

The Politics of Protection:
Conceptualizing Climatic Displacement and a Global Protection Regime

by

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ABSTRACT

Climate change is anticipated to drive millions of people from their homes this century. Estimates indicate that between 200 and 250 million people may be displaced because of rising sea levels, desertification, and increased storm surges working in concert. At present, however, there is no protection regime, institutional mandate, or legal architecture capable of responding to the plight of climatically displaced persons (CDPs). Since 2007, a number of legal regimes have been proposed to provide CDPs with legal assistance. Each regime creates compulsory mandates for states in terms of their assistance to the climatically displaced. Though proposed regimes address the existing legal gaps in protection, they fail to address why states would in fact be willing politically to sign such a treaty. This paper argues that a hard legal framework for CDP protection is not politically prudent. Rather, CDP protection should be pursued through soft legalization. In particular, this paper examines the 1998 Guiding Principles on Internal Displacement and the ways in which their non-binding nature provide a normative framework for the development of a CDP protection instrument. The 1998 Guiding Principles developed in response to the political limitations of the 1951 Refugee Convention and its contemporary application. States have taken increased measures to limit their existing asylum obligations under the legally binding 1951 framework and the non-binding IDP Guiding Principles emerged in direct response to this political resistance. The non-binding nature of the Guiding Principles has not undermined their authoritative force, however, but rather it has served as a powerful tool for protecting vulnerable populations. Thus, this paper contributes to the literature on climatic displacement by conceptualizing how the evolution and application of contemporary protection regimes, as well as their normative frameworks, can shape efforts to protect those who are displaced by climate change.

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INTRODUCTION

Climate change threatens to create a human displacement crisis of unprecedented scale. Human migration, resulting from desertification, resource scarcity, rising sea levels, and increased risk of natural disasters, is becoming increasingly pronounced as the effects of climate change are realized. While the international community recognizes the severity of these impacts, political action remains limited. And while the world's leaders fail to respond concretely with substantial reductions in greenhouse gas emissions, strong financial and political commitments to the G77, and investments in alternative energy sources, the well being of those under greatest threat from climatic perturbations continues to be put at risk. Over the course of this century, it is estimated that between 200 and 250 million people will be displaced as a result of climate change. Norman Myers' estimates, which are largely accepted in the scholarly literature as being quite conservative, indicate that by the year 2050 sea level rise will threaten the existence of 162 million people. In addition to this figure, 50 million people are projected to be displaced as a result of droughts and other climatic phenomena.¹ While the broader literature on environmental displacement depicts a significantly higher figure—nearing 1 billion displaced persons—Myers' estimate is confined to climatically induced migration alone.² Today, the United Nations High Commissioner for Refugees (UNHCR) provides assistance to over 34.5 million persons of concern—including refugees, returnees, stateless persons, and internally displaced persons (IDPs).³ The UNHCR protection regime, however, does not extend to environmental or climatic displacement, nor does international environmental law provide a normative framework for the

¹ Norman Myers, "Environmental Refugees: A Growing Phenomenon of the 21st Century," *Philosophical Transactions: Biological Sciences* vol. 357 no. 1420 (The Royal Society, 2002) 611. This figure is also supported by the Stern Review on the Economics of Climate Change. See Nicholas Herbert Stern, *The Stern Review on the Economics of Climate Change* (Cambridge: Cambridge University Press, 2007) 91-92.

² Christian Aid, *Human Tide: The Real Migration Crisis* (London: Christian Aid, 2007) 5.

³ United Nations High Commissioner for Refugees, "Population Levels and Trends," in *UNHCR Statistical Yearbook 2008* (Geneva: UNHCR, 2008) 23.

protection of climatically displaced persons (CDPs). And with no formal recognition of CDPs as a legal category in international law, there is no legal obligation for states to provide refuge or other kinds of protection to the swelling number of CDPs.

Within the intellectual and policymaking communities, there remains ongoing debate and skepticism as to the direct link between environmental climate change and displacement. While the causal relationship between, for example, economic indicators and migration is well-established both practically and intellectually,⁴ the relationship between the environment and displacement has yet to be fully understood. However, as the effects of climate change become more clearly demonstrable, the evidence is shifting in support of so-called “climate refugees” and the international legal community has taken notice. Since 2007, a number of climatic displacement protection regimes have been proposed by scholars and practicing lawyers alike. Proposals range from global governance architectures to regional frameworks; some are independent models while others are linked to global regimes, such as the United Nations Framework Convention on Climate Change (UNFCCC).⁵ Each schema seeks to establish a legal regime to provide for the needs and rights of those individuals who currently are, or will be, displaced as a result of climate change. One common component unites all of the frameworks—each is legally binding and shifts the onus for protection of CDPs from the home and host states, traditionally of the global South, to the developed states of the global North. A single protection

⁴ See for instance, Douglas S. Massey and J. Arango et al., “Theories of International Migration: A Review and Appraisal,” *Population and Development Review* vol. 19 no. 3 (Sep. 1993) 432-48.

⁵ Four particular frameworks have emerged as the principal proposals for CDP protection and each regime creates a legally binding instrument that extends signatories’ protection obligations. These include two separate proposals each of which call for a global protection convention (see Docherty and Giannini 2009; and Hodgkinson and Burton et al. 2010, respectively), one framework draws specifically on a regional agreement for protection (Williams 2008), while the final model calls for the addition of a protection protocol to the UNFCCC framework (Biermann and Boas 2007). Though subtle nuances distinguish each protection model, the proposed frameworks outline states’ legal obligations to climatically displaced persons and each mandates that states contribute financially to a global protection and resettlement fund (William’s framework, however, links states’ financial obligations to their commitments in the UNFCCC process).

regime, however, has yet to be adopted by the international community and CDP protection proponents continue to face political resistance from developed states to which the responsibility for protection would be passed. Thus, the central question to the CDP protection dilemma remains: how might CDP protection efforts overcome the political obstacles and legal limitations currently undermining formal recognition, in order to create a regime that affords protection to those displaced by climate change?

The answer to this intellectual and political challenge, that is, the ability to deconstruct the politics of protection in order to pave the way for the adoption of an international CDP protection framework, lies in the political evolution of contemporary protection regimes. An examination of the political culture giving rise to the 1951 Convention Relating to the Status of Refugees and the 1998 Guiding Principles on Internal Displacement, as well as their normative foundations, may provide an answer to the CDP protection dilemma. The Geneva Convention, for example, historically placed states' asylum obligations toward the center of the protection spectrum. States' protection mandates strategically centered on minimal protection obligations, with regard to relatively small numbers of refugees, and therefore did not require substantial economic or political commitments on their part. However, as the nature of displacement changed and the institutional capacity of organizations like the UNHCR moved beyond the framework's original mandate, efforts were made to expand the legal responsibilities of states to encompass new kinds of migrants. These efforts were resisted by industrialized states and resulted in their restrictive application of the 1951 framework. As a result, the IDP regime was not appended to the Geneva Convention. Rather, the IDP regime garnered the necessary political support for protection by appealing to states on a concessionary basis. States were not obliged to afford protection to IDPs, but non-binding principles founded on legally recognized norms

guided protection efforts. The new regime not only achieved international support, but led to the successful protection of IDP populations.

CDPs present a challenge to which neither the 1951 Convention nor the IDP Guiding Principles are capable of responding directly, either legally or politically. However, protection efforts can construct a new non-binding regime to protect CDPs by following the normative course pioneered by the IDP framework and its response to the political limitations of the 1951 Convention. With this objective in mind, a CDP protection regime must be framed by existing international norms, especially: 1) a restrictive definition that treats CDPs as a new form of IDP, 2) non-binding protection guidelines that can still shape state actions, 3) an international responsibility to provide asylum and assistance to those who suffer serious harm, and 4) the burden sharing principle that differentiates state responsibilities and is already found in international protection instruments and environmental law. By constructing a protection architecture that is responsive to CDPs' distinct circumstances but founded on these well-established norms, a CDP protection agreement has the potential to gain international support.

