

A CONVENTION FOR PERSONS DISPLACED BY CLIMATE CHANGE

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Frequently Asked Questions¹

1. What is climate change displacement?

Climate change displacement refers to population migration caused by the effects of climate change, which include rising sea levels, heavier floods, more frequent and severe storms, drought and desertification. Such migration can take place within a state (likely the most common form of migration) or across borders. It can also be temporary or permanent. It is developing states which will be most affected by climate change displacement.

2. What is the estimated scale and nature of the climate change displacement problem?

The Intergovernmental Panel on Climate Change (IPCC) and the Stern Review, among many other studies, warn that the effects of climate change – including rising sea levels, heavier floods, more frequent and severe storms, drought and desertification – will cause large-scale population movements. Climate change displacement presents an urgent problem for the international community.

The existence and scale of climate change displacement are often established by reference to the likely numbers of displaced people; figures range from 50 million to 1 billion. The most cited estimate, that of Myers, is 200 million climate change migrants by 2050, or one person in every forty-five displaced. However, Myers' estimate is contested and, as Brown observes, 'nobody really knows with any certainty what climate change will mean for human population distribution'. Nonetheless, there is a consensus in the literature that climate change will lead to 'major forced displacements' over time.

Any proposal for addressing the issue of climate change displaced persons ('CCDPs' is the acronym we use) must take account of the different contexts and forms that such migration is likely to take. There are three kinds of climate change impacts that are likely to have the greatest consequences in terms of human movement: sea level rise; increasing severe weather events; and drought and desertification. The IPCC has highlighted threatened island nations, the continent of Africa, mega-deltas (particularly those in Asia) and the polar regions as areas most exposed to climate change.

¹ For full references for the statements, quotations and primary/secondary source material cited in this document, and for a copy of our most recent paper (July 2011) please contact David Hodgkinson at d.hodgkinson@hodgkinsongroup.com.

Global sea level this century is likely to rise twice as much as projected by the IPCC in its 2007 report. It is likely that, for unmitigated emissions, such sea level rise will exceed one metre, with an upper limit of about two metres. Further, 'several metres of sea level rise must be expected over the next few centuries.' The potential for migration as a consequence of sea level rise is considerable due to its irreversibility.

Large delta systems and small island nations are particularly vulnerable to sea level rise. IPCC calculations have indicated that a rise in sea level of 45 centimetres would displace 5.5 million people, submerging over 10 percent of Bangladesh. A study commissioned for the Stern Review estimates that 146 million people live at an altitude of less than 1 metre with South Asian and East Asian populations being predominantly at risk. However, due to their elevation only centimetres above sea level, Pacific states such as Tuvalu and Kiribati face the prospect of submersion in the short-term. It is a possibility, in the case of threatened island nations, that entire nations may become uninhabitable as a consequence of climate change.

The impact of drought and desertification on Africa and Asia will be particularly harsh. The IPCC's 2007 report estimates that yields from rain-fed agriculture in sub-Saharan Africa could fall by up to 50 per cent by 2020. Crop yields in central and south Asia could also fall by 30 per cent by the middle of the twenty-first century.

3. What legal protections currently exist for those displaced by climate change?

There is a consensus that current protections at international law do not adequately provide for a number of the categories of persons likely to be displaced by climate change. Refugee lawyers generally agree that persons displaced by climate change would not be the subject of protection under the 1951 Convention Relating to the Status of Refugees (the 'Refugee Convention') and its 1967 Protocol. The Refugee Convention, the most comprehensive articulation of refugee rights and state obligations, relies upon a restrictive definition of a refugee as someone with a

well-founded fear of being persecuted for reasons of race, religion and nationality, membership of a particular social group or political opinion', and is 'outside the country of his nationality.

The core issue is that it would be difficult to establish that a person displaced by climate change has been 'persecuted' as required by the Refugee Convention and defined by the existing jurisprudence. As one author states, 'given the object and purpose of the agreement and the narrow applicability of the Refugee Convention intended by the parties', it is difficult to accept an extension of the refugee definition beyond 'political' persecution. The list of persecutory bases is exhaustive, 'clearly setting the boundaries of the legal application of the Refugee Convention'. Further, although it has been argued that 'membership of a particular social group' may be extended to encompass that category of persons displaced by environmental causes', such contentions are likely to be a matter of academic interest only. Further, most of those displaced by climate change are expected to remain within their home states; they will not find themselves outside their country of origin.

Another concern with regard to affording protection to persons displaced by climate change under the Refugee Convention is that to do so risks devaluing current protections for refugees. Further, to

conflate the term 'refugee' such that it includes both climate change displaced persons and traditional refugees obscures fundamental differences of experience between the groups, including that the nexus between climate change displaced persons and their states has not been severed through persecution.

4. Why is a convention needed?

There is 'no coherent multilateral governance framework for environmental migration ... [regulation] is extremely fragmented and disparate.' Neither existing climate change law nor refugee law adequately provides for CCDPs. There has been no coordinated response by governments to address human displacement, whether domestic or international, temporary or permanent, due to climate change. And given the nature and magnitude of the problem which climate change displacement presents, ad hoc measures based on existing domestic regimes may lead to inconsistency, confusion and conflict. It seems the international community has an obvious interest on security and economic grounds (at least) in addressing the problem of human displacement in a coordinated fashion – in providing pre-emptive resettlement assistance to those most at risk in terms of the impacts of climate change. Our proposed convention (the 'Convention'), in addition to providing a general framework for CCDP assistance – its main objective – would address gaps in the international regime of protections and humanitarian assistance as it currently applies to CCDPs. It would do so by incorporating a mechanism for the provision of non-discriminatory assistance to internally displaced CCDPs, setting out a framework for the protection of those persons displaced across international borders, as well as identifying specific principles which should apply to the resettlement of persons from threatened island nations which may become uninhabitable.

