

WARM WORLD, COLD RECEPTION: CLIMATE CHANGE, NATIONAL SECURITY AND FORCED MIGRATION

*Kate Jastram**

'No migration' is not an option in the context of future environmental change: migration will continue to occur in the future and can either be well managed and regular, or, if efforts are made to prevent it, unmanaged, unplanned and forced.¹

Introduction.....	752
I. The Basic Legal Framework for Cross-Border Movements of People .	754
II. Movements Within State Boundaries.....	760
III. Legal Tools Available to U.S. Policymakers in Dealing with Climate Refugees.....	762

INTRODUCTION

Forced migration is an important but often overlooked element in discussions of climate change and national security. At the global level, there are alarming estimates of the potential scope of forced migration due to climate change.² This will affect hundreds of millions of people, numbers that are difficult to imagine, much less devise policy for.³ However, complacency threatens to return upon recalling that most will move only

* Lecturer in Residence and Faculty Co-Director, The Honorable G. William & Ariadna Miller Institute for Global Challenges and the Law, Berkeley Law School, University of California. My thanks to Tuong-Vi Faber for research assistance, and to the *Vermont Journal of Environmental Law* for an excellent symposium.

1. JOHN BEDDINGTON, MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE FUTURE CHALLENGES AND OPPORTUNITIES 13 (2011), available at <http://www.bis.gov.uk/assets/foresight/docs/migration/11-1115-migration-and-global-environmental-change-summary.pdf>.

2. Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345, 348 (2011), available at <https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/coliver/345-374%20Burkett.pdf>.

3. *Id.*

within their own country and not internationally. Neither panic nor calm is yet warranted. Looking closer to home, it is instructive to consider current United States (“U.S.”) policy toward unwanted migrants from the South and envision the challenges of scaling up this approach in the context of accelerating climate change.

U.S. national security concerns are already deeply embedded in our laws and policies regarding refugees and migrants. We use our national security apparatus, specifically, the U.S. Coast Guard, to patrol the Caribbean and to interdict and summarily return Haitians, Cubans, and other asylum seekers with little (in the case of Cubans) or no (in the case of Haitians) inquiry as to whether they are actually at risk of persecution or torture.⁴ The Supreme Court approved this practice in 1981,⁵ which has been otherwise condemned by the Office of the United Nations High Commissioner for Refugees (“UNHCR”),⁶ scholars,⁷ and advocates as a violation of our treaty obligations to protect refugees under the 1967 Refugee Protocol. The interdiction program operates outside the public eye; there is little public awareness and even less public criticism of it. However, to the extent that climate change will strengthen drivers of conflict and migration, we need to be prepared to discuss if and how we will want our military more involved in keeping more people out of the U.S. While refugee and human rights law frame the issue as threats to people from climate change, a national security perspective requires us to face the uncomfortable question of threats from people due to climate change.

There is a need to identify responses to climate change-related forced migration that are attuned to national security concerns as well as to the human rights of the displaced themselves. In attempting this balance, the paper proceeds in three parts. Section one sketches the basic international legal framework for the cross-border movements of people, in order to contextualize the challenges involved in expanding this framework to

4. *Alien Migrant Interdiction*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp> (last visited May 22, 2014). See also Kate Jastram, *The Kids before Khadr: Haitian Refugee Children on Guantanamo*, 11 SANTA CLARA J. INT’L L. 81, 84 (2012) (tracing the use of the Guantanamo Bay detention facility to house “illegal combatants” back to its origins as a site to detain refugees); Sonia R. Farber, *Forgotten at Guantanamo: The Boumediene Decision and Its Implications for Refugees at the Base under the Obama Administration*, 98 CALIF. L. REV. 989, 990 (2010) (arguing that the *Boumediene* decision should apply to refugees detained at Guantanamo).

5. *Sale v. Haitian Centers Council*, 509 U.S. 155, 188–89 (1993).

6. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents at 3, *McNary v. Haitian Centers Council*, No. 92–344 (2nd Cir. July 29, 1992).