This paper contributes to the literature on climatic displacement by conceptualizing how the evolution and application of contemporary protection regimes, as well as their normative frameworks, can shape efforts to protect those who are displaced by climate change. The development of the argument proceeds in five parts. It first evaluates the "climatically displaced person" construct, paying particular attention to the ongoing debate within the literature in order to decouple climatic displacement from the broader literature on environmental displacement. The argument continues by contextualizing the nature of climate change displacement, including its influence on demographics and vulnerable locations. Next, the analysis evaluates the structural constraints that not only undermine efforts to provide protection for CDPs but actually

provide an additional layer of exclusion—namely exclusion from the UNHCR and UNFCCC frameworks—which legally hinders them from obtaining their appropriate political, economic, and social rights. Upon completion of this assessment, the evolution of the 1951 Geneva Convention and IDP frameworks will be examined, including the ways in which the 1951 framework, and the politics behind its application, gave rise to a particular non-binding protection regime for IDPs. An examination of the politics of protection and the normative course pioneered by the IDP regime serves as the foundation for the final section, which is an analysis of how the non-binding nature of the IDP framework can lay the foundation for a future CDP protection regime.

RECONCEIVING CLIMATIC DISPLACEMENT: CONCEPTUAL CHALLENGES AND THE POLITICAL UTILITY OF THE CONSTRUCT

The lack of conceptual clarity and intellectual consensus has hindered the utility of the “climatically displaced person” construct. Among the challenges is the fact that the notion of CDPs has become analytically embedded within the larger “environmental refugee” discourse. The term “environmental refugee,” attributed to Lester Brown of the World Watch Institute in the 1970s, applied to individuals who, because of adverse or irreparable environmental conditions, were forced to leave their native homes.⁶ The term was further refined by United Nations Environmental Programme (UNEP) researcher Essam El-Hinnawi in 1985. El-Hinnawi added a temporal and causal element to the construct, arguing that environmental refugees are “those persons who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic].”⁷ However, the categorical value of the environmental refugee construct has come under strong criticism as scholars and policymakers contest the legitimacy of the concept.

Some intellectuals, such as geographer Richard Black, claim the term lacks utility because of its intrinsic vagueness. The meaning and breadth of the term is so extensive, so the argument goes, that the link between the environment and migration could be linked to *any* ecological, economic, or social indicator—thereby making *millions* of people refugees and entitling them to the accompanying legal rights.⁸ Similarly, Gaim Kibreab contends that those who claim environmental degradation or climate change cause population displacement base

⁶ Ethan Goffman, “Environmental Refugees: How Many, How Bad?” *CSA Discovery Guides* (2006) 5.

⁷ Essam El-Hinnawi, “Environmental Refugees,” *United Nations Environment Programme* (Nairobi: 1985) 4.

⁸ Richard Black, *Refugees, Environment and Development* (New York: Addison Wesley Longman, 1998) 11 and Richard Black, “Environmental Refugees: Myth or Reality?” *United Nations High Commissioner for Refugees—Working Paper Series, Number 34* (Geneva: UNHCR, 2001) 1-11. *See also* Stephen Castles, “Environmental Change and Forced Migration: Making Sense of the Debate,” *United Nations High Commissioner for Refugees—Working Paper Series, Number 70* (Geneva: UNHCR, 2002) 8-10.

their assessments on the wrong assumption, namely, that displacement is mono-causal and that ecological conditions can be isolated from other inextricably interwoven drivers of migration.⁹ While, conversely, protection proponents counter these sentiments arguing that the scope of the concept contributes to its strategic intent to protect as many individuals as possible.¹⁰ By establishing the full range of environmental pressures and their particular relationship to migration, it is possible to deepen our understanding of environmental refugees and the experiences they face. This perspective, they contend, contributes to a comprehensive strategy for protection.

The ambiguity of the environmental displacement construct and the debate over causes, however, has advantaged the political interests of developed states who have an interest in restricting asylum obligations. By continuing to debate and contest the analytic category, as well as the causation mechanism linking a particular environmental condition (either partially or exclusively) to a migration pattern, developed states have evaded responsibility and placed the onus for protection on the home and host states of the displaced persons themselves—typically from the global South. In addition, policymakers strategically have chosen not to assign the classification of “refugee” to environmentally or climatically displaced persons, for in assigning refugee status to these classes of people there is an obligatory set of economic, social, political, and legal mandates that accompany the status.

The current environmental displacement debate is at an impasse, and one of the first steps to break the impasse and advance the discussion is to decouple for analytical purposes climate change displacement from environmental migration. The question of causation that traditionally

⁹ Gaim Kibreab, “Climate Change and Human Migration: A Tenuous Relationship?” *Fordham Environmental Law Review* vol. 20 no. 357 (Winter 2010) 399.

¹⁰ Norman Myers, “Environmental Refugees,” *Population and the Environment* vol. 19 no. 2 (Springer, 1997) 176-81.

has undermined the category of environmental refugee—that is, the inability to identify empirically a *particular* environmental event as the principal factor in human migration—may no longer unduly limit the utility of the climatic displacement construct. There is now mounting evidence suggesting climate change to be a long-term cumulative phenomenon leading to human displacement.¹¹ The precipitating causes for climatic migration may not bring about immediate population displacement, but their effects can accrue over time leading to long-term environmental damage and human migration.

Though some still contest the evidence, the Intergovernmental Panel on Climate Change (IPCC), among others, has taken steps to construct the causal relationship between specific climatic events and migration. In its 2001 and 2007 Climate Change Reports, the IPCC identified rising sea levels, desertification, and extreme weather events to be intrinsic factors in some forms of human migration.¹² For example, climate models¹³ indicate that between 1974 and 1998 a global drying trend occurred.¹⁴ Attributed to increases in global surface temperature associated with climate change, the IPCC projects this historical trend to continue and notes that the drought scenarios will affect multiple sectors, including agriculture, water supply, energy production, and human health. The panel further argues that it is *likely* these effects will spur population

¹¹ See for instance, Vikram Odedra Kolmannskog, “Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration,” *Norwegian Refugee Council* (Oslo: 2008) 13-16. *See also* Intergovernmental Panel on Climate Change, “Climate Change 2007: Synthesis Report,” *United Nations Environment Programme* (Geneva: United Nations Environment Programme and World Meteorological Organization, 2007) 53; Carolyn Kormann, “Retreat of Andean Glaciers Foretells Global Water Woes,” *Yale Environment* 360, 9 Apr. 2009 <<http://e360.yale.edu/content/feature.msp?id=2139>> 28 Jun. 2010.

¹² Intergovernmental Panel on Climate Change, “Climate Change 2007: Synthesis Report,” 53 and Intergovernmental Panel on Climate Change, “Third Assessment Report,” *United Nations Environment Programme* (Geneva: United Nations Environment Programme and World Meteorological Organization, 2001) 537, 571-72.

¹³ The IPCC’s global drought forecasts are derived from the Palmer Drought Severity Index (PDSI). The PDSI methodology is largely accepted within the scientific community as the most comprehensive model for drought forecasting. It uses precipitation, temperature, and local available water content data to assess soil moisture and can be used to calculate drought scenarios across many different climates.

¹⁴ S. Solomon and D. Qin et al., “Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007,” *United Nations Environment Programme* (Cambridge and New York: Cambridge University Press, 2007) 260.

migration.¹⁵ But the IPCC also claims that climatic displacement is not simply a future phenomenon. In its Third Assessment Report, the organization cited flooding and desertification as the principal factors driving Bangladeshi migrants to India. The report observes:

[P]opulation growth and land scarcity have encouraged the migration of more than 10 million Bangladesh natives to neighboring Indian states during the past 2 decades. This migration has been exacerbated by a series of floods and droughts affecting the livelihoods of landless and poor farmers in this region. Land loss in coastal areas resulting from sea-level rise as a result of climate change is likely to continue [and] lead to increased displacement of resident populations.¹⁶

The IPCC has attempted to address the issue of causation by identifying particular climatic events and their contributing role in human migration. By developing the empirical relationship between climate change and displacement, the IPCC has taken the initial step to address the issue of causation that has often limited the utility of the broader environmental refugee construct. And though the IPCC has not fully demonstrated these climatic indicators to be the *exclusive* cause of displacement, it has illustrated that the climatic events may alter the environment to such an extent that one's decision to stay or leave may be critically swayed.

