

FORCED MIGRATION AFTER PARIS COP21: EVALUATING THE “CLIMATE CHANGE DISPLACEMENT COORDINATION FACILITY”

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Climate change represents, perhaps, the greatest challenge of the twenty-first century. As temperatures and sea levels rise, governments around the world will face massive and unprecedented human displacement that international law currently has no mechanism to address. While estimates vary, the scope of the migration crisis that the world will face in the coming decades is startling. In addition to losing their homes, climate change migrants, under current law, will encounter a refugee system governed by a decades-old Refugee Convention that offers neither protection nor the right to resettle in a more habitable place. Armed with the most recent developments in international climate change law following the December 2015 Paris climate conference (COP21), this Note considers which of the existing bodies in the United Nations is best equipped to address forced migration caused by climate change. Inspired by the negotiations leading up to the Paris Conference, this Note advocates for a Climate Change Displacement Coordination Facility, housed within the United Nations Framework Convention on Climate Change (UNFCCC), to protect the rights of displaced persons. Finally, this Note maps out an institutional architecture and a long-term vision for a Displacement Coordination Facility. As opposed to an amendment of the 1951 Refugee Convention or a new rights-based treaty for climate migration, a Facility housed within the UNFCCC provides the greatest possible flexibility, autonomy, and cultural retention for climate change migrants while still protecting their essential human rights.

INTRODUCTION

[N]o challenge . . . poses a greater threat to future generations than climate change.¹

Climate change represents perhaps the largest threat to future generations, and it has become widely accepted that human activity is the root of the problem.² One of the most serious threats global leaders must

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1. Barack Obama, U.S. President, Remarks by the President in State of the Union Address (Jan. 20, 2015), <http://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [<http://perma.cc/H5BP-WSWE>].

2. While some uncertainty remains, it has become widely accepted that human activity is the primary cause of climate change, and this Note follows this understanding.

face in the midst of climate change is the reality of forced global migration, especially for Pacific island nations.³ Because the bulk of emissions causing climate change come from more developed nations like the United States (though this is quickly changing⁴), more developed nations arguably face a moral obligation to assist climate change migrants.⁵ However, international law currently provides no legal protection for those displaced by climate change or other environmental disasters.⁶ Unlike conflict refugees, such as those from war-torn Syria, climate migrants from Small Island Developing States (SIDS) that are swallowed by rising seas will never be able to return home,⁷ presenting a massive and virtually unprecedented legal issue.⁸

Global leaders have long recognized that “the global nature of climate change calls for the widest possible cooperation by all countries” to create an “effective and appropriate international response.”⁹ Just as leaders seek to forge a cooperative international solution to reduce emissions, the effects of climate change—including forced migration—

See Press Release, Intergovernmental Panel on Climate Change, Human Influence on Climate Clear, IPCC Report Says 1 (Sept. 27, 2013), http://www.ipcc.ch/news_and_events/docs/ar5/press_release_ar5_wgi_en.pdf [<http://perma.cc/ZDL8-B723>] (“It is extremely likely [95–100%, according to the Press Release] that human influence has been the dominant cause of the observed warming since the mid-20th century.”).

3. See Leonard A. Nurse et al., Small Islands, *in* Climate Change 2014: Impacts, Adaptation, and Vulnerability 1613, 1639–40 (2014), http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29_FINAL.pdf [<http://perma.cc/AUS3-PYUX>] (noting sea-level rise “poses one of the most widely recognized climate change threats to low-lying coastal areas on islands”).

4. See Alister Doyle, China to Surpass US as Top Cause of Modern Global Warming, Reuters (Apr. 13, 2015), <http://uk.reuters.com/article/climatechange-china-idUKL5N0XA1JD20150413> [<http://perma.cc/J376-7M9R>] (“China’s cumulative greenhouse gas emissions since 1990 . . . will outstrip those of the United States in 2015 or 2016 . . .”).

5. Professor Katrina Wyman argues that while causation issues abound in climate migration, there may be a moral duty to assist those on small island developing states that will soon become submerged by sea level rise. See Katrina M. Wyman, Are We Morally Obligated to Assist Climate Change Migrants?, 7 *Law & Ethics Hum. Rts.* 185, 197–99 (2013).

6. See *infra* section II.A (discussing gap in legal protection under existing 1951 Refugee Convention).

7. See Michael B. Gerrard, Dir., Sabin Ctr. for Climate Change Law, Columbia Law Sch., Statement at the Security Council Open Arria Formula Meeting on the Role of Climate Change as a Threat Multiplier for Global Security 1 (June 30, 2015) [hereinafter Gerrard, Security Council Statement], http://www.spainun.org/wp-content/uploads/2015/07/Michael-Gerrard_CC_201506.pdf [<http://perma.cc/N6UC-EDY2>] (“[W]hile the people who are currently displaced by conflict will hopefully be able to return home some day, the people from areas swallowed by rising seas will never be able to go back.”).

8. See Int’l Bar Ass’n, Achieving Justice and Human Rights in an Era of Climate Disruption 7 (July 2014) (“[T]here are no international law instruments directly applicable to *climate change-related migration*.”).

9. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 166 [hereinafter UNFCCC]. For a discussion of the legal underpinnings of the UNFCCC, see *infra* section I.C.3.

must also be addressed at the international level to protect the rights of those displaced.¹⁰ International law, however, currently has no mechanism to address forced migration as a result of climate change.¹¹ People displaced by the effects of climate change, including rising seas or natural disasters, will have no choice but to move. Further, they will be forced to move without any legal protection or right to do so.¹² Of course, political unrest can also cause disastrous migration changes. During the fall of 2015, the world previewed the devastating effects of a widespread European refugee crisis. The Syrian civil war has forced nearly five million people to flee to other countries.¹³ Further, while those displaced from Syria are fleeing war and persecution from their own government¹⁴ (a prerequisite for refugee status under international treaty law¹⁵), climate migrants will not typically be fleeing war or persecution. As such, the legal protections available to Syrian refugees will likely be unavailable to those displaced by climate change.¹⁶

Although global leaders recently completed an ambitious (albeit largely nonbinding) climate change agreement in Paris during the December 2015 Twenty-First Conference of the Parties (COP21),¹⁷ the

10. Further, the 1951 Refugee Convention has long provided an international-protection regime for more typical refugees from conflict and oppression. See *infra* section I.B.