7. See Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT’L J. REFUGEE L. 103, 105 (1994) (arguing that U.S. judicial approval of the practice of returning refugees to persecution is a domestic decision, not valid under international law).

include those displaced by climate change. Section two shifts the focus to internally displaced persons, a fast evolving area of the law and a potential point of entry for nations such as the U.S. that wish to assist people closer to their own homes. Section three discusses the international and domestic law tools available to U.S. policymakers in planning for and responding to climate refugees.⁸

I. THE BASIC LEGAL FRAMEWORK FOR CROSS-BORDER MOVEMENTS OF PEOPLE

“[A] more coherent and consistent approach at the international level [is needed] to meet the protection needs of people displaced” externally due to sudden-onset disasters.⁹

The international legal and institutional framework for cross-border movements of people does not include those fleeing only from the effects of climate change.¹⁰ A brief sketch of this framework follows in order to understand its limitations and possibilities, including its provisions for national security concerns, as well as to provide context for efforts to address cross-border displacement due to sudden and slow-onset disasters.

People fleeing from persecution across national borders are covered by a robust protection regime.¹¹ However, this protection has strictly limited terms.¹² States obligate themselves to protect only certain, specifically defined people at risk, with the result that many forced migrants do not meet the refugee definition and, therefore, international law does not cover them.¹³ Perhaps the most counterintuitive example of a person who is not considered a refugee under international law is someone fleeing from armed conflict.¹⁴

8. A note on terminology: scholars and practitioners are well aware there are not agreed terms for climate change-related forced migration or the forced migrants themselves, which reflects the migrants' lack of legal status, the lack of certainty as to causation, and perhaps also a lack of political will to identify them as such. For the sake of brevity, and with an intention to include the many situations that might be encompassed, I will refer simply to climate refugees.

9. THE NANSEN CONFERENCE, NANSEN PRINCIPLES (2011), available at http://www.regjeringen.no/upload/UD/Vedlegg/Hum/nansen_prinsipper.pdf.

10. See Walter Kälin, *From the Nansen Principles to the Nansen Initiative*, 41 FORCED MIGRATION REV. 48, 49 (2012) (discussing the need to take regional and international action to protect refugees from climate-related disasters).

11. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., 2007.

12. See *id.* at 201 (noting the basic rights of refugees under current international treaties and laws).

13. See Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Status of Refugees*] (setting forth the definition of refugee).

14. VANESSA HOLZER, 1951 REFUGEE CONVENTION AND THE PROTECTION OF PEOPLE FLEEING ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE 5 (2012).

Given the limited scope of protection for forced migrants in international law, it is generally acknowledged that neither refugee law nor human rights law covers people moving across borders to escape the effects of climate change, thus States are not required to allow these individuals entry nor are they prevented from expelling them.¹⁵ This is because the harm these people fear is not (directly) caused by human actors, and, in the case of refugee law, the harm is generalized and not targeted at certain people for reasons of their religion, ethnicity, or other protected characteristics.

In recognition of the need to develop new responses to climate refugees, States meeting at the 2010 Cancun Climate Change Conference invited all States Parties to enhance action on adaptation by undertaking “measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.”¹⁶ Walter Kälin argues that the significance of this provision lies first in its explicit recognition of the humanitarian consequences of forced migration due to climate change; second, in its expectation that displacement issues will become part of national adaptation plans; and third, in its inclusion of cross-border and not just internal displacement on the international agenda.¹⁷

The cornerstone of the refugee regime is the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.¹⁸ These treaties enjoy widespread adherence, with 147 States Party¹⁹ to one or both instruments, including the United States.²⁰ The fundamental undertaking assumed by States Party is the duty of non-refoulement,²¹ or non-return, owed to persons with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.²² Such individuals, whether arriving singly or in groups, may not be sent back to the frontiers of territories where their life or freedom would

15. Jane McAdam, *Climate Change, Forced Migration, and International Law* (2012).

16. U.N. Framework Convention on Climate Change, Rep. on its 16th Sess., Nov. 29–Dec. 10, 2010, ¶ 14(f), U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

17. Kälin, *supra* note 10, at 48–49.

18. The 1967 Protocol removes the geographic and temporal limitations included in the 1951 Convention, making it a truly universal and inclusive system of protection for those fleeing persecution. The 1967 Protocol also incorporates all the substantive provisions of the 1951 Convention, so while many States have chosen to ratify both instruments it is actually necessary to ratify only the 1967 Protocol.