By decoupling climate change migration from the traditional environmental refugee discourse, thereby narrowing the breadth of the concept to the IPCC categories that have shown a direct link to human migration, there is potential to place analytic boundaries around the category. This confined framework may not address all types of environmental events that can cause migration, such as industrial accidents or dam constructions, but it provides an opportunity to illustrate clearly an element of the displacement phenomenon and contribute to the larger issue of conceptual agreement. Climate change is an environmental phenomenon, but distinguishing climatic displacement from environmental migration creates a conceptual framework for thinking about how particular environmental events may cause migration. By creating this

¹⁵ Intergovernmental Panel on Climate Change, "Climate Change 2007: Synthesis Report," 49, 53.

¹⁶ Intergovernmental Panel on Climate Change, "Third Assessment Report," 572.

normative framework for addressing climatic displacement, there is also potential to advance the broader environmental refugee discourse in the future.

With this in mind, a valuable CDP definition must have explanatory power—it must link explicitly the cause of migration to the type of migration, including voluntary vs. forced displacement patterns, temporary vs. permanent relocations, and international vs. intrastate migration. Working within this limited framework, I propose to adopt a definition that draws on the three climatic events identified by the IPCC as producing displacement and links the causal phenomena, either partially or exclusively, to specific migratory patterns. As such, the following definition will be adopted and draws on the collective work of climate migration scholars:

Climatically displaced persons are those individuals who are volitionally or requisitely driven from their habitual homes, either temporarily or permanently seeking refuge within their home state or across international borders, because of alterations to their natural environment resulting from at least one of three climate-related phenomena: sea level rise, drought and water scarcity, or extreme weather events.¹⁷

¹⁷ Frank Biermann and Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, Global Governance Working Paper no. 33 (Amsterdam et al.: The Global Governance Project, 2007) 8. See also David Hodgkinson and T. Burton et al., *The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change* (A Convention for Persons Displaced by Climate Change, 2010) 22; Bonnie Docherty and Tyler Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change,” *Harvard Environmental Law Review* vol. 33 no. 349 (2009) 367-71.

NATURE OF CLIMATE CHANGE DISPLACEMENT

With scientific and social indicators projecting mass climatic displacement this century, CDPs are predicted to exceed the number of traditional refugees and IDPs—that is, those persons protected under each respective regime—by 2050.¹⁸ But for CDPs, migration may not be limited to intrastate migration, as it is for IDPs; nor is interstate migration with timely and appropriate repatriation efforts necessarily a constructive solution, as may be the case for some traditional refugees. The breadth of climatic displacement will cross borders and legal protocols, but unlike customary displacement patterns in which an individual flees the home state because of persecution, the state, in many climatic displacement cases, may not be culpable. The connection between CDPs and their states may not be severed through persecution but rather geopolitical limitations. As a result, the traditional guarantor of protection—the state—may not have the capacity to adapt and support its citizens, or, as in the case of many small island states and potentially other locales, may not have the geographic landscape to provide refuge. Thus, climatic displacement places the state’s relationship to migration in a new light. The state no longer serves as the driver of migration but it now functions to uphold the rights of its citizens by pursuing climatic mitigation and adaptation measures to prevent or limit displacement.

Conceptualizing climatic displacement requires an alternative framework, one that is not grounded in traditional protection regimes, but still accounts for the parallel experiences of displaced persons. With this objective in mind, it is necessary to acknowledge that similar to refugees and IDPs, climatic displacement threatens individuals’ internationally protected human rights. The effects of climate change and subsequent displacement of people likely undermine one’s right to life, an adequate standard of living, self-determination, and the rights accorded to

¹⁸ Docherty and Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change,” 349.

minorities and indigenous peoples. All of which are already bound intrinsically within existing international human rights instruments, including the UN Declaration on Human Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Declaration on the Rights of Indigenous Peoples.¹⁹ Though these instruments do not make explicit reference to environmental rights, alterations to the physical environment and, in some cases, complete submersion of one's physical home, consequently disrupt livelihoods, national economies, institutional stability, and cultural customs.²⁰ The subsequent manifestation of these social effects clearly enter the realm of human rights doctrine and with the effects of climate change only beginning to materialize, CDPs' freedom to exercise these rights will continue to be tested.

The scope and diverse nature of climatic displacement varies significantly from the traditional displacement narrative and though there are similarities, it is imperative to understand the unique nature of climate migration—including climatic drivers, regional epicenters, demographics, and migration patterns. Working within this framework, it is widely accepted that displacement streams will be caused by three principal drivers: sea level rise, projected to exceed one meter by 2100;²¹ desertification, which will make large swaths of land uninhabitable;²² and extreme weather events, such as tropical cyclones and storm surges.²³ According to the German Advisory Council on Global Change, climate change is less likely to increase the number of tropical cyclones than their destructive energy due to warmer sea temperatures. The Council also

¹⁹ Ben Saul and J. McAdam et al., "Climate Change and Human Rights: Letter to the Office of the United Nations High Commissioner for Human Rights," *Sydney Centre for International Law* (Sydney: University of Sydney, 2008) 2-3.

²⁰ Ibid.

²¹ Katherine Richardson and W. Steffen et al., *Synthesis Report: Climate Change—Global Risks, Challenges & Decisions* (Copenhagen: The University of Copenhagen, 2009) 10.

²² Intergovernmental Panel on Climate Change, "Climate Change 2007: Synthesis Report," 53. See also Docherty and Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change," 349.

²³ Intergovernmental Panel on Climate Change, "Climate Change 2007: Synthesis Report," 53.

projects storm surges to be more frequent and cause more damage than the gradual rise of sea levels.²⁴ In addition to these climatic events, extreme drought patterns, which currently affect 1 to 3 percent of the planet, may increase to 30 percent by 2090.²⁵ And the gradual retreat of glaciers with their accompanying fresh water supply will affect the 1.2 billion people who currently depend on glacial melt.²⁶ A single climatic event may not be the sole driver of migration, but these climatic phenomena will work in concert to create a displacement crisis that may very well achieve Norman Myers' human displacement estimates.

These three types of climatic events are what differentiate climate migration from other forms of environmental migration. The narrowed scope of climatic displacement allows for more careful forecasting of migration patterns. As such, the regional locales anticipated to be of greatest concern include Africa, Asia (particularly mega-delta areas), Latin America, and small island developing states (SIDS).²⁷ Geographic positioning and natural vulnerability to climatic trends certainly will play a role in regional migration movements, but such trends coupled with institutional responses and adaptive capacity may also contribute to or exacerbate certain migration patterns. African nations may be particularly at risk. Frank Biermann and Ingrid Boas, for instance, argue that African states' high natural vulnerability and low adaptive capacity will result in generally higher migration trends. Contending that rising sea levels and exposure to water scarcity will spur continental-wide migration, the authors cite states' currently limited resources as contributing to regional displacement. Taking into account existing adaptive capacities, Biermann and Boas argue that a 2080 projection, indicating a 38cm rise in sea level,

²⁴ R. Schubert and H.J. Schellnhuber et al., "The Future Oceans—Warming Up, Rising High, Turning Sour," *German Advisory Council on Global Change* (Berlin: WBGU, 2006) 38-41.

²⁵ Eleanor J. Burke and S.J. Brown et al., "Modeling the Recent Evolution of Global Drought and Projection for the Twenty-First Century with the Hadley Centre Climate Model," *Journal of Hydrometeorology* vol. 7 (2006) 1122.

²⁶ Ibid.