11. See *infra* section II.A.1 (noting those displaced by climate change almost certainly fall outside existing treaty law). This seems to stem from some combination of uncertainty as to the exact number of people involved, see *infra* section I.A.3, the intersection between climate and immigration policy (typically left to domestic law), and the reality that much of the migration will occur in the second half of the twenty-first century.

12. See *infra* section II.A (discussing the gap in international treaty law with respect to climate migration).

13. See Syria Regional Refugee Response, United Nations High Comm'r for Refugees, <http://data.unhcr.org/syrianrefugees/regional.php> [<http://perma.cc/R38M-DN37>] (last updated Sept. 3, 2016); see also Patrick Kingsley et al., Syrian Refugee Crisis: Why Has It Become So Bad?, *Guardian* (Sept. 4, 2015), <http://www.theguardian.com/world/2015/sep/04/syrian-refugee-crisis-why-has-it-become-so-bad> [<http://perma.cc/69FN-DNAX>] (calling the Syrian refugee crisis "Europe's biggest refugee movement since the second world war").

14. See Somini Sengupta, Migrant or Refugee? There Is a Difference, with Legal Implications, *N.Y. Times* (Aug. 27, 2015), <http://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html> (on file with the *Columbia Law Review*) (noting that most fleeing to Europe are considered refugees under the 1951 Refugee Convention).

15. See *infra* notes 92–96 and accompanying text (describing the requirements under the 1951 Refugee Convention).

16. See *infra* sections I.B–C and accompanying text (discussing the legal gap for climate change migrants).

17. The Conference of the Parties is the "supreme decision-making body of the Convention" that reviews the progress of the United Nations Framework Convention on Climate Change (UNFCCC) and promotes implementation. See Conference of the Parties (COP), United Nations Framework Convention on Climate Change,

agreement considered, but ultimately did not directly address, forced migration.¹⁸ Further, no commenter has addressed climate migration in light of the crucially important developments in Paris. This Note fills a gap in existing literature by fleshing out a role for a Climate Change Displacement Coordination Facility, which was recently considered (but not developed) by the United Nations Framework Convention on Climate Change (UNFCCC) negotiators leading up to COP21 in Paris.¹⁹

This Note proceeds in three parts. Part I discusses the scope of climate migration and introduces international actors. Part II surveys the existing bodies of the United Nations to consider which entity is best positioned to address forced migration within each entity's respective mandate. Finally, Part III focuses on a newly proposed Climate Change Displacement Coordination Facility²⁰ and argues for a two-part solution. This includes short-term soft-law mechanisms and a long-term role for

<http://unfccc.int/bodies/body/6383.php> [<http://perma.cc/WX9Y-853G>] (last visited Aug. 17, 2016).

18. This is likely because the focus of the meeting was emissions targets and addressing displacement remains an incredibly complicated issue in its own right. See United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement (Dec. 12, 2015) [hereinafter Paris Agreement], <http://unfccc.int/resource/docs/2015/cop21/eng/109.pdf> [<http://perma.cc/38HJ-NGQ3>] (requesting various bodies “develop recommendations” for addressing displacement); see also Editorial, Goals of the Paris Climate Conference, Wash. Post (Nov. 29, 2015), http://www.washingtonpost.com/opinions/goals-of-the-paris-climate-conference/2015/11/29/0bc2f6e8-92f6-11e5-b5e4-279b4501e8a6_story.html (on file with the *Columbia Law Review*) (noting primary goals of the Paris Conference). Less than a year after its adoption, enough countries ratified the agreement for it to formally enter into force on November 4, 2016. See Paris Agreement—Status of Ratification, United Nations Framework Convention on Climate Change, http://unfccc.int/paris_agreement/items/9444.php [<http://perma.cc/ZYJ3-RZZN>] (last visited Oct. 16, 2016). The recent election of Donald Trump to the presidency throws the status of the Paris Agreement into immediate turmoil, as Trump has indicated that he plans to withdraw the United States from the Agreement. See Chris Moony, What It Would Really Mean If Trump Pulls the U.S. out of the Paris Climate Agreement, Wash. Post (Nov. 9, 2016), <http://www.washingtonpost.com/news/energy-environment/wp/2016/11/09/what-it-would-really-mean-if-trump-pulls-the-u-s-out-of-the-paris-climate-agreement/> (on file with the *Columbia Law Review*). This Note builds off of the Paris Agreement but is not premised on the United States' participation in the Agreement. The full scope of what a Trump presidency means for environmental law, and climate change law specifically, is best left for other commenters.

19. See Ad Hoc Working Grp. on the Durban Platform for Enhanced Action, Working Document: Section E—Adaptation and Loss and Damage (Sept. 4, 2015) [hereinafter Displacement Facility Document], http://unfccc.int/files/bodies/awg/application/pdf/adp2-10_e_04sep2015t1900_wds.pdf [<http://perma.cc/473U-XST9>] (introducing the concept of a Displacement Coordination Facility). Displacement was only mentioned in the final Paris Agreement text. See Oliver Milman, UN Drops Plan to Move Climate-Change Affected People, Guardian (Oct. 6, 2015), <http://www.theguardian.com/environment/2015/oct/07/un-drops-plan-to-create-group-to-relocate-climate-change-affected-people> [<http://perma.cc/3GPE-W5JS>] (discussing Australian opposition but also noting that “representatives from the US, British and French governments indicat[ed] they were open to the idea”).

20. See Displacement Facility Document, *supra* note 19.

the UNFCCC as a clearinghouse for regional and bilateral treaties, with the U.N. Security Council assisting in an enforcement and stopgap role.²¹ The scope of forced climate change migration necessitates a comprehensive legal solution; that is precisely what this Note seeks to develop by exploring one of the timeliest issues in climate change law following the Paris COP21 meeting.