19. This is the number of States Party as of Apr. 1, 2011.

20. The United States has ratified only the 1967 Protocol.

21. *See* Status of Refugees, *supra* note 13, at art. 33(1) (setting forth the duty of non-refoulement).

22. *Id.* at art. 1A(2) (setting forth the definition of refugee).

be threatened.²³ In addition, States Party to the Convention or Protocol have undertaken to cooperate with UNCHR and to facilitate its duty of supervising these instruments.²⁴

The obligation of non-refoulement is also a rule of customary international law, binding even States that are not party to the Convention or Protocol.²⁵ UNHCR has an independent mandate based on its Statute of Office to work with all UN Member States.²⁶

National security concerns are incorporated into international refugee law in two ways. First, war criminals and common criminals are not included in the Convention's remit even if they otherwise fit the well-founded fear of persecution definition.²⁷ Second, a country of asylum may withdraw the protection of non-refoulement to return a refugee who poses a danger to its national security.²⁸ The national security concerns associated with forced migration resulting from climate change are of a different character, dealing with the quantity and not the quality of those seeking refuge.²⁹

The 1951 Refugee Convention arose from a desire to structure State cooperation in solving the enormous tragedy of persons displaced in Europe by the Second World War.³⁰ In the nearly sixty-five years since then, it has become evident that the Convention definition must be interpreted in a manner responsive to broader developments in international law, particularly the growth of international human rights law. As an example of evolving interpretations of the term "refugee," many States now recognize that various forms of gender-based violence, such as rape, female genital mutilation, and forced sterilization, properly fall within the notion of persecution.³¹

23. *Id.* at art. 33(1).

24. *Id.* at art. 35(1).

25. Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INT'L LAW: UNHCR'S GLOBAL CONSULTATION ON INT'L PROTECTION 87, 142 (Erika Feller et al. eds., 2003), available at <http://www.refworld.org/pdfid/470a33af0.pdf>.

26. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), ¶ 2, U.N. Doc. A/RES/428(V) (Dec. 14, 1950).

27. Status of Refugees, *supra* note 13, at art. 1(F).

28. *Id.* at art. 33(2).

29. OLI BROWN, CLIMATE CHANGE AND FORCED MIGRATION: OBSERVATIONS, PROJECTIONS AND IMPLICATIONS 5, 24 (2007-2008), available at http://www.iisd.org/pdf/2008/climate_forced_migration.pdf.

30. ANTÓNIO GUTERRES, U.N. REFUGEE AGENCY, 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL, 1 (2011).

31. Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds.), *Gender in Refugee Law: From the Margins to the Centre* (2014).

From the perspective of refugee law, the problem with climate change is causality. The Refugee Convention requires that there be a nexus between the harm feared and one of the protected grounds, such as religion.³² Even if one argued that the results of climate change amount to persecution, it would be nearly impossible to show that the actions that resulted in climate change were undertaken with the motivation of causing harm to a person or group because of their protected characteristic.

It has also become clear that States additionally benefit from providing a legal framework for cross-border movements of people who do not, even under a generous reading, fit within the confines of the 1951 Convention definition. To demonstrate this pragmatism, one can point to a variety of legal approaches taken by States to widen UNHCR's mandate. The United Nations has on many occasions broadened the scope of its competence on an *ad hoc* basis to include people fleeing from armed conflict and other violations of human rights as well as to protect people displaced in their home country for refugee-like reasons;³³ it has done so in order to deploy the resources of UNHCR, a field-based organization with offices in 125 countries.³⁴ In addition, States have called upon UNHCR, with its extensive logistical capacity and expertise, to be among the first responders to natural disasters, including the Asian tsunami in 2005.³⁵

States in several regions of the world have adopted more expansive definitions of what it means to be a refugee and have thus obligated themselves to protect a wider range of forced migrants.³⁶ Although these innovations were designed to provide protection to victims of armed conflict, some of them could be interpreted to reach forced migration as a result of climate change. African States led the way with the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, whose refugee definition includes those compelled to leave their country