[See also question 18, 'Are there other proposals designed to address climate change displacement?']

5. What about the United Nations Framework Convention on Climate Change (UNFCCC)? Could climate change displacement be addressed under the UNFCCC?

Proposals for some kind of legal instrument designed to address the problem of climate change displacement seek, in various ways and for various reasons, to link that instrument with the United Nations Framework Convention on Climate Change (UNFCCC). Yet neither the UNFCCC process nor its Kyoto Protocol contemplates or addresses the issue of displacement. In our view, the UNFCCC – notwithstanding its focus on adaptation (as well as mitigation) – has limitations as a framework for dealing with climate change displacement. Displacement is not its focus; its concerns lie elsewhere. Its structure and institutions are not designed to address displacement and the issues associated with it. Moreover, as the 2009 Copenhagen and 2010 Cancun climate change conferences reveal, the UNFCCC cannot easily be altered in order to accommodate CCDPs; dealing with *existing* provisions is already problematic.

These arguments are put succinctly by Docherty and Giannini. While they note that the UNFCCC does apply directly to climate change, they also note that it has legal limitations for dealing with climate change displacement. As an environmental law treaty, the UNFCCC

primarily concerns state-to-state relations; it does not discuss duties that states have to individuals or communities, such as those laid out in human rights or refugee law. It is also

preventive in nature and less focused on the remedial actions that are needed in a refugee context. Finally, although the UNFCCC has an initiative to help states with adaptation to climate change, that program does not specifically deal with the situation of climate change refugees. Like the refugee regime, the UNFCCC was not designed for, and to date has not adequately dealt with, the problem of climate change refugees.

A UNFCCC ‘non-paper’ can be used as a tool by state parties as a starting point for work on negotiating texts as well as a vehicle for comments and proposing revisions. Non-paper 41 on climate change adaptation produced after the seventh session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LA) under the UNFCCC in Barcelona in October, 2009 refers to migration and displacement as follows:

All Parties [shall] [should] jointly undertake action under the Convention to enhance adaptation at the international level, including through ... (b) Activities related to migration and displacement or planned relocation of persons affected by climate change, while acknowledging the need to identify modalities of interstate cooperation to respond to the needs of affected populations who either cross an international frontier as a result of, or find themselves abroad and are unable to return owing to, the effects of climate change.

While the Norwegian Refugee Council argues that ‘[i]t is important that the reference [in the non-paper] to ‘the international level’ is not interpreted to mean that only cross-border movements are addressed,’ it is clear that, for the AWG-LCA, emphasis is on international displacement. Yet, as we argue, most displacement will likely occur within national borders.

While a focus of the UNFCCC is adaptation, it is not concerned with or designed for climate change displacement and, as a framework for dealing with displacement, it has clear limitations. Further, Neither COP 15 and COP/MOP 5 in Copenhagen in 2009 nor COP 16 and COP/MOP 6 in Cancun in 2010 addressed displacement.

6. What are the main features of the proposed convention?

We propose a single, multilateral, stand-alone convention to address the problem of climate change displacement, the scope of which – like the problem, both in terms of causation and consequences – is global; parties to the Convention would include both developed and developing states.

While our Convention is a stand-alone instrument, it does draw upon and adapt provisions of other instruments to adequately provide for, assist and protect those displaced by climate change. Adopting a multifaceted, cooperative and international approach to providing for, assisting and protecting CCDPs, our Convention encompasses those displaced internally *and* those who cross international borders. Migration experts state that most persons displaced by climate change will be unlikely to cross an international border.

Developing state parties to the Convention – with economies dependent on the natural environment, but without resources to mitigate and adapt to the effects of climate change – will be those states most in need of displacement assistance. As the International Council on Human Rights Policy notes, ‘the most dramatic impacts of climate change are expected to occur in the world’s poorest countries’; indeed, these countries already experience such impacts.

Finally, both temporary and permanent relocation would be provided for under the Convention. The need for relocation assistance and protection arises whether the relocation is temporary or permanent.

Our Convention proposal is based on the following principles and provides for the following matters, all of which are more fully set out in this FAQ document:

- The Convention would provide a general framework for assistance to CCDPs, and would address gaps in current human rights, refugee and humanitarian law protections for CCDPs.
- Most people made homeless by climate change are expected to stay within their home countries. The Convention would encompass those displaced within states and those who cross international borders.
- Persons displaced within state borders would be subject to a framework of assistance in which obligations would be shared between the home state and the international community. In the case of CCDPs who have migrated across state borders, the Convention would outline the rights and obligations of the CCDP and the home and host states.
- The poorest countries in the world are likely to experience the most severe impacts of global warming. The Convention would provide for contributions to a fund for climate change displacement by developed state parties based upon the principle, at least as a starting point, of 'common but differentiated responsibilities'.
- We recognise that current levels of scientific knowledge create causality issues regarding the extent to which climate change contributes to a particular weather event or population movement. The Convention would adopt a 'very likely' standard to identify certain phenomena and trends as consistent with climate change and human contribution.
- Rather than assigning rights and protections on the basis of the individual satisfaction of definitional criteria, as in the Refugee Convention, we believe that *en masse* designation of CCDP status is more appropriate to the characteristics of climate change migration.
- Because of the necessity of integrating complex issues of causality and evolving science into decision-making in respect of climate change migration, our proposal involves the creation of a sophisticated institutional architecture for designating a particular population as CCDPs.
- The very real prospect of entire states becoming uninhabitable differentiates the plight of threatened island nations from other regions in which there is likely to be large-scale displacement, and requires specific consideration. We propose that the principles of proximity, self-determination and the safe-guarding of intangible culture should be applicable to bilateral displacement agreements between threatened island nations and host states, such agreements to be negotiated under the aegis of the Climate Change Displacement Organisation, the organisation established under the Convention.