I. SCOPE OF DISPLACEMENT AND INTERNATIONAL LEGAL FRAMEWORK

Though some scientific uncertainty exists at the margins, the factual link between human activity and climate change is now widely accepted.²² This Part reviews the scientific connection between human activity, climate change, and the predicted scope of forced migration. Section I.A discusses the relationship between climate science and migration, with a particular focus on climate change “migrants” and current predictions for the scope of the migration problem.²³ Section I.B examines existing refugee law, namely the 1951 Refugee Convention.²⁴ Section I.C introduces the framework for entities in the U.N. system that could address climate migration. In sum, Part I provides the backdrop, both in terms of climate change migration and the existing legal landscape, that informs the solution proposed in Part III.

A. *Climate Science and the Predicted Scope of Climate Migration*

The Intergovernmental Panel on Climate Change (IPCC) determined that it is “extremely likely” (defined as a likelihood of ninety-five- to one-hundred- percent) that human activity is the primary cause of climate change.²⁵ This section introduces essential climate science to

21. See *infra* Part III (describing proposal).

22. This is often termed “anthropogenic” climate change. See Press Release, Intergovernmental Panel on Climate Change, *supra* note 2, at 1 (finding that there is a ninety-five- to one-hundred-percent likelihood that human activity caused climate change).

23. This Note does not address the related problem of “statelessness,” which will occur when a small island nation ceases to have landmass and no longer meets the technical definition of statehood, thus implicating U.N. and International Court of Justice membership. For a full treatment of these issues, see generally Jacquelynn Kittel, *The Global “Disappearing Act”: How Island States Can Maintain Statehood in the Face of Disappearing Territory*, 2014 Mich. St. L. Rev. 1207 (arguing for a new multilateral treaty that creates a “state-in-exile” scheme); Jenny Grote Stoutenburg, *When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States, in Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* 57 (Michael B. Gerrard & Gregory E. Wannier eds., 2013) (arguing that states may have a moral duty to continue to recognize island states that lose their territory); Derek Wong, *Sovereignty Sunk? The Position of ‘Sinking States’ at International Law*, 14 Melb. J. Int’l L. 346 (2014) (discussing the current inability of international law to appropriately deal with the issue of statelessness).

24. See *infra* section II.A (discussing the 1951 Refugee Convention and the rights it guarantees).

25. *Supra* note 2 and accompanying text.

underscore the scope of forced migration, discusses definitional issues, and underscores numerical estimates of forced migration.²⁶ While the definitional debate might seem semantic, pinning down an exact definition is crucial to defining the scope of the solution.²⁷

1. *Climate Science and Forced Migration.* — Climate change, as defined by the IPCC, refers to any identifiable change in climate over time, “whether due to natural variability or as a result of human activity.”²⁸ Nearly all reputable scientists believe that climate change is both occurring and caused by humans.²⁹ However, accepting that greenhouse gas emissions represent the “dominant cause of the observed warming since the mid-20th Century,” as the IPCC found,³⁰ is not necessarily the linchpin of the analysis. Even if climate change was caused by natural variations in climate,³¹ which the IPCC resolutely disputes, the world would still face a migration crisis.³²

In the most recent IPCC report on adaptation to climate change, the panel noted two types of forced migration that will occur: migration as a response to extreme weather events (likely to increase due to climate change³³) and migration due to “longer-term climate variability and

26. See *infra* section I.A.2 (describing definitional controversy over “climate migrants”).

27. The definition of the group has important implications for the scope of the proposed solution; this Note adopts a broad definition to include internal and external migration caused by climate change. See *infra* section I.A.2.

28. Lenny Bernstein et al., *Climate Change 2007: Synthesis Report 30* (Rajendra K. Pachauri & Andy Reisinger eds., 2008), http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_full_report.pdf [<http://perma.cc/UQ88-W6Y8>].

29. See Press Release, Intergovernmental Panel on Climate Change, *supra* note 2, at 1 (“It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.”). While scientists might often face conflicts of interest, much of the climate-change-denial science can be tied back to fossil-fuel interests. See Eric Roston, *Unearthing America’s Deep Network of Climate Change Deniers*, *Bloomberg* (Nov. 30, 2015), <http://www.bloomberg.com/news/articles/2015-11-30/unearthing-america-s-deep-network-of-climate-change-deniers> [<http://perma.cc/XA5J-DUX5>] (discussing a recent study empirically linking groups with fossil-fuel interests to funding the denial of climate change).

30. Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report: Summary for Policymakers 4* (2015), http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf [<http://perma.cc/XX86-4EXK>].

31. See Jocelyn Kiley, *Ideological Divide over Global Warming as Wide as Ever*, *Pew Research Ctr.: Fact Tank* (June 16, 2015), <http://www.pewresearch.org/fact-tank/2015/06/16/ideological-divide-over-global-warming-as-wide-as-ever/> [<http://perma.cc/U34Y-HVE6>] (discussing a faction of Americans that believe climate change is caused by natural variations in climate, rather than human activity).

32. However, the anthropogenic nature of climate change might affect the responsibility of more developed nations.

33. See Kevin E. Trenberth, John T. Fasullo & Theodore G. Shepherd, *Attribution of Climate Extreme Events*, 5 *Nature Climate Change* 725, 727 (2015) (noting that Superstorm Sandy, which caused \$65 billion in damages in New York City, was “a bigger, more intense storm” because of higher sea surface temperatures).

change” (presumably from sea level rise) that will envelop small island nations.³⁴ Climate change can create instability in other ways, including changing precipitation patterns (leading to desertification), melting polar ice caps, and increasing the frequency of extreme weather events (including storms, heat waves, droughts, etc.).³⁵ Some have even argued that forced migration due (in part) to climate change has already occurred, specifically in Somalia in the 1990s³⁶ and in Syria during the fall of 2015.³⁷ The cause of these events remains hotly contested,³⁸ which highlights complex causation issues associated with pinning a particular weather event on climate change³⁹ or singling out an individual’s choice to migrate.⁴⁰ In sum, even if climate change is not the sole or primary cause of instability following a weather event, it makes bad situations much worse and will undoubtedly lead to migration of startling magnitude. This is precisely the problem that this Note seeks to address.