²⁷ Intergovernmental Panel on Climate Change, "Climate Change 2007: Synthesis Report," 48-52.

may affect up to 13 million persons in northern Africa, 36 million in western Africa, and 33 million in eastern Africa. While further studies illustrate that drought and water stress, caused by a temperature increase of 2 to 3 degrees by 2085, may impact an additional 200 million Africans.²⁸ If these climatic stressors fully manifest themselves and adaptive capacities remain constant, then migration may be one of the prominent social responses.

Moving further east, south and southeast Asia are also highly vulnerable to climatic perturbations. With low-lying topography, high population densities, and increased risk of tropical storms and flooding, nine river delta regions in south Asia, with a population exceeding 250 million, risks severe inundation.²⁹ Bangladesh, for instance, lies on average just 2 meters above sea level and it is anticipated that rising sea levels together with increased riverine and coastal flooding could inundate 20 percent of the country by 2030—thereby limiting access to viable land and generating forced migration in the order of 26 million persons.³⁰

Latin American nations and SIDS face a similar fate with rising sea levels and tropical storms. Assuming a one meter rise in sea level, as predicted by the IPCC, the deltas of the Parana (Argentina), Amazon (Brazil), and Orinoco (Venezuela) are at risk of severe flooding, while water scarcity will place additional stress on dense urban centers, such as La Paz and Lima. Similarly, though perhaps even more pronounced, is the risk of complete inundation that threatens island states like the Maldives, the Marshall Islands, and Tuvalu. For states such as

²⁸ Bierman and Boas, “Preparing for a Warmer World: Towards a Global Governance System To Protect Climate Refugees,” 11-12.

²⁹ Ibid., 12.

³⁰ Devin T. Hagerty, “Bangladesh in 2007: Democracy Interrupted, Political and Environmental Challenges Ahead,” *Asian Survey* vol. XLVIII no. 1 (University of California Press, 2008) 182. See also Bierman and Boas, “Preparing for a Warmer World: Towards a Global Governance System To Protect Climate Refugees,” 12.

these, sea level rise threatens national and cultural survival and has the potential to displace nearly 2.6 million people without any potential for repatriation.³¹

Though the scope of climatic migration varies from historical displacement trends, there are certain endemic features of climatic displacement which, if projected correctly, may reveal certain migration patterns. The direction of CDP flows is not demonstrable empirically, but it is anticipated that CDPs are likely to migrate in large numbers and collectively. Biermann and Boas note that “[w]hile current refugee governance builds on the individual person persecuted by a public authority in his or her country, climate migration is in principle a collective phenomenon that entails entire villages, cities, provinces and at times entire nations.”³² And while it is expected that CDPs will move in a communal fashion, observers note that regional and intrastate migration movements are far more likely to occur than wide-spread international flows.³³ These patterns, of course, are based on the individual, community, and state’s capacity to adapt. With many regions lacking effective institutional mechanisms and low adaptive capacities, only those individuals with adequate resources will be able to determine the timing and direction of migration.

³¹ Bierman and Boas, “Preparing for a Warmer World: Towards a Global Governance System To Protect Climate Refugees,” 13.

³² Ibid., 15.

³³ Hodgkinson and Burton et al., *The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change*, 5.

THE PROTECTION GAP: STRUCTURAL LIMITATIONS OF EXISTING REGIMES AND THEIR APPLICATION TO CLIMATIC DISPLACEMENT

As Ben Saul et al. rightfully note, “those displaced by climate change are not yet recognized in international law as an identifiable group whose rights are expressly articulated, or as a formal legal category of people in need of any special protection.”³⁴ Affording protection to CDPs does not fit within the treaty or customary international law regimes as applied through international refugee law and international environmental law. Some efforts to extend protection to CDPs, for instance, have attempted to mold the legal framework of the 1951 Refugee Convention to address climatic displacement. But the 1951 Convention relies on a restrictive definition of refugee—one, who, “owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”³⁵ is entitled to state protection and the accompanying rights. CDPs, however, do not fit within this legal construct because the term *persecution* does not extend beyond the criteria listed above and legal precedent has yet to establish climate change as a form of persecution. In addition, persecution constitutes a state act. In the context of climatic displacement, CDPs are not being targeted by the state and its actions are not considered to be the driver of migration. Similarly, the 1951 framework affords protection only to exiles who traverse international borders, while many CDPs may be displaced internally. This begs the question as to whether the IDP Guiding Principles framework may offer protection to CDPs. The core contention here, however, is that IDP protection, though potentially providing an avenue for those who are internally displaced by

³⁴ Saul and McAdam et al., “Climate Change and Human Rights: Letter to the Office of the United Nations High Commissioner for Human Rights,” 3.

³⁵ United Nations High Commissioner for Refugees, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,” *United Nations High Commissioner for Refugees* (Geneva: UNHCR, 1992) 8-12.

climate change, extends only to individuals who are internally displaced as a result of *conflict*—not climate change.³⁶

Other protection proponents have turned to international environmental law as a prospective legal avenue for CDP protection. Environmental law does provide a cohesive framework for addressing state contributions to climate change as well as mitigation measures such as reductions in greenhouse gas emissions. And though climatic displacement may intuitively fit within this legal purview, a principal limitation of environmental law is its state-based model. Legal responsibility, as practiced through environmental jurisprudence, resides between and among states and this has a three-fold effect. First, individual claimants have a limited legal capacity to pursue protection unless advanced by the state. Second, it is difficult to establish a causal connection between a particular state's carbon emission levels and a specific displacement outcome. And third, holding corporations accountable for emissions remains difficult in a legal system which holds states as the primary duty-bearers.³⁷ Thus, there is limited legal recourse for holding corporations and their practices accountable for climatic displacement.

The structural limitations of CDP protection are also found within other established authorities, such as the UN Framework Convention on Climate Change. As an environmental treaty, the UNFCCC addresses state-to-state relations but the framework's state-based model, similar to the larger environmental legal regime, does not provide for CDP protection. Docherty and Giannini address the normative foundation of the UNFCCC framework, noting that climatic displacement falls outside the Convention's mandate. Accordingly, they write:

³⁶ Saul and McAdam et al., "Climate Change and Human Rights: Letter to the Office of the United Nations High Commissioner for Human Rights," 3. *See also* United Nations, "Guiding Principles on Internal Displacement," (Geneva: 1998).

³⁷ Saul and McAdam et al., "Climate Change and Human Rights: Letter to the Office of the United Nations High Commissioner for Human Rights," 6.

The UNFCCC applies directly to climate change, but it too has legal limitations for dealing with climate change refugees. [T]he 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.³⁸

In terms of CDP protection, the state centered model is a clear limitation of the UNFCCC framework, but it is not the framework's sole constraint. Docherty and Giannini acknowledge rightfully that the UNFCCC's directives center on remedying the ecological impacts of climate change, not the resulting social consequences such as human displacement. As the framework stands currently, the UNFCCC is not a venue that can ensure CDP protection.

By deconstructing the legal instruments which, upon first glance, may seem amenable to CDP protection, it becomes quite clear that CDPs are not only driven from their homes and cultures, but they also are excluded from international legal regimes that are not designed specifically to address climatic displacement. The categorical exclusion of CDPs in international law, however, is not the only structural constraint CDPs face. In addition to these protection gaps, no international institution holds a clear mandate to serve this population and there is currently no funding mechanism equipped to address climatic displacement.³⁹ Based on its extensive history of refugee protection, the UNHCR may appear to be the institution most suitable to address this issue. And while there is strong normative weight to extend protection to CDPs under the UNHCR regime, doing so might overwhelm its already limited institutional capacity. Saul et al. acknowledge that "[t]here are real doubts whether UNHCR has the resources, expertise and capacity to assume a protection or assistance function for over double

³⁸ Docherty and Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change," 359.