The Convention contemplates the collaborative provision of pre-emptive assistance (and if necessary, resettlement) to those most at risk in terms of the impacts of climate change. Provision of assistance under the Convention could, thus, be described as ‘anticipatory adaptation.’

7. Which states will most be in need of displacement assistance?

As the International Council on Human Rights Policy notes, ‘the most dramatic impacts of climate change are expected to occur in the world’s poorest countries’; indeed, these countries already experience such impacts. For the developing world generally, the magnitude of the impacts – as the World Bank notes – are sobering: with regard only to sea level rise, displacement due to climate change may affect millions of people.

It is developing state parties to the Convention – with economies dependent on the natural environment, but without resources to mitigate and adapt to the effects of climate change – who will be most in need of displacement assistance.

[See also question 8 below]

8. Will climate change displacement be largely internal (within a state) or will such displacement also occur across borders?

Migration experts state that most persons displaced by climate change will be unlikely to cross an international border. There is also a consensus that, generally, it is not the poorest people who cross borders, as ‘international migration is an expensive endeavour that demands resources for the journey’. The German Advisory Council on Global Change takes the view that ‘environmental migrants’ are ‘more likely to be internally displaced persons rather than migrants who cross national borders.’

The majority of displacement, then, will be internal rather than across national borders; developing states, which already experience environmental degradation and natural disasters, will bear the additional burden of displacement. For these states, a ‘vicious cycle links precarious access to natural resources, poor physical infrastructure ... [with] vulnerability to climate change-related harms’. As the German Advisory Council on Global Change also notes, ‘[m]ost cross-border environmentally induced migration will probably take the form of south-south migration; no trend towards large south-north migrations has been identified’.

Adopting a multifaceted, cooperative and international approach to providing for, assisting and protecting CCDPs, the Convention encompasses those displaced internally (that is, within a country) *and* those who cross international borders – thus, both internal and international displacement. While it is necessary to distinguish between internally and internationally displaced persons in the context of climate change displacement, and to make the same distinction in drafting the Convention, the provisions of the Convention would encompass and reflect careful consideration of both categories of displacement.

In our view, under a convention in which (a) requests for assistance can come from state parties to that convention, whether such parties be ‘home’ or ‘host’ states; and (b) assistance can be offered by the climate change displacement organisation under that convention to home or host states

(such offered assistance by the organisation to either be accepted or declined by the relevant state), contentious issues of sovereignty should be minimised.

9. How can the extent to which climate change causes displacement be determined?

At the moment it is not possible for science to determine whether a particular environmental event was caused by climate change. It is possible, however, as the IPCC shows, to identify certain phenomena and trends as consistent with climate change. So, for example, the IPCC identifies (a) increased incidence of extreme high sea level (excluding tsunamis); (b) intense tropical cyclone activity increases; and (c) areas affected by drought increases, as 'likely', that is, with more than sixty-six percent probability. Further, scientific progress

in understanding how climate is changing in space and in time has been gained through improvements and extensions of numerous datasets and data analyses, broader geographical coverage, better understanding of uncertainties, and a wider variety of measurements'.

Climate change science, thus, continues to evolve. Any instrument that seeks to address migration induced by climate change events must be based on scientific evidence as to whether those events are consistent with climate change and sufficiently flexible to reflect developments in scientific understanding over time.

Another issue is the extent to which humans contribute to particular climate change events (humans have contributed to climate change generally and, it is argued, should accept and bear some responsibility for dealing with displacement caused by, or resulting from, climate change). Just as science can't determine whether a particular environmental event was caused by climate change, neither can science determine the extent to which humans contributed to specific climate change events. It is possible to argue, however, that science can determine the likelihood that humans contributed to a type of disruption.

While the focus of the Convention is persons displaced by climate change, the Convention would recognise problems with (a) determining the extent to which climate change causes an event giving rise to displacement; (b) identifying certain phenomena and trends as consistent with climate change; and (c) the extent to which humans contribute to particular or general climate change events.

The Convention would adopt a 'very likely' standard to identify certain phenomena and trends as consistent with climate change, and human contribution (*see question 10 below*). The reason for this higher standard is that it provides increased certainty and targeted resource allocation in the context of a convention that could apply to hundreds of millions of people.

10. Would your Convention proposal operate prospectively – and is displacement assistance thus viewed by you as a form of climate change adaptation?

By adopting the 'very likely' standard (*see question 9*), and in light of the current state of climate change science, we anticipate that requests from state parties attracting the operation of the Convention would overwhelmingly concern slow-onset, gradual displacement which is more likely to

be able to be established as induced by anthropogenic climate change than a sudden disaster. However, the development of climate change science would be continually assessed, and the Convention's proposed Climate Change Displacement Environment and Science Organisation (CCDESO) – established in part to conduct climate change research and develop links and relationships with existing climate change science research organisations – would continually assess the development of climate change science, and would advise the Convention's Climate Change Displacement Organisation (CCDO) of matters which would affect the standard adopted by the Convention, and related matters (*see question 13 for the operation of the CCDO and its constituent bodies, including the CCDESO*).