32. GUTERRES, *supra* note 30, at 3.

33. SUSAN F. MARTIN, REVIEW OF LEGAL AND POLITICAL FRAMEWORK WHICH AFFECTS MIGRATION, INCLUDING INSTITUTIONAL ARCHITECTURE AND CAPACITY, AND HOW IT IS AFFECTED BY FUTURE ENVIRONMENTAL CHANGE 16–18 (2011), available at <http://webarchive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/assets/foresight/docs/migration/drivers/11-1183-dr13-review-legal-and-political-framework-affects-migration.pdf>.

34. *Where We Work*, OFF. OF THE U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c206.html> (last visited May 22, 2014).

35. *UNHCR Taking Rare Operational Role in Natural Disaster Response*, OFF. OF THE U.N. HIGH COMM'R FOR REFUGEES (Jan. 3, 2005), <http://www.unhcr.org/41d9772e4.html>.

36. See MICHAEL REED-HURTADO, CARTAGENA DECLARATION ON REFUGEES AND THE PROTECTION OF PEOPLE FLEEING ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE IN LATIN AMERICA 32 (2013), available at <http://www.unhcr.org/51c800fe9.html> (describing the need for broad definitions of refugee).

owing to “events seriously disturbing public order.”³⁷ Many Latin American States have expanded refugee definitions in their domestic legislation, inspired by the non-binding Cartagena Declaration of 1984, which includes as refugees people who flee their country due to “massive violation[s] of human rights and other circumstances that seriously disturb public order.”³⁸ The European Union has defined a category of persons who might benefit from a subsidiary, lesser form of protection than that afforded to refugees, but it is basically limited to victims of armed conflict and is not likely to help those fleeing from the effects of climate change.³⁹

While these legal developments are significant, they have not been universally adopted. The U.S. does not recognize those fleeing from armed conflict as refugees under its domestic law.⁴⁰ The limited reach of protection for victims of armed conflict bears consideration, not only as a testament to the difficulty of amending the 1951 Refugee Convention definition, but also because, to the extent that climate change is seen as a precursor or contributor to armed conflict, there is still not an international protection regime in place for those who must flee from what might be considered as a secondary effect of climate change.

In addition to the international refugee law regime and its various regional expansions, human rights law provides some forced migrants with protection from return.⁴¹ However, these provisions are even less likely to encompass forced migration related to climate change. Certain human rights treaties, such as the Convention against Torture, specifically include the obligation of non-refoulement for those protected by their terms,⁴² while other treaties, such as the International Covenant on Civil and Political Rights, have been interpreted to encompass this protection.⁴³ Arguments in favor of climate refugees based on the non-refoulement provisions of human rights treaties are difficult to make. The Convention against Torture, for example, requires that torture be inflicted intentionally by or with the

37. AU Convention Governing Specific Aspects of Refugee Problems in Africa art. I(2), Sept. 10, 1969, 1001 U.N.T.S. 45, available at <http://www.achpr.org/instruments/refugee-convention/>.

38. Cartagena Declaration on Refugees art. III(3), Nov. 22, 1984. In a study of seventeen Latin American States, seven had directly imported the Cartagena definition, while six used slightly different wording. Reed-Hurtado, *supra* note 36, at 16, 29.

39. Council Directive 2011/95, art. 15(b), 18. 2011 O.J. (L 337) 9 (EU) presents the only other possibility, defining as serious harm “inhuman or degrading treatment or punishment.”

40. See Immigration and Nationality Act of 1980, 8 U.S.C. § 1101(a)(42) (2012) (omitting people fleeing their country due to armed conflict under the definition of refugee).

