5 (May 12, 1999).

104. *Id.*

105. U.N. Framework Convention on Climate Change, art. 4 § 4, May 9, 1992, 1771 U.N.T.S. 107, available at unfccc.int/resource/docs/convkp/conveng.pdf.

framing of the Convention in 1992, today, migration is increasingly considered together with in situ measures as a probable adaptation response. The UNFCCC's definition of adaptation, not being limited to in situ situations, may be understood to subsume resettlements in both national and international levels.¹⁰⁶

B. Justice and Equity

Admittedly, notions of justice are more settled within a state setting while “comparatively little attention has been directed to them in a global setting.”¹⁰⁷ Among the contemporary philosophers arguing along Kantian lines was John Rawls. Using a hypothetical device of the “veil of ignorance” and “original position,” Rawls articulated principles of justice free from bias and self-interest.¹⁰⁸ These are the principles of liberty and difference, which Rawls argues, will guide society towards equal liberty with an activist slant towards the least advantaged. The first principle grants equal liberties for all: “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”¹⁰⁹ The second principle acknowledges that, while societal and economic inequalities do exist, the principles of justice will have to be applied favoring the least-fortunate members of society, and positions need be open to all under fair conditions of equal opportunity.¹¹⁰ While Rawls limits his principles within the nation state, some argue that an expanded interpretation of Rawls will have a bearing on issues of justice in an international setting.¹¹¹ Carens in particular argues that Rawls' principles in fact “strengthens the case for open borders and reveals its roots in our deep

106. Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 357, 375 (2011).

107. Brian Opeskin, *Foreign Aid in a Bounded World, An Appraisal of the Universalistic Moral Tradition*, 20 BULL. AUSTRAL. SOC'Y OF LEGAL PHIL. 4, 6 (1995).

108. JOHN RAWLS, *A THEORY OF JUSTICE* 136–37 (Harvard University Press 1971). The principles are chosen by members of society from a “veil of ignorance,” a hypothetical situation devised by Rawls where participants, to ensure impartiality, do not know about their personal situation and societal status.

109. *Id.* at 60.

110. *Id.* at 60, 101–02 (“Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well. No one deserves his greater natural capacity nor merits a more favorable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure of society can be arranged so that these contingencies work for the good of the least fortunate [the “difference principle”].”).

111. See CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 134–36 (Princeton University Press 1979).

commitment to respect all human beings as free and equal moral persons.”¹¹²

Behind the “veil of ignorance,” in considering possible restrictions on freedom, one adopts the perspective of the one who would be most disadvantaged by the restrictions, in this case the perspective of the alien who wants to immigrate. In the original position, then, one would insist that the right to migrate be included in the system of basic liberties for the same reasons that one would insist that the right to religious freedom be included: it might prove essential to one’s plan of life.¹¹³

Following Beitz and Carens interpretation of Rawls, states have an obligation under the principles of justice to enhance opportunities for migration, particularly favoring the least advantaged segments of society.

Under the emerging, albeit controversial, international law principle of “common but differentiated responsibilities” (Principle 7 of the Rio Declaration), certain states, in view of their contribution to environmental deterioration, as well as level of technological and financial capacity, are given greater responsibilities in responding to environmentally induced problems.¹¹⁴ Based on tonnes per capita the top four greenhouse gas emitting countries are developed countries of Australia (at 27.9), the United States (20.7), Canada (22.2), and Ireland (15.6).¹¹⁵ They are also the most developed Pacific Rim countries, and, except for Canada, have close historical and social connections with many Pacific nations. Thus, it may be argued that an expanded interpretation of the “common but differentiated

112. Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POLITICS 251 (1987).

113. *Id.* at 258.

114. 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, 31 I.L.M. 874 (Vol. 1). Principle 7 of the Rio Declaration reads:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Id.

115. RODNEY TIFFEN & ROSS GITTINS, *HOW AUSTRALIA COMPARES* 160 (Cambridge University Press, 2nd ed. 2009). While it is extremely difficult to isolate causations of climate change considering natural variables, nevertheless the reasons for thinking recent changes in climatic and weather patterns are “anthropogenic” in origin are compelling.

responsibilities” principle mandates these countries to undertake a greater role in finding solutions not only in mitigating carbon emissions but in responding to the impacts of climate change, among them environmental displacements. Enhancing migration opportunities for environmentally vulnerable Pacific populations would be among the logical ways the “common but differentiated responsibilities” principle may be implemented.