2. *Defining Climate Migrants and the Academic Terminology Debate.* — Providing a clear definition for those displaced by climate change has

34. Intergovernmental Panel on Climate Change, *Climate Change 2014 Impacts, Adaptation and Vulnerability: Summary for Policymakers* 20 (2014), http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf [<http://perma.cc/55PA-TVSW>].

35. *Id.* at 6–8.

36. See Shirley V. Scott & Roberta C.D. Andrade, *The Global Response to Climate Change: Can the Security Council Assume a Lead Role?*, 18 *Brown J. World Aff.*, Spring/Summer 2012, at 215, 216, 220 (discussing Security Council Resolution 794, S.C. Res. 794 (Dec. 5, 1992), in which the Security Council framed migration concerns caused by food insecurity as arguably exacerbated by climate change).

37. See Aryn Baker, *How Climate Change Is Behind the Surge of Migrants to Europe*, *Time* (Sept. 7, 2015), <http://time.com/4024210/climate-change-migrants/> [<http://perma.cc/33CS-USAR>] (noting that “[f]rom 2006 to 2011, large swaths of Syria suffered an extreme drought that . . . was exacerbated by climate change” and connecting the drought to internal migration and social unrest).

38. Compare James Delingpole, *For the Last Time, No, the Syrian Crisis Was Not Caused by Climate Change*, *Breitbart* (Sept. 9, 2015), <http://www.breitbart.com/national-security/2015/09/09/for-the-last-time-no-the-syrian-crisis-was-not-caused-by-climate-change/> [<http://perma.cc/EV74-NR JL>] (rejecting a link between climate change and the Syrian conflict), with *supra* note 37 and accompanying text (referencing convincing arguments that climate change exacerbated conflict conditions). This comparison also highlights the stark political divisions around climate change.

39. But see Dim Coumou et al., *Quasi-Resonant Circulation Regimes and Hemispheric Synchronization of Extreme Weather in Boreal Summer*, 111 *PNAS* 12,331, 12,331 (2014) (finding an increase in extreme weather events “can largely be explained by a slowly warming atmosphere”).

40. See Office of the United Nations High Comm’r for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law*, Submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention (AWG-LCA 6) 2 (May 20, 2009) [hereinafter *UNHCR Climate Report*], <http://www.unhcr.org/4a1e4d8c2.html> (on file with the *Columbia Law Review*) (“There is no monocausal relationship between climate change and displacement.”); see also Katrina Miriam Wyman, *Responses to Climate Migration*, 37 *Harv. Envtl. L. Rev.* 167, 172 (2013) [hereinafter *Wyman, Responses*] (noting “migration decisions often are a response to a combination of factors”).

proven surprisingly difficult,⁴¹ due in large part to causation issues.⁴² This Note adopts the terminology “Climate Change Migrants,”⁴³ which refers to “those whose movement is triggered” in substantial part “by the effects of climate change.”⁴⁴ This broad definition is meant to capture both internal and external climate migrants, as well as movement occurring due to slow-onset impacts (such as sea level rise), sudden environmental disasters, and resource scarcity or conflict stemming in part from climate change. However, the definition is limited to capture those who move due to the effects of *climate change*, as opposed to *all environmental disasters*, primarily in order to cabin the issue within the confines of the UNFCCC.⁴⁵ While tedious discussion of defining the group affected by climate migration might seem overly pedantic, the definition delineates the substantive scope of the solution.

As the definition adopted herein includes internal displacement, it is key to recognize the distinction between internal and external displacement. “Internally displaced people,” or those who move *within* their own country, will likely make up a large majority of climate-related

41. Claire DeWitte, *At Water’s Edge: Legal Protections and Funding for a New Generation of Climate Change Refugees*, 16 *Ocean & Coastal L.J.* 211, 221–22 (2010) (noting the “increasingly heated academic debate has focused on possible new definitions for people displaced by climate change”).

42. Despite the causation issues, “[i]gnoring environmental migration because of semantics could have disastrous consequences for the global population.” Amanda A. Doran, *Where Should Haitians Go? Why “Environmental Refugees” Are up the Creek Without a Paddle*, 22 *Vill. Envtl. L.J.* 117, 129 (2011).

43. Professor Wyman also uses the term “climate change migrants.” Wyman, *Responses*, *supra* note 40, at 178; see also Lauren Nishimura, ‘Climate Change Migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, 27 *Int’l J. Refugee L.* 107, 111 (2015) (using the term “climate change migrants” as well).

44. Nishimura, *supra* note 43, at 114. While the language “in substantial part” admittedly creates line-drawing issues, it is meant to avoid a mere tangential connection to climate change. Consider the complicated categorization of migrants currently moving from the Marshall Islands to Arkansas. They are ostensibly coming for better job opportunities, but the reality of their hopeless future in the Marshall Islands undoubtedly plays a role. See John. D. Sutter, *Opinion, You’re Making This Island Disappear*, CNN, <http://www.cnn.com/interactive/2015/06/opinions/sutter-two-degrees-marshall-islands/> [<http://perma.cc/3PX2-U87E>] (last visited Aug. 16, 2016).

45. Limiting the scope to climate change couches the issue within the UNFCCC. While other commentators may have limited their focus for different reasons, several have taken a similar approach in defining climate change migrants. See Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 *Global Envtl. Pol.* 60, 63 (2010) (noting that “for both analytical and political reasons it is imperative to specify climate refugees as a sub-category of environmentally induced migrations”); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 *Harv. Envtl. L. Rev.* 349, 361 (2009) (focusing “on those who move across state borders because of climate change”).

displacement, at least at first.⁴⁶ This definitional choice improves the utility of the proposal by including the majority of early migrants but nevertheless confines the issue to climate change migration in the interest of political feasibility. Currently, the United Nations Guiding Principles on Internal Displacement indicate that “[n]ational authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”⁴⁷ That is, if people were forced to relocate within Bangladesh, Bangladesh would bear the primary responsibility for protecting their human rights.⁴⁸ Defining the group to include *all* environmental migration could be perceived as infringing on domestic law by attempting to control how countries address a broad scope of internal displacement (rather than displacement caused primarily by climate change). While the *nonbinding* Guiding Principles on Internal Displacement cover internal displacement,⁴⁹ nothing comparable exists for cross-border climate migration.⁵⁰