41. Jane McAdam, *Complementary Protection in International Refugee Law* (2007).

42. U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 3(1), U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

43. See U.N. International Covenant on Civil and Political Rights art. 6–8, Dec. 19, 1966, 999 U.N.T.S. 171 (declaring the inherent human right to life and to be free from torture and slavery).

consent or acquiescence of government officials for certain specified reasons.⁴⁴

Given the limitations of existing law, there have been a number of proposals to amend the Refugee Convention or to draft a new international treaty. The 2008 National Intelligence Assessment predicts that “to insert a sense of urgency” into the debate and pressure countries and international institutions, environmental and human rights groups “may press to broaden the definition of ‘refugee’ to include environment or climate migrants.”⁴⁵ This approach was rejected as inappropriate in the U.K.’s Foresight: Migration and Global Environmental Change.⁴⁶ Jane McAdam agrees that focusing on a new multilateral treaty may not present the most appropriate tool to deal with climate change displacement. Among other concerns, she notes that defining a “climate refugee” category may lead to a hardening of the concept, while simultaneously defining groups as “in” or “out” of need.⁴⁷ McAdam instead suggests thinking in terms of crisis migration, which allows for a broader perspective on appropriate legal and policy responses.⁴⁸

Kälin also notes the lack of political will.⁴⁹ While the 2010 Cancun Outcome Agreement, discussed above, contains encouraging language on adaptation, States failed to follow up and make a commitment to address the issue of cross-border climate refugees at the next major meeting of UNHCR in December 2011.⁵⁰ In response, a group of States led by Norway and Switzerland have announced the Nansen Initiative, a state-owned consultative process outside the U.N., to build consensus on how best to address cross-border displacement in the context of both sudden and slow-onset disasters, not only climate-related, but geophysical in nature.⁵¹ Based on the Nansen Principles, the Nansen Initiative intends to present a Protection Agenda in 2015.⁵²

44. U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1(1), U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

45. HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE HOUSE SELECT COMMITTEE ON ENERGY INDEPENDENCE AND GLOBAL WARMING, NATIONAL INTELLIGENCE ASSESSMENT ON THE NATIONAL SECURITY IMPLICATIONS OF GLOBAL CLIMATE CHANGE TO 2030, 16 (2008) [hereinafter HOUSE COMMITTEES] (statement of Thomas Fingar, Deputy Director of National Intelligence for Analysis and Chairman of the National Intelligence Council).

46. BEDDINGTON, *supra* note 1, at 1, 17.

47. SUSAN MARTIN ET AL., MIGRATION AND HUMANITARIAN CRISES: CAUSES, CONSEQUENCES AND RESPONSES (2014).

48. *Id.*

49. Kälin, *supra* note 10, at 49.

50. *Id.*

51. *Id.*

52. THE NANSEN INITIATIVE, TOWARDS A PROTECTION AGENDA FOR DISASTER-INDUCED CROSS-BORDER DISPLACEMENT 1 (2013).

II. MOVEMENTS WITHIN STATE BOUNDARIES

It is generally assumed that most people forced to move due to climate change will not cross an international border, but will become displaced internally within their own country. The prevalence of internal over external displacement is true even in refugee-like situations when the danger comes from a human actor, whether government or non-state. Presumably, it is even more likely when the danger is from environmental changes, and the government should be able to help or accept help from the international community.

Although internally displaced persons are often forced to flee for the same reasons as refugees, the fact that they do not cross an international border means that the Refugee Convention and Protocol are not applicable. Furthermore, the UNHCR does not take responsibility for displaced persons unless specifically authorized to do so.⁵³ By the late 1980s, refugee and human rights advocates, including Norway and other sympathetic governments, had moved the issue of climate refugees forward in the U.N. Commission on Human Rights (now the Human Rights Council), latching on to the momentum then building for a mechanism to address the problems of internally displaced persons.⁵⁴

The Commission on Human Rights responded in 1992 by creating the mandate of the Secretary-General's Representative on Internally Displaced Persons.⁵⁵ The first holder of the post, Francis Deng, drafted the 1998 Guiding Principles on Internal Displacement.⁵⁶ Although internally displaced persons had been analogized to refugees, the description contained in the Guiding Principles also included people forced to flee as a result of natural disasters, a striking departure from the refugee definition.⁵⁷

53. Status of Refugees, *supra* note 13, at 1(A)(2); GUTERRES, *supra* note 30, at 3.

54. ROBERTA COHEN, LESSONS LEARNED FROM THE DEVELOPMENT OF THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT 3, 9 (2013).