C. Morals

Kant believes that morality allows no exceptions. Whereas Pufendorf and Vattel argue for the state’s freedom to choose whether to exercise duties toward non-citizens, Kant believes that states have the duty—a categorical imperative—to aid people in distress, whether these be citizens or non-citizens, within or outside state borders. To Kant, the “principle of humanity” gives rise to the “meritorious duty” to help others who “struggle with great hardships.”¹¹⁶ For it could be that in another time and circumstance the helper would be “need[ing] the love and sympathetic participation of others.”¹¹⁷ States may argue that the Kantian rule of universalizing moral principles and actions is utopian. Yet, they cannot deny that more than any other philosopher, Kant’s imperatives come closest to the principles enunciated by the Universal Declaration of Human Rights. Everyone has the right to life.¹¹⁸ Corollary The corollary to this is everyone’s right not to be deprived of his or her means of subsistence.¹¹⁹

Most of us intuitively acknowledge a moral obligation to relieve human suffering or distress when doing so would not equally endanger our life and limb.¹²⁰ This acknowledgement stems from our common humanity and is most manifest in one’s instinctive (almost reflexive) response to save a drowning person from a pool. Admittedly, the demand to respond to such a situation is more compelling within those closest to us: family, neighbors, community. Yet, visitors in a foreign land on their holidays would be equally pressed to save a drowning local child should they be in a proximate situation to do so. The obligation, thus, is not limited to blood relations or psychological proximity, but one rooted in our basic humanity, the sameness of the human condition we share. Writing on the universal obligation to help famine victims of Bangladesh in the early 70’s, Singer

116. KANT FOUNDATIONS, *supra* note 78, at 33, 39.

117. KANT GROUNDWORK, *supra* note 86, at 41.

118. Universal Declaration of Human Rights, *supra* note 97, at art. 3.

119. International Covenant on Civil and Political Rights, *supra* note 99, at art. 1.

120. Brian Opeskin, *The Moral Foundations of Foreign Aid*, 24 WORLD DEV. 21, 23 (1996).

posits that such an obligation extends to individuals beyond state borders.¹²¹ His argument is premised on the fact that suffering from lack of food and medicine is bad, and that it is within the power of other states to prevent or relieve the suffering in such a situation. Singer believes that the more privileged nations can do something to reduce the number of starving people without giving up the basic necessities themselves.¹²² As extreme or prolonged environmental changes not only displace people but, based on experience (among them the Bikinian and Banaban resettlements—at least in the initial phases), places them in situations of near starvation, Singer's arguments apply equally to them.

Expectedly, not all thinkers followed Kant's universalist line of thinking. Walzer, for instance, argues for community based rights, hence comes closer to Pufendorf and Vattel's views on migration: "[a]cross a considerable range of decisions that are made, states are simply free to take in strangers in [or not]."¹²³ Much like Vattel, he justified the exclusion on state liberty and the states' right to self-determination. Yet, Walzer's right to exclude is constrained by three factors, foremost was the duty to aid aliens in dire need:

First, we have an obligation to provide aid to others who are in dire need, even if we have no established bonds with them, provided that we can do so without excessive cost to ourselves. So, we may be obliged to admit some needy strangers or at least to provide them with some of our resources and perhaps even territory. Second, once people are admitted as residents and participants in the economy, they must be entitled to acquire citizenship, if they wish. Here the constraint flows from principles of justice not mutual aid. The notion of permanent "guest workers" conflicts with the underlying rationale of communal self-determination which justified the right to exclude in the first place. Third, new states or governments may not expel existing inhabitants even if they are regarded as alien by most of the rest of the population.¹²⁴

121. Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFFAIRS 229, 229-30 (1972).

122. *Id.*

123. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY* 61 (Basic Books 1983).

124. Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders* 49 REV. OF POL. 251, 266 (1987).

Walzer's duty to aid aliens "in dire need," it is submitted, applies to environmental migrants forced out of their homes by life-threatening environmental forces or processes beyond their capacity to cope.

CONCLUSION

The impacts of environmental threats facing humankind today do not respect national boundaries. True, most environmental migration occurs internally, but many have already crossed borders, and international environmental migration is projected to increase in the years ahead. Transnational challenges require transnational responses. As stated earlier, the state-centered paradigms of Pufendorf and Vattel seem too parochial and territorially bounded to meaningfully respond to the international reach of the impacts of climate change. Further, these challenges cannot be adequately addressed through protectionist approaches, as the same would likely escalate rather than resolve conflict through law and policy.

Unlike international refugee laws, there is as yet no categorically binding framework for environmental migrants. Yet, nation states may, through domestic laws and policies, extend obligations beyond borders to peoples in distress, from natural or man-induced disasters. Based on emerging principles of international law, equity and justice, as well as taking cue from Kant's imperatives, states are morally if not legally bound to extend obligation beyond borders towards populations in distress. It remains to be seen whether today's territorially bounded states, by heeding this obligation, will provide a more humane and cosmopolitan framework towards affected populations as climate change makes its impact felt in the Pacific and other regions of the earth.