³⁹ Ibid.

the number of people for whom it already cares.”⁴⁰ With no institutional or legal architecture to guide protection efforts, home states hold the initial responsibility to assist CDPs and yet the burden will increasingly be spread regionally and then globally as climatic migration becomes more pronounced. With the global South being the epicenter of displacement and bearing a disproportional level of responsibility, the responsibility has not yet been equitably distributed and a framework does not currently exist from which to engage developed states, either on an obligatory or concessionary basis.

Although no legal or institutional frameworks presently exist, a future regime for CDP protection is still possible. The foundation for CDP protection and the potential to engage the international community lies in the evolution of the 1951 Refugee Convention and, in particular, the normative course pioneered by the IDP Guiding Principles in response to the Convention’s limitations. Drawing on the path forged by the IDP regime, a CDP protection regime has the potential to overcome the political and legal limitations currently in place.

⁴⁰ Saul and McAdam et al., “Climate Change and Human Rights: Letter to the Office of the United Nations High Commissioner for Human Rights,” 7.

THE HISTORICAL EVOLUTION OF THE CONTEMPORARY PROTECTION REGIMES: PIONEERING A NORMATIVE FRAMEWORK FOR CDP PROTECTION

In the wake of World War II the international community was left reeling from the atrocities of genocide, crimes against humanity, and a new global displacement crisis. The era was shaped by a profound sense of responsibility and a recognition that the international community had a collective duty to protect the nearly 1 million persons who fled Nazism, and later communism, in Europe.⁴¹ This context framed the development of the 1951 Geneva Convention, the formation of the UNHCR, and the accompanying 1967 Protocol—the cornerstones of international refugee law. Protection efforts were welcomed by the international community, both as a remedial measure following World War II and as a strategic tactic during the Cold War. Non-citizens were afforded protection by states because refugees filled domestic labor shortages and came in manageable numbers from neighboring countries with ethnic affinities.⁴² Emigration also reflected important ideological differences between the eastern and western blocs, and the liberal asylum policies of NATO states encouraged individuals' flight from communism with a virtual guarantee of resettlement.⁴³ This political ethos coupled with the relatively limited breadth of the displacement crisis garnered international support for a protection regime that focused on an individualized and persecution-based approach to protection. States found their protection mandates strategically positioned between positive obligations, requiring firm commitments from states to provide asylum, and negative obligations, simply guiding states not to harm, or persecute, vulnerable populations. The practical application

⁴¹ Erika Feller, "Asylum, Migration, and Refugee Protection: Realities, Myths and the Promises of Things to Come," *Oxford Journals* (Oxford: Oxford University Press, 2006) 131.

⁴² Ibid., 129. *See also* Erika Feller, "International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present, and Future," *International Review of the Red Cross* vol. 83 no. 843 (Sep.2001) 584-85; Ethan Goffman, "Environmental Refugees: How Many, How Bad?"⁴; Jeanhee Hong, "Refugees of the 21st Century: Environmental Justice," *Cornell Journal of Law and Public Policy* vol. 10 no. 323 (Ithaca: Cornell University Press, 2001) 323-26.

⁴³ Charles B. Keely, "How Nation-States Create and Respond to Refugee Flows," *International Migration Review* vol. XXX no. 4 (1996) 1057.

of the refugee regime, however, addressed states' strategic political objectives and many states were willing to position their protection obligations between these two poles in order to pursue their own political ends.

As the nature of displacement moved beyond the limited environment of World War II and the Cold War rivalry, interethnic conflict in newly independent states led to an exponential growth in refugee crises.⁴⁴ The corresponding growth in asylum claims increasingly tested states' resources and their ability, as well as willingness, to protect refugees. Protection mandates no longer centered on that curious middle ground, from which protection simply meant to do no harm, but states' positive obligations came to the fore and increasingly demanded governments provide asylum, employment, housing, and education, among other obligations. States' protection mandates soon extended beyond the Geneva Convention's original framework and the subsequent response of many governments was a restrictive application of the Convention. The assimilation of non-citizens was no longer viewed as a strategic political tactic, as was the historical case, but a fear of large-scale refugee flows overburdening domestic resources and igniting social strife shaped domestic asylum policies. Beginning in the 1980s, many states proceeded to readdress their liberal asylum policies by tightening traditionally porous borders and redefining their protection obligations to reflect the new nature of displacement.⁴⁵

With the restriction of protection obligations finding political expression in many state policies, both in the past and present, the Geneva Convention's application came to be limited to specific forms of persecution that induce international migration. The changing nature of

⁴⁴ In the late 1980s there were 10 million refugees worldwide and by 1995 the number of persons needing assistance grew to 25 million. See Erika Feller, "The Evolution of the International Refugee Protection Regime," *Journal of Law and Policy* vol.5 no. 129 (2001) 134.

⁴⁵ Many states have taken exclusionary or non-arrival measures to ensure that their obligations under the Geneva Convention are limited. Examples include visa requirements, intended to slow the arrival of asylum seekers; sanctions on airlines and shipping companies carrying non-citizens to states without proper documentation; and the placement of airport liaisons at foreign airports to detect inadmissible aliens before they enter their territory.

displacement, however, no longer fits strictly within the Convention's narrowed scope. And though the 1951 framework does not preclude the addendum of new migration protocols, the politics of the Convention's application demonstrates states' unease and, in some cases, unwillingness to extend protection mandates, and thus their positive obligations, to new forms of migration. As a result, protection for non-traditional migrants has been pursued through alternative instruments. In perhaps no area has this become more apparent than in the situation of internal displacement.

The last decade of the twentieth century placed a new migration trend on the international agenda—one that did not fit within the traditional sphere of the 1951 Convention and did indeed test its application. The plight of IDPs came to the fore as the growth in civil wars and communal violence led to egregious human rights violations and uprooted millions of people from their homes. These populations, unlike traditional refugees, were not driven across international boundaries but remained at risk within the borders of their own countries. The political boundary was the sole indicator of legal protection and IDPs were not afforded protection under the 1951 Convention because they did not traverse international borders. Remaining inside their own countries and under the jurisdiction of their own governments, the very governments that may have caused their displacement and compromised their security, IDPs had limited recourse for protection.

In 1990 the limitations of the 1951 framework and its inability to respond to the IDP phenomenon, both legally and politically, led to discussions surrounding appropriate remediation measures. The absence of an IDP protection regime led to critical questions as to the course of protection—should an IDP protection protocol simply be added to the Geneva Convention or should the international community chart an alternative course for IDP protection? Francis Deng

and Roberta Cohen exposed four major weaknesses in the international legal regime that required attention if the gap in IDP protection was to be bridged. A suitable IDP protection architecture, according to Deng and Cohen, should: bridge the gap between human rights and humanitarian law that can exist in the transition between peace time and wartime; create protection obligations for non-state actors, thus extending obligations beyond the traditional state model; encourage states to protect human rights despite not being a signatory to international treaties; and finally, develop similar protections as those granted to refugees under the Refugee Convention.⁴⁶ Though existing international legal instruments provided some measure of protection, the legal shortcomings coupled with a political culture in which states restricted their asylum obligations under the 1951 Convention illustrated the need for a specific instrument responsive to the particular needs of IDPs.

Understanding the limitations of international law, but perhaps even more the political resistance of signatories to extending positive protection obligations beyond the customary application, non-governmental organizations (NGOs),⁴⁷ the UN Representative of the Secretary General on Internal Displacement, and the governments of Norway and Austria forged a process

⁴⁶ Hannah Entwisle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement," *Georgetown Immigration Law Journal* vol. 19 no. 369 (Spring 2005) 372. *See also* Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington D.C.: Brookings Institution Press, 1998) 73-85, 187-98, 203-09, 255-63.