To avoid encroaching on the role of states in addressing internal displacement,⁵¹ some commenters have defined climate change migrants narrowly to focus only on cross-border displacement. For instance, the Nansen Initiative, created by Norway and Switzerland, focuses exclusively on cross-border climate change migration.⁵² It attempts to form a

46. See UNHCR Climate Report, *supra* note 40, at 3–4.

47. Francis M. Deng (Representative of the Secretary-General), at 6, Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter Guiding Principles]; see also UNHCR Climate Report, *supra* note 40, at 4–5 (“States bear the primary duty and responsibility to provide assistance and protection in all phases of internal displacement . . . for all [internally displaced persons], including those who have been displaced by the effects of climate change.”).

48. Bangladesh is often cited as a nation likely to be affected dramatically by climate change displacement, as it represents “a low-lying, densely-populated delta nation, with a significant proportion of its population living in coastal or flood-prone areas.” Jane McAdam, *Swimming Against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer*, 23 *Int’l J. Refugee L.* 2, 10–12 (2011) [hereinafter McAdam, *Swimming Against the Tide*]. It is estimated that sea level rise will “subsume up to 30 percent of Bangladesh’s coastal land by 2080.” *Id.* at 10; see also Gardiner Harris, *Borrowed Time on Disappearing Land*, *N.Y. Times* (Mar. 28, 2014), <http://www.nytimes.com/2014/03/29/world/asia/facing-rising-seas-bangladesh-confronts-the-consequences-of-climate-change.html> (on file with the *Columbia Law Review*) (“The country’s climate scientists and politicians have come to agree that by 2050, rising sea levels will inundate some 17 percent of the land and displace about 18 million people . . .”).

49. See Guiding Principles, *supra* note 47.

50. See *infra* section II.A (discussing this gap in 1951 Refugee Convention); see also Wyman, *Responses*, *supra* note 40, at 177–81 (discussing the “rights gap” in existing international law).

51. See *supra* notes 46–50 and accompanying text (discussing internal displacement under current law).

52. See About Us, Nansen Initiative: Disaster-Induced Cross-Border Displacement, <http://www.nanseninitiative.org/secretariat/> [<http://perma.cc/T27M-3NKT>] [hereinafter Nansen Initiative, About Us] (last visited Aug. 16, 2016) (focusing on the “legal gap [that]

nonbinding coalition of states and develop best practices (a “soft-law approach”⁵³) to protect cross-border climate migrants.⁵⁴ Similarly, Professors Bonnie Docherty and Tyler Giannini define the group narrowly to include cross-border migration from “sudden or gradual environmental disruption . . . consistent with climate change.”⁵⁵ Since the vast majority of displacement will likely be internal (at least in the short term),⁵⁶ such a definition eliminates a sizable percentage of the affected group. Furthermore, focusing exclusively on cross-border displacement limits the scope “implicitly within the preoccupations of the ‘developed’ world, with all of the attendant security concerns—and perhaps even the xenophobic reactions—that such a stance entails.”⁵⁷

Having defined the scope broadly, this section now briefly turns to terminology issues. Authors have used a variety of terms to describe the affected group, including “climate refugees,”⁵⁸ “environmental refugees,”⁵⁹ “climate change migrants,”⁶⁰ etc. While various commenters have advocated for the term “climate refugees,”⁶¹ the term has received substantial pushback. Using the term “refugee” could cement and ossify an outdated term, as has occurred with the 1951 Refugee Convention,⁶² and unintentionally water down the already tenuous rights of existing refugees.⁶³ Instead, this Note uses the term “climate change migrants,”⁶⁴

exists with regard to cross-border movements in the context of disasters and the effects of climate change”).

53. For a discussion of soft-law approaches, see *infra* notes 86–89 and accompanying text.

54. See Nansen Initiative, *About Us*, *supra* note 52.

55. Docherty & Giannini, *supra* note 45, at 361.

56. See UNHCR Climate Report, *supra* note 40, at 3–4.

57. David Hodgkinson et al., *The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change*, *Monash U. L. Rev.*, no. 1, 2008, at 69, 83.

58. See *infra* note 64 (citing commenters using the term “climate refugees”).

59. See, e.g., Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 *Wis. Int’l L.J.* 607 *passim* (2009) [hereinafter *Atapattu, Climate Change*] (using the term “environmental refugees”); Brittan J. Bush, *Redefining Environmental Refugees*, 27 *Geo. Immigr. L.J.* 553 *passim* (2013) (using the same term).

60. See *supra* note 43 (citing articles using the term “climate change migrants”).

61. See *Atapattu, Climate Change*, *supra* note 59, at 627–32.

62. See, e.g., Jane McAdam, *Climate Change, Forced Migration, and International Law* 199 (2012) [hereinafter *McAdam, Forced Migration*] (“There is a risk that legally defining a ‘climate refugee’ category may lead to a hardening of the concept, simultaneously defining groups ‘in’ or ‘out’ of protection needs.”).

63. See *Atapattu, Climate Change*, *supra* note 59, at 622 (arguing that “an expansion would devalue the current protection for refugees”); see also David Keane, *Graduate Note, The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees,”* 16 *Geo. Int’l Envtl. L. Rev.* 209, 215 (2004) (making a similar argument).