55. U.N. Comm'n on Human Rights, Internally Displaced Persons, G.A. Res. 1992/73, U.N. Doc. 4/RES/1992/73 (Mar. 5, 1992), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b00f0e71c> (last visited May 22, 2014). The name of the mandate was changed in 2004 to the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons; it was changed again in 2010 to the Special Rapporteur on the Human Rights of Internally Displaced Persons. See Office of the High Comm'r for Human Rights, *Introduction to the Mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons (IDPs)*, Dr. Chaloka Beyani, <http://www.ohchr.org/EN/issues/IDPersons/Pages/Mandate.aspx> (last visited May 22, 2014).

56. Representative of the U.N. Secretary-General on Internally Displaced Persons, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement>.

57. UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT 1 (1998), available at <http://www.unhcr.org/43ce1cff2.html>.

The Guiding Principles are recognized in the Nansen Principles as a “sound legal framework to address protection concerns arising from climate- and other environmentally-related displacement.”⁵⁸ While the Guiding Principles have not yet given rise to an international treaty or matured into customary international law, they continue grow in acceptance and influence, particularly in Africa.⁵⁹

At the sub-regional level, the eleven states in the Great Lakes Region have included the Guiding Principles on Internal Displacement in their 2006 Great Lakes Pact on Security, Stability and Development.⁶⁰ The Pact has ten protocols, including one on internally displaced persons.⁶¹ The Great Lakes Pact is the first multilateral instrument to commit member States to implementing the Guiding Principles, including through adopting the description of internally displaced persons in the Guiding Principles as a definition in their domestic legislation.⁶² The Annex to the Great Lakes Protocol on Internally Displaced Persons includes the full text of the Guiding Principles as well as model legislation.⁶³

At the regional level, the African Union has taken the lead on internal displacement, as it did with refugees.⁶⁴ It expanded upon the Guiding Principles on Internal Displacement to form a continent-wide treaty, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”), which entered into force in December 2012 and has now been ratified by twenty-two of the African Union’s fifty-four member states.⁶⁵ An explicit reference to climate change-related forced migration is one example of how the Kampala Convention has advanced the normative framework for addressing internal displacement. Article 5(4) of the Kampala Convention obliges States to protect and assist those who have been internally displaced due to “natural

58. THE NANSEN CONFERENCE, *supra* note 9.

59. WALTER KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT ANNOTATIONS VII (2008).

60. THE INTERNAL DISPLACEMENT MONITORING CTR. AND THE INT’L REFUGEE RIGHTS INITIATIVE, THE GREAT LAKES PACT AND THE RIGHTS OF DISPLACED PEOPLE: A GUIDE FOR CIVIL SOCIETY 4 (2008).

61. *Id.* at 12.

62. Int’l Conference on the Great Lakes Region, Pact on Security, Stability and Development in the Great Lakes Region art. 12, Dec. 15, 2006.

63. Int’l Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons, Annex, Nov. 30, 2006.

64. *See* African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Oct. 22, 2009 (stating concern for the suffering and vulnerability of internally displaced persons).

65. OAU/AU Treaties, Conventions, Protocols & Charters, <http://www.au.int/en/treaties> (last visited May 29, 2014).

or human made disasters, including climate change."⁶⁶ The Kampala Convention provides a natural point of entry for donor states and others wishing to strengthen the ability of African States to prevent and respond to climate-related displacement.