Adaptive capacity is integral to displacement decisions – and both adaptation and displacement are determined as much by available resources as by environmental factors. The Convention would address the causality issues associated with the multi-factorial nature of population movements by adopting an objective rather than a subjective approach. In addition, the Convention would largely operate *prospectively*; assistance to CCDPs would be based on an assessment of whether their environment was likely to become inhabitable due to events consistent with anthropogenic climate change such that resettlement measures and assistance were necessary. In other words (*as previously stated in question 6*), displacement is viewed as a form of *adaptation* that creates particular vulnerabilities requiring protection as well as assistance through international cooperation.

Because of the necessity of integrating complex issues of causality and evolving science into decision-making in respect of climate change migration, our proposal involves the creation of a sophisticated institutional architecture for designating a particular population as 'climate change displaced persons' (*see also questions 11 and 13*). While the scope of the Convention includes those persons displaced as a result of sudden climate change events (or impacts), as a practical matter the proposed Convention's 'architecture' or machinery may not be suited to immediately reacting to an unforeseen disaster. Indeed, attempts to apply the Convention in such situations may prevent the operation of existing and more effective disaster relief and management programs. Multiple channels through which aid, assistance and protection are provided to those displaced by sudden environmental impacts already exist in the international arena. Moreover (*as discussed at question 9*), the science of climate change is currently unable to attribute a particular sudden climatic event to anthropogenic causes with any degree of certainty.

11. How would CCDPs be defined and designated under the Convention?

There has, historically, been a focus on definitions in the literature on climate change and environmental displacement. This focus may be partly explained as an effort to disentangle 'environmental' from 'economic migration'. However, the preoccupation with definitions may also have arisen as a consequence of the centrality of the definition of a 'refugee' to the assignment of protection under the Refugee Convention. In the context of that instrument, the definition of a 'refugee' gives expression to the fundamental principle that international protection has been triggered on the basis that a relationship between an individual and their nation has been damaged or severed in certain prescribed ways.

The construction of a convention for CCDPs around definitional criteria or the individual processing of ‘asylum’ claims is not the optimal solution in the context of climate change displacement for two reasons. First, it is unlikely to be possible to attribute an individual decision to migrate solely, or perhaps even directly, to climate change. Second, climate change impacts and any corresponding displacement are likely to be felt on a mass-scale rather than on an individualised basis. Climate change is better understood as affecting entire communities rather than certain individuals, although some persons in those communities will no doubt be more affected than others.

Rather than assigning rights and protections on the basis of the individual satisfaction of definition-based criteria, we propose *en masse designations* of the status of CCDPs through a process of request and determination by states and Convention institutions. Such an approach would nevertheless require a definition of CCDPs because, as has been observed,

we cannot get around definitional categories ... easily, for definitions are crucial in guiding the policies of governments and international agencies towards mobile people.

We propose this definition of CCDPs:

CCDPs are groups of people whose habitual homes have or will become temporarily or permanently uninhabitable as a consequence of a climate change event.

We define a ‘climate change event’ as ‘sudden or gradual environmental disruption that is consistent with climate change and to which humans very likely contributed’.

Under the Convention, protection and assistance would not be triggered solely by fulfilling the requirements of a definition but, rather, through an international process of status designation, informed by scientific studies, affected communities, states and international institutions. As a consequence, the definition of a ‘climate change displaced person’ is thus less pivotal in the context of our proposal than it is to the Refugee Convention. Further, as the designation would be made through prescribed Convention processes, it would obviate the need to construct an elaborate definitional mechanism that would specifically address ‘slow-onset’ climate change events.

12. What forms of protection and assistance would be provided to climate change displaced persons generally, and specifically to CCDPs displaced internally and across borders?

Generally: The Convention would address gaps in the international regime of human rights protections and humanitarian assistance as that regime currently applies to CCDPs. While the Convention provides a general framework for the provision of assistance to CCDPs (regardless of the nature of their displacement), it would address gaps in existing protections by setting out a framework for the protection of those persons displaced across international borders, as well as identifying principles which should apply to the resettlement of persons from small island states.

Most climate change displacement is likely to occur within state borders. The Guiding Principles on Internal Displacement provide a coherent statement of the matrix of human rights and humanitarian protections that are applicable to internally displaced persons. However, it is our view that because climate change is a global problem, the international community has an obligation to provide

assistance to CCDPs regardless of whether their movement has a trans-border dimension. We therefore propose a Convention that incorporates a mechanism for the provision of non-discriminatory aid to internal CCDPs. Such a mechanism would recognise that in order to adequately address the special needs of CCDPs both broad-based assistance and human rights protections are required.

Again, the Convention would apply to both internal and trans-border displacement. However, we take account of the clear distinction that is drawn in international refugee law between refugees and those internally displaced. It would recognise the principle of state sovereignty and non-intervention by operating within the existing distinction at international law between trans-border and internal displacement. It would distinguish between the explicit provision of rights and protections on the basis of internal and international displacement. Certain ambit provisions, however, should be applicable to both persons displaced both internally *and* across recognised state borders; the principle that non-discriminatory international assistance should be provided is equally applicable to both categories of displacement.

A framework for the provision of protection and assistance to persons internally displaced due to climate change, in which obligations are shared between the home state and the international community, would also be provided for. In the case of 'international' or trans-border CCDPs, the rights of the CCDP and the obligations of the host state, borrowing from the Refugee Convention, would be outlined. Rather than distinguishing between temporary and permanent displacement, we envisage that rights would be gradually accrued based on the duration of the displacement. In this way, state obligations to CCDPs would remain flexible and responsive to environmental changes.