⁴⁷ In the mid-1980s a group of three NGOs—the Refugee Policy Group, the Quaker United Nations Office, and the World Council of Churches—led a lobbying campaign urging intergovernmental and state actors to address the phenomenon of internal displacement. Over the course of two years, the NGOs organized numerous conferences, wrote draft resolutions, and submitted written statements to the Commission on Human Rights, calling on the UN to initiate a formal process. In 1990, the UN Economic and Social Council (ECOSOC) formally recommended that the UN Secretary General initiate an internal assessment of the UN's ability to provide protection and assistance to internally displaced persons. In 1991 the ECOSOC report concluded that no UN entity had the mandate to provide all levels of assistance and protection to internally displaced populations. Following this report, Austria and Norway joined the effort to address internal displacement and called on the international community to act. For the UN Report, please see Jacques Cuénod, *Report on Refugees, Displaced Persons and Returnees: Report to ECOSOC*, UN Doc E/1991/109/ Add. 1 (1991).

for the development of an international IDP protection architecture.⁴⁸ The 1998 Guiding Principles on Internal Displacement were designed to fill the gaps in the existing protection framework. More importantly, the regime's architects constructed a protection schema that explicitly circumvented the political limitations of the 1951 Convention and its modern-day application by centering the regime on non-binding principles that did not extend states' positive protection obligations. Unlike the Geneva Convention, the Guiding Principles did not dictate states' actions by prescribing obligatory mandates. Rather, the Guiding Principles took the form of "soft law" and provided non-binding guidelines for the protection and resettlement of IDPs. Though discretionary in nature, the Guiding Principles were framed by protection norms bound in international law. The right to asylum, for instance, was normatively guided by international refugee law but found political expression in Guiding Principles 2 and 15.⁴⁹ The regime's architects drew strategically on these legally recognized norms as the foundation for a non-binding protection framework that would guide states' actions without creating compulsory mandates. In so doing, the IDP regime molded existing protection norms to construct a new normative framework for the protection of internally displaced persons.

The evolution of the IDP regime and its non-binding construct truly were revolutionary. By mobilizing existing protection norms while simultaneously constructing a new normative framework for IDP protection a new regime emerged that was flexible and responsive to the particularities of internal displacement. Three principal features distinguish the IDP framework from the Geneva Convention and contribute to its political force. First, the Guiding Principles

⁴⁸ Entwistle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement," 376.

⁴⁹ The IDP framework draws on additional protection norms bound in international refugee law and human rights law, such as the right to be protected from forcible return to any area where individuals' life, safety, and liberty would be put at risk (the principle of non-refoulement); assistance during resettlement; and the freedom to enjoy the full range of human rights, as defined by the 1948 Universal Declaration of Human Rights and accompanying legal treaties.

were not negotiated by states and consent was not required for the framework to be adopted, as was the case for the Geneva Convention. The Principles were developed by international experts under the direction of the UN Secretary General's representative. Working outside the traditional intergovernmental process expedited the regime's implementation by eliminating political negotiations shaped by particular state interests. Second, the Guiding Principles extended the scope of protection obligations beyond the customary state model by calling on other authorities including intergovernmental and nongovernmental organizations, individuals and communities to provide assistance to IDPs—thereby distributing the protection burden. And third, national authorities assumed the primary responsibility to provide protection and assistance to IDPs within their jurisdiction. As such, the scope of responsibility was largely confined to each state's borders.⁵⁰ By extending the plane of protection beyond states to incorporate other international actors and constructing a framework that engaged states on a concessionary basis, IDP protection proponents mobilized political support for the Guiding Principles by strategically minimizing the scope of states' obligations.

The non-binding nature of the IDP regime, however, did not preclude international actors from implementing the Guiding Principles. To the contrary, the guidelines soon gained international acceptance and authority. Governments, international organizations, regional authorities, and NGOs began to cite and apply them and, in so doing, transformed the normative foundation of protection previously embodied by binding legal instruments. Hannah Entwisle notes that “soft law is as persuasive as hard law,” suggesting that an international legal norm

⁵⁰ If, however, national authorities are unable or unwilling to provide protection to IDPs, Guiding Principle 25 states that international humanitarian organizations and other appropriate actors have the right to enter a state's borders to provide assistance to IDPs. National authorities are required to facilitate the free passage of international assistance to ensure it reaches IDP populations.

cannot simply be equated with formal, binding laws but rather its level of acceptance.⁵¹ Today, the Guiding Principles have an authoritative force and are influential in shaping how countries and international organizations regard and treat IDPs. States with some of the most serious internal displacement crises have taken the Guiding Principles seriously by adopting them in various forms.

Uganda and Sri Lanka, for example, adapted the Guiding Principles to create domestic law that outlines governmental obligations and duties toward IDPs.⁵² While in Colombia, which has the world's second largest population of IDPs, the Constitutional Court held the Guiding Principles to be of equal legal authority to the Colombian Constitution.⁵³ The Guiding Principles have also found political expression in the actions of intergovernmental agencies, the UN General Assembly, UN treaty bodies, and regional forums. The 2008 Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact) exemplifies the authoritative force of the Guiding Principles. Ratified by its eleven member states,⁵⁴ the Great Lakes Pact entails two protocols that specifically address IDP protection: the Protocol on the Protection and Assistance to Internally Displaced Persons (the Great Lakes Protocol) and the Protocol on the Property Rights of Returning Populations. The Pact not only addresses the specific experiences of internal displacement in Africa's Great Lakes Region,⁵⁵ but it is the first binding instrument to

⁵¹ Entwisle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement," 387.

⁵² Ibid., 374. *See also* Internal Displacement Monitoring Centre, "Guiding Principles on Internal Displacement," *IDMC* <<http://www.internal-displacement.org/8025708F004D404D/%28httpPages%29/168DF53B7A5D0A8C802570F800518B64?OpenDocument>> 17 Jul. 2010.

⁵³ Entwisle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement," 374.

⁵⁴ The Great Lakes Pact and its accompanying IDP protocols has been ratified by Angola, Burundi, Central African Republic, Democratic Republic of the Congo, Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda, and Zambia.

⁵⁵ The Great Lakes Pact is tailored to the particular experiences of internal displacement in the region. Specific measures include protection for pastoralists and host communities and families of mixed ethnic identity.

legally commit states to adopt and implement the Guiding Principles.⁵⁶ The 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) has followed a similar course.⁵⁷ Addressing the causes and phases of internal displacement, the regional agreement imposes legal obligations on states in relation to their protection of IDPs.⁵⁸ These examples demonstrate that soft law can develop into hard law. But perhaps more importantly, the transformation in legal character illustrates the corresponding shift in political thought. Initially, states may only be willing to observe a non-binding protection instrument, thereby limiting their obligatory mandates. Over time, however, states can come to recognize the necessity of protecting vulnerable populations and they may become willing to assume considerable burdens to protect these persons, including legal ones, even if it limits their discretion within their own borders.

Soft law can develop into hard law and exert an additional level of influence on international actors. In the interim, however, soft law has the advantage of balancing existing political limitations with the needs of displaced populations. This has the two-fold effect of pursuing protection measures that, as the IDP regime illustrates, lead to international observance without being constrained by states attempting to limit their positive protection obligations. But as the Great Lakes Protocol and Kampala Convention demonstrate, soft law can strengthen the normative consensus for protection and mature into legally binding regimes. The IDP framework, moreover, has generated a new normative protection regime, and its development

⁵⁶ Internal Displacement Monitoring Centre, “Pact on Security, Stability and Development in the Great Lakes Region,” *IDMC* <<http://www.internal-displacement.org/greatlakes>> 31 Jul. 2010.

⁵⁷ Internal Displacement Monitoring Centre, “Guiding Principles on Internal Displacement,” <<http://www.internal-displacement.org/8025708F004D404D/%28httpPages%29/168DF53B7A5D0A8C802570F800518B64?OpenDocument>> 17 Jul. 2010.

⁵⁸ Internal Displacement Monitoring Centre, “Convention for the Protection and Assistance of Internally Displaced Persons in Africa,” *IDMC* <<http://www.internaldisplacement.org/8025708F004CFA06/%28httpPages%29/BD5B09AC759011EEC1257669004FD167?OpenDocument>> 31 Jul. 2010.

illustrates that in some circumstances a “soft” non-binding instrument may be the most influential vehicle for change.