64. But see Biermann & Boas, *supra* note 45, at 63 (using the term “climate refugees” but noting “there is no consensus definition”); Angela Williams, *Turning the Tide:*

which more accurately describes the situation both legally and practically. Legally, using the term “refugee” implies rights and privileges under international law that simply do not exist—nearly all climate migrants will not qualify for traditional refugee status.⁶⁵ Practically, since the majority of displacement will remain internal,⁶⁶ using the term “refugee” could unnecessarily confuse the matter.⁶⁷ Finally, the multicausal nature of climate change disasters and individual migration decisions cautions against using the term “refugee.”⁶⁸

3. *Numerical Estimates of Climate Change Migration.* — While exact estimates of the number of people displaced by climate change vary considerably, the numbers will prove staggering if one includes internal migration.⁶⁹ The U.N. High Commissioner for Human Rights estimates that “between 50 and 200 million people may move by the middle of the century, either within their countries or across borders, on a permanent or temporary basis.”⁷⁰ Earlier estimates ranged from 200 to 250 million people by the middle of the century.⁷¹ Importantly, the majority of those displaced will likely move gradually and internally, and causation remains difficult to pin down.⁷² Even climate change scholar Professor Jane

Recognizing Climate Change Refugees in International Law, 30 *Law & Pol’y* 502, 502 (2008) (using the term “climate change refugees”); Wyman, Responses, *supra* note 40, at 187 (using the term “climate refugees”).

65. See *infra* section I.B (explaining the gap in protection for environmentally displaced persons under existing refugee law).

66. See *supra* notes 46–50 and accompanying text (discussing internal and external displacement).

67. Refugee law covers those fleeing persecution from their government and *moving to another nation*. See Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].

68. Although the link between extreme weather events and climate change stands on firm ground, pinning individual weather events *solely* on climate change remains a dubious proposition. Further, drawing clear causal links between climate events and individual migration decisions will often prove impossible. See Nansen Initiative, Cross-Border Displacement in the Context of Disasters and Climate Change: A Protection Agenda, Draft for Consultation 43 n.2 (2015) [hereinafter Nansen Initiative, Protection Agenda], <http://www.nanseninitiative.org/wp-content/uploads/2015/02/DRAFT-Nansen-Initiative-Protection-Agenda-for-Consultation-08042015.pdf> [<http://perma.cc/EV35-4YF7>] (arguing that causation issues cut against term “refugee”); see also UNHCR Climate Report, *supra* note 40, at 3–4.

69. See *supra* note 44 and accompanying text (providing the adopted definition).

70. UNHCR Climate Report, *supra* note 40, at 3.

71. See Christian Aid, Human Tide: The Real Migration Crisis 5–6 (2007), <http://www.christianaid.org.uk/Images/human-tide.pdf> [<http://perma.cc/Q6G4-AY7G>] (estimating 250 million people will be displaced); Norman Myers, Environmental Refugees: A Growing Phenomenon of the 21st Century, 357 *Phil. Transactions Royal Soc’y London B* 609, 609 (2002) (estimating 200 million people will be displaced).

72. See, e.g., McAdam, Forced Migration, *supra* note 62, at 199 (noting that “it is inherently fraught to speak of ‘climate change’ as the ‘cause’ of human movement, even though its impacts may exacerbate existing socio-economic or environmental vulnerabilities” and that “climate-related movement is likely to be predominantly internal

McAdam calls these “alarmist figures,” noting the complex causation issues associated with giving a clear estimate.⁷³ For example, suppose a family lives on a small island in the Pacific Ocean and ocean water rises high enough to make the groundwater undrinkable.⁷⁴ That family might first move inland multiple times before finally leaving the country entirely.⁷⁵ And when that family moves permanently, the process of displacement will prove gradual and sporadic.⁷⁶

The use of a broad and inclusive definition to capture internal displacement allows for causation uncertainty. Just as causation issues abound in defining the group of climate change migrants,⁷⁷ causation makes estimating the precise group likely to be displaced nearly impossible.⁷⁸ The decision to abandon one’s home is often complicated and multifaceted, except perhaps when sea level rise makes an island nation completely uninhabitable.⁷⁹

B. *Introducing the 1951 Refugee Convention: Limited Coverage for Climate Change Migrants*

While some climate migrants will move across borders (similar to traditional refugees), the vast majority of them will not receive protection under existing law.⁸⁰ This section introduces sources of international law and explores existing refugee law. Major sources of international law

and/or gradual”); see also U.N. Secretary-General, *Climate Change and Its Possible Security Implications*, ¶ 13, U.N. Doc. A/64/350 (Sept. 11, 2009) (indirectly linking climate change and security as a “threat multiplier,” especially in already vulnerable nations).

73. McAdam, *Forced Migration*, supra note 62, at 16 n.8.

74. See Nurse et al., supra note 3, at 1632 fig.29-4 (noting the risk of “saline intrusion into freshwater lenses”); see also Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 *Wm. & Mary Envtl. L. & Pol’y Rev.* 713, 728 (2012) (“Sea level rise will extend areas of salinization of groundwater and estuaries, resulting in a decrease in freshwater availability for humans and ecosystems in coastal areas.”).

75. See DeWitte, supra note 41, at 236 (“As sea level rises, residents of coastal communities will gradually move inland as their land is eroded, disappears, or can no longer be cultivated.”). However, moving inland is not possible in some atoll nations. See Marshall Islands, *Encyclopedia Britannica*, <http://www.britannica.com/place/Marshall-Islands> [<http://perma.cc/7897-KHFW>] (last updated May 18, 2016) (“None of the 29 low-lying coral atolls and the five coral islands in the Marshall group rises to more than 20 feet (six metres) above high tide.”).

76. See McAdam, *Swimming Against the Tide*, supra note 48, at 8 (arguing that “movement is likely to be predominantly internal and/or gradual, rather than in the nature of refugee ‘flight’”).

77. See supra section I.A.2 (discussing the definitional and causation issues associated with climate migration).

78. See supra note 40 and accompanying text (noting issues associated with finding a single causal link between climate change and individual decisions to migrate).