Internal displacement: The Convention, in providing a framework for the provision of protection and assistance to persons internally displaced due to climate change, adopts a model in which the primary responsibility for CCDPs rests with their own state. However, in recognising that climate change displacement is a global problem and a shared responsibility, the Convention draws on 'the accepted legal principle of international cooperation and assistance' in acknowledging the duty of the international community to assist in the provision of protection and aid in respect of climate change displacement occurring within state borders.

While different states have different capacities, states are responsible for caring for their own people. The Convention would recognise that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to CCDPs within their jurisdiction. It would also require the home state to help prevent a refugee crisis by either attempting to eliminate the need for migration or by preparing to handle it in an organised way, consonant with the international law principle that states are responsible for preventing forced migrations.

Climate change induced displacement, however, is also a matter of global responsibility, regardless of whether such displacement crosses a national border. The international community should therefore be obliged to cooperate in the provision of protection and assistance to internally displaced CCDPs. Upon request by the home state, and in accordance with the Convention, other parties to the Convention would be required to provide assistance in cases of internal displacement. The international and customary law right to offer institutional protection would also be applicable.

As well as being responsive to existing principles of international law, the Convention would be targeted to the particular needs and characteristics associated with persons internally displaced due to climate change. CCDPs are not displaced as a consequence of political, religious, ethnic or otherwise discriminatory persecution or violence; in principle, they continue to enjoy state protection. The emphasis, then, of a global CCDP instrument should be less on the protection of persons outside their states, and more to do with supporting governments, local communities and agencies in protecting people within their own territory.

Nevertheless, displacement makes people vulnerable, including to infractions and abuses of their human rights. State parties would be required, with respect to CCDPs in areas under their jurisdiction and control, to provide (to the extent practicable) age and gender-sensitive assistance, including emergency services, evacuation and relocation, medical assistance, housing, food, measures necessary for social and economic inclusion, property restitution where possible, and the facilitation of family reunion. Further, in fulfilling their obligations under the Convention, each state party should be precluded from discriminating against or among CCDPs.

As we state in the answer to question 10, the operation of the Convention would, in many ways, be prospective. State parties to the Convention would be obliged, among other things, to collect reliable and relevant data on climate change displacement; adopt a general policy which integrates the protection of and assistance to CCDPs into future comprehensive planning programs; and closely consult with and actively involve potential or actual CCDPs and their representative organizations in the collection of data and the development of policy and its implementation. The Convention would, therefore, provide a forum for the provision of pre-emptive adaptive resettlement to populations most vulnerable to the impacts of climate change. The principles of information dissemination, public participation and civil society involvement would assist in ensuring that adaptive solutions were ‘bottom up’, generated by communities in order to maximise their effectiveness and appropriateness.

Assistance under the Convention would, thus, have an adaptive quality, rather than simply facilitating the provision of humanitarian aid. Such an approach correlates with the view that migration is best understood as a form of adaptation to climate change.

Trans-border displacement: Any treaty for CCDPs *should be premised on the rights and protections that states have already agreed to accord to traditional refugees*; the Convention should guarantee a range of civil, political, economic, social and cultural rights, based on a principle of non-discrimination. Further, CCDPs should be guaranteed a minimum standard of treatment, at least equivalent to aliens in the host country. However, analogous to the Refugee Convention, certain rights afforded to CCDPs should be those of nationals in the host country and, in some cases, rights should be afforded based on an absolute standard, rather than being contingent on existing rights in host nations. Rights relating to movement are especially significant to CCDPs, and in particular, CCDPs should enjoy the right to non-refoulement, a core principle of refugee law under Article 33 of the Refugee Convention. In the context of the new instrument, non-refoulement would prohibit the forcible return of a refugee to a situation in ‘climate-induced environmental change would threaten the refugee’s life or ability to survive’.

Following the Refugee Convention, the rights of CCDPs displaced across international borders should expand on an incremental basis, with rights accruing the longer CCDPs remain in a host nation. As one author has noted,

the refugee rights regime is not simply a list of duties owed by state parties equally to all refugees. An attempt is instead made to grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he or she is present. While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state.

Adoption of the Refugee Convention model of a gradually deepening set of rights enables the Convention to flexibly adapt to changing environmental conditions and scientific knowledge. International CCDPs would remain eligible for assistance until they (a) acquired a new nationality; (b) voluntarily returned to their home country; or (c) refused to return when it was safe for them to do so.

Finally, persons fleeing climate change-induced disasters or degradation require humanitarian aid as well as human rights protections. Any instrument for CCDPs should 'go beyond the Refugee Convention to guarantee that basic survival needs are met'. Again, a duty of international cooperation and assistance, based on the principle that climate change is a global problem, is equally applicable to both CCDPs who cross state borders and to those who remain within their own nations. Provision should be made (where necessary) for the international community to render assistance to host states in the protection of the rights afforded under the proposed Convention.

13. What organisational structure is proposed under the Convention?

(a) Organisation

While other proposals describe discrete agencies to administer their respective conventions, no proposal attempts to set out in detail the operation of a climate change displacement organisation and its constituent bodies, and how those bodies work together and interact. Our proposal attempts to remedy this gap by putting forward a climate change displacement organisation structure and, within that structure, setting out the roles and obligations of Convention participants both in narrative and diagrammatic form. Although we envisage a single, stand alone Convention with a global scope, the Convention's governance structure also contemplates a role for regional committees and multi-disciplinary collaborations across developed and developing states, and including government and non-government organisations.

Our Convention proposal would create a Climate Change Displacement Organisation (CCDO) consisting of four core bodies: an Assembly, a Council, a Climate Change Displacement Fund, and a Climate Change Displacement Environment and Science Organisation. Climate Change Displacement Implementation Groups would also be formed to facilitate resettlement.