TOWARD A FUTURE OF PROTECTION: HISTORICAL LESSONS AND THE FOUNDATION FOR A CLIMATICALLY DISPLACED PERSONS PROTECTION REGIME

The evolution of the contemporary protection regimes illustrates the limitations in existing protection frameworks, as well as the possibility of creating flexible protection schemas in the future that respond to emerging displacement phenomena. Similar to the plight faced by internally displaced persons and the gap in their legal protection, climatically displaced persons present a migration trend the world has not fully witnessed. And with no legal protocols providing the architecture for protection and an unprecedented displacement crisis looming, the international community needs to address in advance the gaps in legal protection and construct a protection regime that is responsive to the particular needs of CDPs. This, however, raises certain fundamental questions: what might a CDP protection regime look like and what can we learn from the development of past international protection regimes that we can apply to an instrument for CDPs?

There are three constructive alternatives for a CDP protection architecture. The first, and perhaps most widely cited, is the addition of a CDP protocol to the 1951 Geneva Convention and its binding framework.⁵⁹ The UNHCR is overextended with its current mandate; but, even if resources and personnel were to flow freely, affording CDP protection by way of the Refugee Convention is not politically likely. The contemporary application of the Convention illustrates that many states are unwilling to extend their protection mandates to new forms of migration, let alone a displacement trend projected to exceed 200 million persons. This political resistance, for instance, was the force behind the non-binding nature of the IDP protection regime and it may

⁵⁹ Docherty and Giannini's proposed model, for instance, creates a climate change refugee instrument that draws on the UNHCR framework. They contend that placing the category of climatic refugees under the institutional oversight of the UNHCR or creating a coordinating agency mirrored on the UNHCR regime would allow climatically displaced persons to benefit from the organization's experience with migration, its existing structure, and its established authority. The instrument would also call for a global fund as a provision for financial assistance, a coordinating agency, and a body of scientific experts. See Docherty and Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change," 383-84, 388-89.

very well be the resistance that bars a binding CDP protection instrument from moving forward. There are, however, additional dangers in appending a CDP protection protocol to the Convention. Extending refugee status to CDPs would expand the notion of what it means to be a refugee and obscure important distinctions between traditional refugees and CDPs. This may in fact devalue current protections for traditional refugees. It is thus imperative that measures to protect CDPs do not in turn undermine the protection of traditional refugees and their unique circumstances.

The second protection mechanism is the development of a new legal regime that is binding on state signatories. Though this approach may legally address the existing gap in CDP protection, the historical treatment of the Geneva Convention clearly demonstrates the political limitations of extending states' positive protection obligations, such as binding provisions to assist with housing, education, healthcare etc. Many states are taking extreme measures to limit these existing protection obligations. By imposing exclusionary measures, such as visa restrictions designed to prevent asylum seekers from reaching their borders, states are attempting to limit the burden on their own domestic resources, institutions, and social structures. At this point, it is not likely that states would willingly extend their protection mandates to those displaced by climate change. But if a binding CDP protection instrument were to be adopted, it must ensure that states are unable to circumvent their obligations because the current application of the Geneva Convention illustrates that exclusionary measures further undermine the well being of displaced persons.

The third, and most politically prudent approach, is to construct a non-binding CDP protection regime that engages states on a concessionary basis. Climatically displaced persons will become an internationally recognized category over the course of the coming century; and

though the issue has yet to capture the attention of high-level government officials, the developmental course of the IDP Guiding Principles and their authoritative status provide a model for CDP protection. Similar to IDPs, CDPs face a temporal limitation, for climate change displacement may materialize before the international community develops a substantive climate change agreement. Without delay, CDP protection proponents should draw on existing concepts that are normatively and legally grounded in existing sources of international law. Concepts such as protection and human rights are not new concepts and by employing these existing norms CDP protection proponents have the potential to expedite protection efforts. The IDP Guiding Principles, for instance, may have been readily accepted because they placed existing human rights and humanitarian legal norms within the context of internal displacement. Similarly, CDP protection efforts should mobilize legally recognized norms from existing sources of international refugee law, environmental law, and human rights law and place them within the context of climatic displacement.

As Martha Finnemore and Kathryn Sikkink note, norms are most persuasive when they are “grounded in precedent.”⁶⁰ Normative frameworks that are well-established have achieved international acceptance and are recognized as an authoritative force. There is no need to “persuade” the international community to adopt such norms because normative consensus has already been achieved and the norms are legitimated through continual observance. As such, actors are successfully socialized and share a common understanding that shapes their actions. By framing a CDP protection instrument with norms that are “grounded in precedent” there is potential to draw on the shared understandings of displacement, protection, and responsibility to

⁶⁰ Ibid., 382. See also Martha Finnemore and Kathryn Sikkink, “Norm Dynamics and Political Change,” *International Organization* vol. 52 no. 4 (1998) 915.

create a new normative framework for climatic displacement that is embraced by the international community.

With this in mind, four principal norms should become the foundation for a CDP protection framework: 1) a restrictive definition of CDP that limits the categorical scope to the three primary climatic drivers and the particular forms of migration,⁶¹ 2) non-binding protection guidelines that identify individuals' rights and protection guarantees as well as guidance for international actors in terms of their response to CDPs, 3) an international responsibility to provide asylum and assistance to displaced persons, as found within existing international refugee law and the IDP protection regime, and 4) the burden sharing principle that extends protection responsibilities beyond the traditional state model to incorporate other international actors, including non-governmental and intergovernmental organizations, multinational corporations, communities, and individuals.

Many governments contend they are overburdened with existing asylum claims and there is resistance to extending their legal obligations to new migrants. But by expanding the scope of responsibility beyond the traditional state model, as pioneered by the IDP regime, the extension of the burden sharing principle to international actors other than states creates a framework that potentially limits governments' protection obligations without actually undermining protection efforts. The international community at large shares in the responsibility to provide assistance to CDPs. Assistance, in this context, comes in various forms and burden sharing ranges from financial to physical assistance. Nation-states undoubtedly will provide geographic refuge, but those who contribute to climate change, such as multinational corporations, should bear some of

⁶¹ As addressed above, climatically displaced persons are those individuals who are volitionally or requisitely driven from their habitual homes, either temporarily or permanently seeking refuge within their home state or across international borders, because of alterations to their natural environment resulting from at least one of three climate-related phenomena: sea level rise, drought and water scarcity, or extreme weather events.

the financial burden for assistance and resettlement. While non-governmental and intergovernmental organizations, for instance, may also contribute by providing the institutional structure for managing displacement claims. A concerted effort to distribute responsibility limits political resistance by narrowing the breadth of each actor's individual obligations. International actors, moreover, may be willing to assume specific responsibilities to show solidarity and contribute to mediating this global challenge, for climatic displacement is a global phenomenon and protection is a global obligation.

Though we are just in the beginning stages of an internationally recognized CDP protection regime, the development of a regime's content and form may contribute to its successful acceptance and eventual recognition by the international community. In this regard, Entwisle draws on Finnemore and Sikkink's norm-cycle theory noting "that norms are more likely to be effective when they are clear and specific, rather than ambiguous and complex."⁶² She goes on to state that "[t]he norms as embodied in the Guiding Principles are straightforward, well organized, and clearly set out the responsibilities of States in regards to the assistance and protection they must provide to the internally displaced."⁶³ The success of the IDP regime is partially attributed to its methodical and deliberate framework, clearly delineating the rights of the internally displaced as well as the responsibility of appropriate actors.

Extending the utility of this approach to climatic displacement is a powerful idea. Decoupling climatic displacement from environmental displacement and narrowing the breadth of the category by placing parameters around the concept, as discussed above, is a necessary condition if the international community is to embrace a CDP protection regime. As such, a CDP

⁶² Entwisle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement," 382. *See also* Martha Finnemore and Kathryn Sikkink, "Norm Dynamics and Political Change," 906-07.