79. See supra section I.A.1 (discussing climate science and sea level rise).

80. See infra section II.A.1 (explaining why most cross-border climate change migrants will not be protected by the 1951 Convention).

typically include customary law or a treaty,⁸¹ which is defined as “an international agreement concluded between states in written form and governed by international law.”⁸² A convention, like the UNFCCC,⁸³ typically refers to a large multilateral treaty⁸⁴ that addresses a specific topic—like climate change in the case of the UNFCCC—and often involves international bodies and modifying protocols.⁸⁵ Soft law, which plays a large role in this Note, “is generally used to describe international instruments that their makers recognize are not treaties.”⁸⁶ In other words, soft law refers to nonbinding “pledges,” rather than binding treaties or “contracts.”⁸⁷ Soft-law mechanisms include things like guiding principles, such as the Guiding Principles on Internal Displacement⁸⁸ and the Nansen Initiative.⁸⁹

The primary international mechanism that protects the legal rights of displaced persons is the 1951 Convention Related to the Status of Refugees (“Refugee Convention” or “1951 Convention”),⁹⁰ which the U.N. High Commissioner for Refugees (UNHCR) carries out.⁹¹ The 1951 Convention defines refugees as:

Any person 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*, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country⁹²

81. Restatement (Third) of Foreign Relations Law of the United States § 102(1)(c) (Am. Law Inst. 1987).

82. Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331.

83. UNFCCC, *supra* note 9. Conventions often include aspirational language and goals. See *id.*

84. Anthony Aust, *Modern Treaty Law and Practice* 9 (3d ed. 2013).

85. See International Conventions on Child Labour, United Nations, <http://www.un.org/en/globalissues/briefingpapers/childlabour/intlconvs.shtml> [<http://perma.cc/3BFH-5E7Y>] (last visited Sept. 9, 2016) (“A Convention is an international agreement between countries. These are usually developed by the United Nations or other international organizations.”).

86. Aust, *supra* note 84, at 49–50.

87. Kal Raustiala, *Form and Substance in International Agreements*, 99 *Am. J. Int’l L.* 581, 588–91 (2005).

88. See Guiding Principles, *supra* note 47.

89. See Nansen Initiative, Protection Agenda, *supra* note 68.

90. 1951 Refugee Convention, *supra* note 67. This Convention is the seminal international law mechanism that protects the rights of refugees; its place in this discussion is crucial.

91. See *infra* section I.C.2 (discussing the UNHCR and its mandate).

92. 1951 Refugee Convention, *supra* note 67, art. 1, ¶ (A)(2) (emphasis added). Note that this definition requires movement across borders, which eliminates the majority of early climate change migrants altogether. See *supra* notes 46–50 and accompanying text (discussing internal displacement).

Generally speaking, the 1951 Convention grants those defined as refugees access to the judicial system, public education, and a right to work.⁹³ Perhaps most importantly, the 1951 Convention includes non-refoulement protection, which provides that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁹⁴ These five protected statuses (race, religion, nationality, and membership of a social group or political opinion) derive from the foundational Universal Declaration on Human Rights.⁹⁵

The vast majority of climate change migrants will have no recourse under international law. Under Article I, refugees must have a “well-founded fear” of persecution *coming from their own government* on the basis of “race, religion, nationality, or membership of a particular social group or political opinion.”⁹⁶ This would prove problematic, as climate change affects all people in a nation regardless of these factors.⁹⁷ Climate migrants from less-developed nations will also have a difficult time proving that persecution came from within their nation,⁹⁸ especially because those nations most likely to bear the burden of sea level rise will be those that did not cause the bulk of emissions driving climate change in the first place.⁹⁹ The original treaty was drafted just after World War II to address refugees fleeing into Europe;¹⁰⁰ the original drafters did not

93. 1951 Refugee Convention, *supra* note 67, arts. 16, 17, 22, 33, ¶ 1 (guaranteeing various rights).

94. *Id.* art. 33, ¶ 1.

95. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948). This connection to the U.N. General Assembly’s Universal Declaration on Human Rights reflects the postwar environment in which both were passed. See 1951 Refugee Convention, *supra* note 67, *pmbl.*; see also Atapattu, *Climate Change*, *supra* note 59, at 624–25, 625 n.90 (discussing the roots and expansion of the 1951 Refugee Convention); Doran, *supra* note 42, at 120–22 (same).

96. 1951 Refugee Convention, *supra* note 67, art. 1, ¶ (A)(2).

97. See Jane McAdam, *From Economic Refugees to Climate Refugees?*, 10 *Melb. J. Int’l L.* 579, 590–92 (2009) (“The impacts of climate change . . . are largely indiscriminate, rather than tied to particular characteristics.”).

98. See Wyman, *Responses*, *supra* note 40, at 179 (noting for environmentally displaced persons, “[t]heir governments likely will not have abandoned them and indeed may be actively trying to assist them in dealing with climate change”).

99. See Office of the High Comm’r for Human Rights, *Relationship Between Climate Change and Human Rights*, ¶ 93, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) (“Vulnerability due to geography is often compounded by a low capacity to adapt, rendering many of the poorest countries and communities particularly vulnerable to the effects of climate change.”).

100. See Office of the United Nations High Comm’r for Refugees, *Introductory Note to the Convention and Protocol Related to the Status of Refugees* 1, 2 (Dec. 2010), <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [<http://perma.cc/7HMH-4RTF>] (“The 1951 Convention, as a post–Second World War instrument, was

contemplate climate change or environmental displacement.¹⁰¹ Finally, the 1951 Convention focused entirely on refugees that flee one country for another, making it inapplicable to internal displacement that will make up the bulk of early climate migration.¹⁰²

A small subset of climate migrants could fall under the 1951 Convention, but these cases will prove few and far between. In the event of a natural disaster, victims might flee if “their government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five grounds” associated with establishing refugee status.¹⁰³ They might also find protection if a natural disaster or other climate-related event (such as drought or resource scarcity) causes violent social conflict.¹⁰⁴ In both instances, though, the 1951 Convention would only apply to climate migrants because the circumstances created violent conflict or oppression, on its own terms, with no relation to climate-related disasters.

C. *Relevant Bodies of the U.N. System and Their Mandates*

Various bodies of the U.N. system could potentially address forced climate migration, though none of them can do so effectively without a dramatic change to current law. These U.N. bodies receive their mandates from the U.N. Charter (for example, the General Assembly and Security Council), treaty law (UNFCCC and UNHCR), and even General Assembly Resolutions (UNHCR, in part). This section briefly sketches the mandates of these U.N. bodies.