(b) State parties: Offers of and requests for assistance, and designations

The Convention framework contemplates that states providing displacement assistance funding and states receiving such funding would be parties to the Convention. The Convention limits the

provision of assistance to developing state parties. A developing state party would make a request to the CCDO for internal or international resettlement assistance (in the case of a host state, referencing a relevant home state request, if any). That state party would, at the time of making a request for assistance, also request *en masse* designation of the status of CCDPs.

Developing state parties may also make financial and other requests for assistance in fulfilling their Convention obligations. These obligations would include collecting data on climate change displacement; integrating protection of and assistance to CCDPs into future planning programs; and consulting with potential or actual CCDPs and their representative organizations in the collection of data, the development of policy and its implementation.

It would be open to the CCDO (through the CCDO Council) to offer assistance to developing state parties without a request from those parties. It is also open to civil society within state parties to the Convention to request CCDO assistance, but such requests must be authorised and submitted by the relevant state party.

Again, the Convention would largely operate prospectively; assistance to CCDPs would be based on a 'bottom-up/top-down' assessment of the likelihood of their environment becoming uninhabitable due to events consistent with anthropogenic climate change such that resettlement measures and assistance were necessary. In other words, displacement is viewed as a form of adaptation that creates particular vulnerabilities requiring protection as well as assistance through international cooperation. As Mastrandrea and Schneider note,

[s]uccess in adaptation to climate change will come from the mating of top-down and bottom-up assessment. Scientific projections are most useful when joined with the intimate knowledge of existing vulnerabilities that stakeholders possess ... Detailed bottom-up studies provide understanding of the structural, institutional, psychological, financial, legal and cultural frameworks of affected sectors [and] ... communities.

(c) Regional committees

Williams outlines the clear virtues of regional initiatives and cooperation to address the plight of persons displaced by climate change, including the ability to assess

current vulnerabilities to climate change impacts, along with information exchange on traditional coping practices, diversified livelihoods, and current government and local interventions'.

A regional structure, Williams notes, would allow 'for various levels of engagement and development by states, depending on the individual capacity of each country involved and the (perceived) severity of the problem in that area'. McAdam notes that responses on a regional basis might 'be more appropriate and culturally sensitive ... taking into account the particular features of the threatened population'.

Accordingly, we propose the establishment of regional committees which would inform CCDO decision-making of regional perspectives and enable the unique situation of threatened island states

to be addressed, in part through the conclusion of bilateral displacement agreements between home and host states.

14. How will displacement assistance be funded, or financed, under the Convention?

We propose that developed state parties to the Convention make mandatory financial contributions to the Climate Change Displacement Fund, and that such contributions are made on the basis that, at least as a starting point, states and state parties to the Convention have common but differentiated responsibilities. The principle of ‘common but differentiated responsibilities’, the basis upon which developed state parties could make contributions to the Fund,

recognises historical differences in the contributions of developed and developing states to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems.

This principle underpins the obligations of state parties to the Convention. State practice and legal precedent supports the principle of common but differentiated responsibilities. Our proposal that funding should be apportioned on the basis of the common but differentiated responsibilities principle also finds support in other proposals for climate change displacement instruments.

We recognise, however, various problems with the principle and, in determining the hard issue of the level of specific state party contributions to the Fund, it may be that actual state party contributions would largely be a matter for negotiation. We also recognise, of course, that adaptation funding is difficult – as the UNFCCC process reveals, whether through the provision by developed states of USD 30 billion in ‘fast start financing’ (FSF) or a commitment by developed states to provision of USD 100 billion each year by 2020. FSF has not met even modest expectations, and the question of where to find USD 100 billion per year has proven to be divisive. Further, the Copenhagen Accord is vague on climate finance sources for adaptation.

15. How will the unique circumstances of small island states be addressed under the Convention?

Rising sea levels and the submersion of islands are perhaps the most publicly recognisable possible consequences of climate change. One author has suggested that ‘their small physical size, exposure to natural disasters and climate extremes, very open economies and low adaptive capacity make them particularly susceptible and less resilient to climate change.’ The populations of small island states may not only be displaced but may see the disappearance of their homelands. As a result, although they will amount only to a fraction of the total number of likely CCDPs, the interests and expectations of the populations of these small island states have a high profile.

The possibility of entire nations disappearing or becoming uninhabitable differentiates the plight of small island states from other regions in which there is likely to be large-scale displacement, and requires specific consideration. The complete loss of a physical territory signals the practical end of those states’ national sovereignty. More broadly, it signifies the end of unique ways of life which are intimately connected to precarious physical landscapes. We propose that the principles of proximity, self-determination and the safe-guarding of intangible culture should be applicable to bilateral

displacement agreements between small island states and host states, such agreements to be negotiated under the aegis of the CCDO (*see question 13*).

It is proposed that a climate change convention should be implemented with recourse to a principle of *proximity* which requires the least separation of persons from their cultural area. Proximate resettlement of small island state nationals may be particularly appropriate given their strong connections to both land and seascapes. A principle of proximate resettlement should guide bilateral agreements between small island states and developed states in the relevant region.

A second principle which should inform small island state resettlement is *self-determination*. Self-determination is enshrined in the United Nations International Covenant on Economic, Social and Cultural Rights: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' (Article 1). We consider self-determination as relevant to two distinct elements of relocation: (a) when people will abandon their territories; and (b) where people will choose to resettle. In terms of (a), the Convention recognises that small island state nationals may want to remain in their home states for as long as practicable. The capacity of the Convention's fund to provide prospective resources for persons likely to be displaced by climate change would enable adaptation funding to be provided to small island state CCDPs.