III. LEGAL TOOLS AVAILABLE TO U.S. POLICYMAKERS IN DEALING WITH CLIMATE REFUGEES

*The United States will need to anticipate and plan for growing immigration pressures. Although sea level rise is probably a slow and long-term development, extreme weather events and growing evidence of inundation will motivate many to move sooner rather than later. Almost one-fourth of the countries with the greatest percentage of population in low-elevation coastal zones are in the Caribbean, so assisting these populations will be an imminent task.*⁶⁷

This paper uses a broad definition for national security, which is consistent with that employed in the National Intelligence Assessment. The Statement for the Record explained:

We first considered if the effects would directly impact the US homeland, a US economic partner, or a US ally. We also focused on the potential for humanitarian disaster, such that the response would consume US resources. We then considered if the result would degrade or enhance one of the elements of national power (Geopolitical, Military, Economic, or Social Cohesion), and if the degradation or enhancement, even if temporary, would be significant.⁶⁸

Given such an expansive view of national security, it is not surprising that the U.S. has used its immigration system as a critical component of maintaining its security posture. While the U.S. has gone too far in the direction of saying 'no' to immigration, particularly since 2001, there are, nevertheless, possibilities in the law for dealing more constructively and creatively with forced migrants, including climate refugees.

66. Kampala Convention, art. 5(4).

67. HOUSE COMMITTEES, *supra* note 45, at 16.

68. *Id.* at 3.

The United States is a leader in the international refugee regime, both as the largest single donor to UNHCR⁶⁹ and by virtue of its example. The Refugee Act of 1980 was designed to incorporate the provisions of the 1967 Protocol into the Immigration and Nationality Act.⁷⁰ The Protocol's definition of a refugee and its duty of non-refoulement are mirrored in U.S. law.⁷¹ For asylum seekers at the border or within the interior, there is an elaborate, if under-resourced, system for identifying refugees and extending them protection, which is implemented by the Department of Homeland Security, the Department of Justice, and the federal appellate courts.⁷² Protecting people from return to a country where they face a substantial risk of torture is also incorporated into this process pursuant to U.S. treaty obligations under the Convention against Torture.⁷³

In 1990, the United States created a special immigration category known as Temporary Protected Status ("TPS") for foreign nationals in the U.S. who were otherwise deportable, but who could not be returned to their country of origin for certain specified reasons.⁷⁴ Temporary Protected Status cannot be claimed by an individual in the same way that asylum can.⁷⁵ Instead, the Secretary of Homeland Security designates a country affected by ongoing internal armed conflict or one of the other statutory triggers.⁷⁶ The origins of TPS were the unsuccessful attempts to win refugee status for large numbers of Salvadorans who fled their country's civil war in the 1980s.⁷⁷ So, while the U.S. has recognized that the refugee definition found in international and domestic law does not apply to those fleeing armed conflict, the solution in the U.S. has been the creation of a discretionary remedy with fewer benefits and less security than the asylum

69. Charity Tooze, *The UN Refugee Agency Thanks the United States for Generous Humanitarian Aid*, UNHCR, http://www.unrefugees.org/site/c.lf1QKSOWFqG/b.8470025/k.45EC/The_UN_refugee_agency_thanks_the_United_States_for_generous_humanitarian_aid.htm (last visited May 22, 2014).

70. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

71. Immigration and Nationality Act of 1980, 8 U.S.C. § 1101(a)(42) (2012).

72. See Immigration and Nationality Act of 1980, 8 U.S.C. § 1158(b)(1)(A) (2009) (outlining conditions for granting asylum).

73. See U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 3(1)–(2), U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (“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.”).

74. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> (last visited May 22, 2014).

75. *Id.*

76. *Id.*

77. Teresa Castellanos, *KIN-El Salvador*, IMMIGRANTINFO.ORG, <http://www.immigrantinfo.org/kin/elsalvador.htm> (last visited Mar. 24, 2014).

status afforded to refugees meeting the Protocol definition.⁷⁸ Furthermore, it is important to note that TPS applies only to nationals of a given country who are already in the U.S. when the designation is made.⁷⁹ It does not allow for the entry of subsequent arrivals from the stricken country.⁸⁰

Nevertheless, Temporary Protected Status introduced an innovative benefit, as it can also be used to suspend the return of people whose country has suffered a natural disaster.⁸¹ The Immigration and Nationality Act lists as examples “an earthquake, flood, drought, epidemic, or other environmental disaster resulting in a substantial, but temporary, disruption of living conditions in the area affected.”⁸² Of the seventeen countries that have been designated for TPS since 1990, five have made the list for environmental reasons, three countries for geophysical phenomena such as earthquakes and volcanic eruption and two countries for a devastating hurricane.⁸³ Temporary Protected Status is of limited value since it does not provide protection for people fleeing the effects of climate change unless they already happen to be in the U.S. in another immigration status or without any legal status at all.⁸⁴ Still, it is an underutilized category that could be made more responsive to the needs of climate refugees.