⁶³ Entwisle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement," 382.

protection framework must account for the type of migration and link it directly to at least one of the three climatic drivers. This restrictive definition is the first step to creating a “clear and specific” CDP protection norm. In addition, however, it is necessary to delineate the particular responsibilities of international actors in their response to CDPs. By providing explicit standards for protection and clearly identifying the role and duties of each actor, CDP protection is likely to be effective and, most importantly, address the full range of circumstances an individual may face.

The non-binding nature of the IDP Guiding Principles led to the doctrine’s timely adoption. Rather than focusing protection efforts on a formally binding legal agreement, requiring extensive intergovernmental negotiations and consensus building, the evolution of the IDP framework demonstrates that protection regimes need not be binding for compliance to be achieved. Some observers note that law should not be viewed as an all-or-nothing proposition, where hard law and soft law stand in binary opposition, but rather a continuous process of facilitating communication between a variety of state and non-state actors with the objective of creating shared understandings. Law, they assert, can exist by degrees and is best measured by the influence it exerts.⁶⁴ The IDP framework draws on many of the characteristics of legal protection norms, but its “soft” legal approach has become a moral and authoritative force expressed in a number of international protocols and domestic statutes. This is a critical lesson for CDP protection proponents. For the climatically displaced to be protected and their fundamental human rights upheld, a binding legal regime is not a necessary condition, for the IDP regime illustrates that a soft legal instrument can serve to protect vulnerable populations.

⁶⁴ Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance,” *International Organization* vol. 54 no. 3 (MIT Press, 2000) 421-22, 424, 451-52. *See also* Entwisle, “Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement,” 387.

This does not mean, however, that the IDP Guiding Principles were immediately or universally accepted by the international community. As with any new regime, a socialization process between state and non-state actors shaped the international community's understanding of internal displacement as well as their individual responsibilities to protect IDPs. This implicit socialization process shaped both the interests and identities of states. Initially, states may have endorsed or adopted the Principles out of self-interest to maintain their good standing as members of the international community. However, as the Guiding Principles soon gained global credibility, many states recognized the fundamental tenets of the IDP framework as part of their identity. Entwisle observes:

States initially may have adopted the Guiding Principles out of financial or political self-interest because they viewed the non-binding norms as unthreatening. However, over time we may see that as the norms gain greater influence through international pressure and continued advocacy and dissemination of the norms domestically, this engagement may ultimately shape States' identities about the importance of protecting the rights of internally displaced persons within their countries.⁶⁵

By constructing a protection regime founded on negative obligations, states did not view the Guiding Principles as requiring substantive commitments on their part. Over time, however, the Guiding Principles found expression as part of states' identities and gradually gained status and authority. Similar to the developmental course of the IDP Guiding Principles, the notion of CDP protection and an accompanying protection regime will need to go through a process of socialization that, over time, may well become internalized by states and shape their identity as actors who share in the global responsibility to assist CDPs. The IDP framework clearly illustrates how norms can be created, promoted, and adopted and a CDP protection regime can

⁶⁵ Entwisle, "Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement," 384.

create a new protection norm that can be promoted, internalized, and embraced by the global community.

Kenneth Abbott and Duncan Snidal note that “Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own.”⁶⁶ In particular, soft legalization provides a useful way to introduce new norms, socialize actors, and eventually achieve recognition and consensus on particular issues. This legal framework, they contend, circumvents the limitations of politicking while simultaneously shaping the actions and interests of actors. Climate change displacement presents a new global challenge, one that is not fully recognized nor understood. But by constructing a soft legal framework that elucidates the breadth of the crisis and the nuances of the phenomenon, there is potential to disseminate the issue and introduce the plight of CDPs to the global stage. There is, however, an additional advantage of pursuing a non-binding framework for CDP protection. Abbott and Snidal argue that soft legalization “offers effective ways of dealing with uncertainty, especially when it initiates processes that allow actors to learn about the impact of an agreement over time.”⁶⁷ Climate change, in many ways, is not tangible. It has yet to fully manifest itself and its social effects are still uncertain. A soft legal framework for CDP protection provides a flexible schema that not only responds to the existing nature of climatic displacement, but is adaptable to the nature of displacement in the future. It can be responsive to new climatic drivers that may emerge as well as the evolving experiences of displaced persons.

Soft legal regimes provide the foundation for addressing new challenges and pursuing normative consensus and, in some cases, they can develop into binding legal frameworks. The Great Lakes Protocol and the Kampala Convention illustrate that “soft law sometimes [serves] as

⁶⁶ Abbott and Snidal, “Hard and Soft Law in International Governance,” 423.

⁶⁷ Ibid.

a way station to harder legalization.”⁶⁸ Countries with large numbers of IDPs, such as Sudan and the Democratic Republic of the Congo, have not simply embraced the IDP Guiding Principles and agreed to observe them, but they have elevated their authority by incorporating them into hard legal agreements. States such as these have internalized the normative conditions of internal displacement and are in fact willing to assume binding obligations to address the challenges at hand. Climatic displacement presents a similar challenge and a non-binding framework, like the IDP regime, may evolve into a binding legal instrument through which states willingly accept certain burdens to address the challenges that climate change and displacement collectively present. Accepting these burdens, however, requires a socialization process and soft law provides the opportunity to engage the issues with both state and non-state actors.

There is yet an additional advantage of a non-binding CDP protection regime. In 2012 the Kyoto Protocol will expire; and, though the 2007 Bali Action Plan and the 2009 Copenhagen Climate Summit attempted to provide a course for future climate change negotiations and a post-Kyoto agreement, a new comprehensive climate protocol has yet to be adopted. The Copenhagen Accord, the culminating agreement of the Climate Summit, is not legally binding and does not commit countries to a binding post-Kyoto regime. But climate discussions are unfolding and this provides an opportunity to introduce the international community to the challenges of climatic displacement. By initiating the conversation and advancing the utility of a non-binding CDP protection agreement, one that does not threaten to extend states’ obligations and resources but provides a framework for CDP assistance, we lay the normative groundwork for protection. This is the time to present a CDP protection framework to the international community, for it has the potential to shape future climate accords and perhaps afford formal recognition to CDPs. In addition to providing protection to millions of displaced persons, however, a non-binding

⁶⁸ Abbott and Snidal, “Hard and Soft Law in International Governance,” 423.

protection instrument and the culminating discussions may also ignite a socialization process through which states recognize their contributions to climate change and commit to a substantive mitigation agreement.

CONCLUSION

What lies before us is a shift in normative thought, a shift in the ways we think about displacement, protection, and responsibility. Climatic displacement and the plight of CDPs present the international community with a migration phenomenon it has yet fully to comprehend and a protection challenge to which no existing regime can respond. The gap in protection raises both legal and political questions—how might a CDP protection instrument overcome the insufficiencies in existing international law to afford protection to those displaced by climate change, and how can political resistance to protection assistance be tempered to ensure that the particular needs and rights of climatically displaced persons are met? A number of CDP protection proposals have been introduced and each attempts to bridge the gap in legal protection by constructing a binding regime that establishes compulsory state mandates. Yet by and large, these proposals fail to address adequately the associated issue of political will. Why, for instance, would states be willing to assume additional binding protection obligations when they are overburdened with existing mandates? And how can a protection instrument bypass political resistance to afford formal recognition to CDPs? Hard legalization may address the gap in legal protection, but it does not necessarily address political interests that may undermine CDP assistance. A soft legal regime, however, has the potential to address both legal and political constraints in order to protect those who are displaced by climate change. The evolution of the IDP regime illustrates that a robust protection schema, one that is observed and given global credence, need not be binding. It has the advantage, moreover, of establishing a framework that provides formal assistance while avoiding lengthy deliberations constrained by particular state interests. But perhaps most importantly, a non-binding protection instrument can strengthen the normative consensus for international CDP protection by deliberately appealing to states on a concessionary basis. This has the potential to advance the understanding of important protection

norms, push for strengthened capacities to prevent and halt climatic displacement, and mobilize a protection regime that is able and ready to respond to the global crisis.

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