In this regard we note the work of Barnett and Campbell in *Climate Change and Small Island States: Power, Knowledge and the South Pacific*:

[F]ocusing on large-scale adjustments in social systems or large scale engineering works is likely to be a less effective and efficient approach to adaptation ... than multiple small-scale processes to build adaptive capacity at the community ... local government ... and national government levels ... These approaches do not mean that the international community [is] ... absolved of responsibility for adaptation ... [A]daptation responses ... are likely to have major costs, little if any of which should be borne by communities forced to take adaptive action.

In terms of where people will choose to resettle, collective self-determination should inform agreements between small island states and host states. Small island states' preferences may relate to existing migration patterns or proximity and should, to the extent possible, be adhered to.

Finally, we recognise the effects of climate change on populations (as well as individuals). This is reflected in our proposal for *en masse* CCDP designations. As 'group status determinations ... increase opportunities to formulate solutions that would keep the integrity of a group intact, which could help preserve cultures and national identities,' the Convention emphasises the importance of the maintenance of the CCDP group's social and cultural cohesion in their host country. For small island states, protection of cultural autonomy is of particular concern given their territory may cease to exist or become uninhabitable. Although there exists no explicit protection of refugees' cultural autonomy in current international legal regimes, the protection of social and cultural rights in the Refugee Convention may be invoked as a useful precedent. The Convention for the Safeguarding of the Intangible Cultural Heritage is also relevant. Its purpose (as set out in Article 1 of that convention) is to (a) *safeguard intangible cultural heritage*; (b) ensure respect for the intangible

cultural heritage of the communities, groups and individuals concerned; (c) raise awareness of the importance of intangible cultural heritage; and (b) provide for international cooperation and assistance.

Our aim, above all, is to enable people to remain in their homes for as long as possible or to move in a planned manner over time.

16. Why should developed states sign up to the Convention?

While climate change is a global problem, it is developing states – with economies dependent on the natural environment, but without resources to mitigate and adapt to the effects of climate change – which will most be affected by climate change and in need of displacement assistance. The IPCC highlights small island states, the continent of Africa and mega-deltas (particularly those in Asia) as areas most exposed to the effects of climate change.

It appears to us that developed states have an obvious interest in signing up to the Convention, in addressing the problem of climate change displacement in an orderly and coordinated fashion. There are, for example, strong economic and security arguments in favour of developed states dealing with climate change displacement before it becomes a problem. As the Center for Strategic and International Studies and the Center for a New American Security has noted,

dramatic movements of people and the possible disruptions involved could easily trigger major security concerns and spike regional tensions. In some scenarios, the number of people forced to move in coming decades could dwarf previous historical migrations ... [U]ncontrolled migration [is] ... likely to overwhelm the traditional instruments of national security (the military in particular) and other elements of state power and authority.

War, terrorism and trade disputes could result, with resulting economic consequences.

More broadly, assistance from developed states under the Convention would recognise

historical differences in the contributions of developed and developing states to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems,

as well as ‘the need to take into account the different circumstances, particularly each state’s contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat’. And, as two US academics have noted, ‘[b]ecause the nature of climate change is global and humans play a contributory role, the international community should accept responsibility for mitigating climate-induced displacement’.

In outlining why developed states should sign up to the Convention, it should be noted that, while different states have different capacities, states are responsible for caring for their own people. The Convention would recognise that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to CCDPs within their jurisdiction. It would also require the home state to help prevent a refugee crisis, by either attempting to eliminate the need for migration or by preparing to handle it in an organised way, consonant with the international law

principle that states are responsible for preventing forced migrations. Again, it is developing states who will most be affected by climate change.

Two other points should, again, be noted:

- the majority of displacement will be internal rather than across national borders. Developed state parties to the Convention would generally *not* be required to accept CCDPs (and, in the event they were, not without their agreement) but, rather, to provide adaptive (financial and material) assistance to address largely internal displacement before it occurs, before it becomes a problem; and
- the Convention would largely operate prospectively; assistance to CCDPs would be based on an assessment of whether their environment was likely to become uninhabitable due to events consistent with anthropogenic climate change such that resettlement measures and assistance were necessary. In other words, *displacement is viewed as a form of adaptation that creates particular vulnerabilities requiring protection as well as assistance through international cooperation. Put another way, the Convention contemplates the provision of pre-emptive resettlement to those most at risk in terms of the impacts of climate change. Provision of assistance under the Convention would, thus, have an adaptive quality.*

17. What role can civil society play in addressing climate change displacement?

We envisage civil society – non-governmental organisations, business and other professional associations, advocacy groups, and other non-profit organisations and coalitions – playing a significant role under the Convention, both generally in the context of displacement and specifically in terms of the operation of Climate Change Displacement Implementation Groups. We also envisage a significant role for civil society in the negotiation of the Convention and in the design of the framework within which it would operate; recent experience suggests that the role of civil society can be vital not only in the process of drafting and negotiating a treaty but also in securing its ratification.

The ‘Ottawa Process’, launched in October 1996, the main elements of which included a

government-civil society partnership, non-traditional diplomacy with an extensive role for NGOs, a focus on shared humanitarian aims and not narrow national interests, and the intense dedication of numerous individuals inside and outside of government,

led to the signing of the Mine Ban Treaty just over a year later. The work of the Mine Ban Treaty continues to be driven by both government and civil society.

The ‘Oslo Process’, based on the Ottawa Process, has been similarly successful, and resulted in the Convention on Cluster Munitions in May 2008. The first global conference on cluster munitions had been held in Oslo just over a year earlier, in February 2007. A main feature of the Oslo Process was the active participation in discussions and final negotiations of civil society, represented by UN organisations, the International Committee of the Red Cross and the Cluster Munitions Coalition. Over 100 civil society and NGO representatives participated in the February, 2007 meeting. ‘NGOs

were given high visibility speaking slots and intervened on the same basis as states', and draft treaty texts were developed in consultation with NGOs.