A third provision of U.S. law addressed to cross-border movements of forced migrants is the “overseas” refugee program, which allows up to 70,000 people per year to enter the U.S. already recognized as refugees so they do not need to go through our domestic asylum adjudication process.⁸⁵ The overseas refugee program, also known as the refugee resettlement program, is based on U.S. legislation and is not required by the Refugee Convention or Protocol.⁸⁶ It stems instead from a humanitarian commitment to assist the individual refugees chosen for entry as well as to acknowledge that countries of first asylum, most of them in the global South, bear the

78. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 74.

79. *Id.*

80. *Id.*

81. *Id.*

82. Immigration Act of 1990, 8 U.S.C. § 1254a(b)(1)(B)(i) (2012).

83. See The U.S. Dep’t of Justice, *Temporary Protected Status Notices*, <http://www.justice.gov/eoir/vll/fedreg/tpsnet.html#tpscount>, (last visited May 22, 2014) (providing links to the Temporary Protection Status Notices for El Salvador, Haiti, Honduras, Nicaragua, and Montserrat, the five countries that have been designated for Temporary Protection Status since 1990 for environmental reasons).

84. U.S. CITIZENSHIP & IMMIGR. SERVICES, *supra* note 74.

85. *FY12 Refugee Admissions Statistics*, U.S. DEP’T OF ST. (Feb. 28, 2013), <http://www.state.gov/j/prm/releases/statistics/206319.htm>.

86. *History of the U.S. Refugee Resettlement Program*, REFUGEE COUNCIL USA, <http://www.rcusa.org/?page=history> (last visited May 22, 2014).

brunt of the world's refugee problem.⁸⁷ The number of refugees that the U.S. takes in from any given country of first asylum is usually not enough to make a meaningful contribution to actually lifting the burden, but it sends a strong political message internationally and reinforces U.S. leadership in refugee protection.⁸⁸

Most of the refugees in the overseas program are chosen from camps in countries of first asylum, although some at-risk individuals are selected while still in their country of origin.⁸⁹ In either case, under current law, they need to meet the essential elements of the refugee definition set forth in U.S. and international law.⁹⁰ The overseas refugee program is potentially a valuable policy tool for protecting people displaced by climate change. There is no reason why the program could not be re-purposed to allow the entry of people who have crossed a border for climate-related reasons, or indeed, people who are internally displaced for such reasons. The U.S. is free to admit whomever it likes under its humanitarian immigration categories, and, if the political will can be mustered, at least some of those forced to flee as a result of climate change could find a home in the United States.⁹¹

Given our current political paralysis on both immigration reform and climate change, this or any other climate refugee-positive proposal may seem unrealistic.⁹² However, pragmatic national security arguments may be more persuasive than ones based on human rights. If the U.S. could make such a gesture, it would send an important international message about thinking broadly and creatively about national security, climate change, and forced migration.

87. *Humanitarian*, U.S. CITIZENSHIP & IMMIGR. SERVS. www.uscis.gov/humanitarian (last visited May 22, 2014).

88. Erin Patrick, *U.S. Refugee Resettlement Program*, MIGRATION INFO. SOURCE (Jun. 1, 2004), <http://www.migrationpolicy.org/article/us-refugee-resettlement-program>.

89. *Id.*

90. U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2014, at 6 (Dec. 19, 2013), available at <http://www.state.gov/documents/organization/219137.pdf>.

91. PAIGE PIPER-BACH & BRIAN PREST, IMMIGRATION POLICY IN THE UNITED STATES: AN UPDATE 5-6 (Christine Bogusz et al. eds., 2010), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/119xx/doc11959/12-03-immigration_chartbook.pdf.

92. See Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 153738 (2009) ("American international environmental policy is typically driven by utilitarian calculations about the national interest," producing a "reluctance to act [that] is remarkably powerful.").