From an examination of the Ottawa and Oslo processes it is clear that the participation of states and civil society was vital. These processes, it seems to us, also provide useful models for the inclusion of not only civil society but also those states most at risk from the effects of climate change, most vulnerable to the displacement of populations, such as small island states, in the negotiation and formation of the Convention.

18. Are there other proposals designed to address climate change displacement?

Yes. Proposals for a new instrument providing for people displaced by climate change have been advanced by Docherty and Giannini, Biermann and Boas, Williams and Betaille et al. There is some consensus among the authors of these proposals, and we acknowledge the contributions made by these authors and the extent to which we have taken account of and incorporated aspects of their proposals in our own.

No proposal, however, has offered a comprehensive, global solution to the displacement problem; our proposal attempts to provide such a solution.

Any convention designed to deal with the climate change displacement problem on a comprehensive basis must include internal displacement – that which occurs within state borders and the most likely form of displacement – and international (or trans-border) displacement. Our Convention, while it necessarily distinguishes between internal and international displacement, provides for both. For those displaced within state borders it institutes a mechanism for the provision of principled, non-discriminatory assistance. It also provides an original definition of 'climate change displaced persons' and a 'climate change event'.

The Convention attempts to prioritise climate change displacement solutions without shaping instruments not designed to deal with the displacement problem.

The Convention proposal provides specifically for the populations of small island states which may become uninhabitable due to the effects of climate change, and differentiates such states from others which may be affected by large-scale displacement; it treats small island populations as a discrete group. It suggests that certain principles – proximity, for example, and the preservation of intangible culture – be applied to bilateral displacement agreements to be made between small island states and host states.

Finally, our proposal sets out in some detail a sophisticated Convention governance and organisational structure and the roles and obligations of Convention participants and constituent bodies. The mechanics of the Convention's institutional operation and processes are examined and outlined both in narrative and diagrammatic form. The procedures through which offers of and requests for assistance would be made are also described.

19. How likely is it that states will take up our proposed Convention?

We make our proposal in part because no coherent, international framework exists to provide for the millions of people likely to be displaced by climate change. We also make the proposal against a background of increasing international support from states and international and non-governmental organisations, in addition to academic support, for finding ways of addressing climate change displacement.

Our proposal is an ambitious one, but we attempt to outline a convention that we believe states could sign up to. So, for example, assistance and protection obligations generally go no further than existing instruments; the Convention would operate within the present international law distinction between internal and international displacement; and those moving across state borders would be entitled to rights based on the Refugee Convention – and 147 states have either signed up to the Refugee Convention, its 1967 Protocol, or both.

Further, the Convention would recognise that *national authorities* have the primary duty and responsibility to provide protection and humanitarian assistance to CCDPs within their jurisdiction. And developed state parties to the Convention would generally not be required to accept CCDPs (and, in the event they were, not without their agreement) but, rather, to provide adaptive (financial and material) assistance to address largely internal displacement before it occurs, before it becomes a problem.

Finally, of course, state parties are being asked under our Convention proposal to sign up to an international agreement dealing with climate change *adaptation* rather than mitigation (the latter perhaps more problematic). And, in terms of adaptation, the 2009 Copenhagen Accord provides that

developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity building to support the implementation of adaptation action in developing countries ... [and] especially in those that are particularly vulnerable ... [:] least developed countries, small island developing States and Africa.'

Again, then, given its focus on adaptation and for other reasons, we hope that our proposed Convention is one to which states – developed and developing – can sign up to.

20. Is 'advocacy for a new treaty' misplaced? What arguments have been made against a convention?

Arguments have been made that 'advocacy for a new treaty to address climate-related movement is presently misplaced' (see, for example, Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not *the Answer*,' (2011) 23 *International Journal of Refugee Law* 2). For a copy of our most recent paper (July 2011) which addresses arguments against a climate change displacement convention, please contact David Hodgkinson at d.hodgkinson@hodgkinsongroup.com.

21. Why should Australians attempt to take the lead in addressing climate change displacement?

It has been suggested that Australia should take the lead in international efforts to develop a framework for responding to climate change displacement. The broader region in which Australia is situated accounts for 60% of the world's population; it is also a region – which includes small Pacific island states – that will be significantly affected by the effects of climate change, perhaps most dramatically by sea level rise. As Corlett notes, to take such a lead 'is not to concede that mitigation and adaptation efforts are beyond us'. Rather,

planning for a future of mass displacement due to climate change gives us the opportunity – before millions of people are on the move throughout the world because of climate change; before we, and other nations, become tempted to erect walls to keep them at bay; before we start to say as though as a reflex that “we will decide who comes and the circumstances in which they come” – to develop frameworks and institutions that might not only be politically realistic, but also based on principles that promote human rights and dignity.

22. What are the next steps for the climate change displacement project?

The CCDP convention project website is www.ccdpconvention.com which includes discussion papers and journal articles which we have produced, and conference and seminar papers and speeches which we have given in Australia, the UK, Europe and North America. To date our project has been entirely self-funded, but we have now reached the stage where we need research assistance so that we can continue to progress the Convention. This would enable us to continue our research and to accept invitations within Australia and internationally to discuss the Convention and to build support for it.

The project's next step is to begin drafting the Convention.

23. How can I become involved in the project?

Please contact David Hodgkinson by email at d.hodgkinson@hodgkinsongroup.com and on +61 402 824 832. The project's postal address is:

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