1. *General Assembly.* — The General Assembly functions as the primary democratic body of the United Nations, but its role remains functionally limited by its narrow mandate in the U.N. Charter. Under the Charter, the General Assembly may discuss and make recommendations (to Members of the United Nations or the Security Council) on any matter within the scope of the Charter or related to international peace and security.¹⁰⁵ Thus, whereas the Security Council has a far larger role in the international system,¹⁰⁶ the General Assembly is often

originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage.”); see also *infra* note 143 and accompanying text (discussing the 1967 Amendment to the Refugee Convention).

101. In fact, the term global warming itself did not exist until 1975. See Wallace S. Broecker, *Climatic Change: Are We on the Brink of a Pronounced Global Warming?*, 189 *Science* 460, 460 (1975) (coining the term “global warming” in 1975).

102. See *supra* note 46 and accompanying text (discussing the scope of internal displacement).

103. UNHCR *Climate Report*, *supra* note 40, at 9–10. The report acknowledges that such a situation would be quite rare. *Id.* at 10.

104. See *id.* at 10.

105. U.N. Charter art. 10–11.

106. See *infra* section I.C.4 (discussing the expansive role of the Security Council).

functionally limited to making recommendations and initiating studies.¹⁰⁷

2. *Office of the U.N. High Commissioner for Refugees.* — While some climate change migrants will move across borders, the UNHRC has limited capacity to help them.¹⁰⁸ The UNHCR is primarily responsible for “providing international protection” for refugees, *as defined by the 1951 Refugee Convention*.¹⁰⁹ For the UNHCR to address climate migration completely, those displaced by climate change would have to qualify as refugees under the Refugee Convention,¹¹⁰ which is almost certainly not the case.¹¹¹

3. *UNFCCC.* — The United Nations Framework Convention on Climate Change,¹¹² implemented by the Conference of the Parties, represents the primary international legal text devoted to combatting climate change. The UNFCCC is a framework convention under which future agreements are signed (for example, the Kyoto Protocol¹¹³). In December 2015, the UNFCCC parties met for COP21 in Paris, setting a goal of limiting global warming to two degrees Celsius over preindustrial temperatures (with surprising aspirational language seeking to limit warming to one-and-one-half degrees Celsius).¹¹⁴ The agreement also includes provisions on Loss and Damage, which refers to damage caused by the adverse effects of climate change, by extending the Warsaw

107. See U.N. Charter art. 13, ¶ 1 (providing the General Assembly with power to initiate studies for various purposes). This is not to say that the General Assembly is a neutered branch of the U.N. system. Although General Assembly meetings may not directly lead to policy changes on their own, raising awareness or creating a political moment can prove extremely valuable. For example, the most recent U.N. General Assembly meeting on climate change occurred at the end of June 2015. “The main objective of the [e]vent was to contribute to building political momentum for an ambitious climate agreement . . .” President’s Summary of High-Level Event on Climate Change 1 (July 24, 2015), <http://www.un.org/pga/wp-content/uploads/sites/3/2013/11/Climate-Change-Summary-30-July-2015.pdf> [<http://perma.cc/BP9D-QD4Q>].

108. A 1950 General Assembly resolution created the Office of the U.N. High Commissioner for Refugees. G.A. Res. 428 (V), Statute of the Office of the United Nations High Commissioner for Refugees, ¶ 1 (Dec. 14, 1950).

109. See *id.* annex ¶ 1 (describing the UNHCR’s responsibilities); *id.* ¶ 6(A)(ii).

110. The UNHCR has a limited mandate: “The competence of the High Commissioner” only extends to refugees under the 1951 Refugee Convention and its 1967 Protocol. *Id.* art. 6, ¶ (A)(ii).

111. See *infra* section II.A.1 (arguing that climate migrants will not count as refugees under existing law).

112. UNFCCC, *supra* note 9.

113. See Kyoto Protocol, United Nations Framework Convention on Climate Change, http://unfccc.int/kyoto_protocol/items/2830.php [<http://perma.cc/4GWW-JN32>] (last visited Aug. 16, 2016) (“The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its Parties by setting internationally binding emission reduction targets.”).

114. See Paris Agreement, *supra* note 18, ¶ 17.

Mechanism.¹¹⁵ The agreement only mentions displacement in passing; the Coordination Facility was left for another day.¹¹⁶

4. *U.N. Security Council.* — The U.N. Security Council is primarily responsible for maintaining international peace and security, which could arguably apply to climate migration.¹¹⁷ The Council includes fifteen voting member states, including five permanent member states that retain veto power over all Security Council actions.¹¹⁸ Although the U.N. Charter ostensibly limits the Security Council to maintaining international peace and security, the Council itself determines what falls within its purview.¹¹⁹ The Charter provides that the Security Council must act within the “Purpose and Principles of the United Nations,”¹²⁰ but most commenters agree that the Council enjoys nearly unlimited discretion to make an Article 39 determination.¹²¹ Thus, if the Security

115. The provisions specifically do “not involve or provide a basis for any liability or compensation.” *Id.* ¶ 52. Instead, the Paris Agreement extends the Warsaw Mechanism, *id.* ¶ 48, which essentially amounts to an agreement to keep talking about Loss and Damage. The Warsaw Mechanism was the first UNFCCC agreement to address Loss and Damage. It primarily supports information sharing, gathers stakeholders, and makes technical recommendations. See Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, United Nations Framework Convention on Climate Change, http://unfccc.int/adaptation/workstreams/loss_and_damage/items/8134.php [<http://perma.cc/Y4J2-RNG3>] (last visited Aug. 16, 2016).

116. See Paris Agreement, *supra* note 18, ¶ 50. This is likely because mitigating emissions was the primary goal of COP21; Loss and Damage was a secondary issue. See Editorial, *supra* note 18. This might seem to cut against the importance of migration, but it merely reflects the urgency of emissions targets after COP16’s failure in Copenhagen, *id.*, and that early migration faces causation issues.

117. U.N. Charter art. 24, ¶ 1. The U.S. Department of Defense is considering the security implications of climate change. See Dep’t of Def., National Security Implications of Climate-Related Risks and a Changing Climate 1 (July 23, 2015), <http://archive.defense.gov/pubs/150724-congressional-report-on-national-implications-of-climate-change.pdf?source=govdelivery> [<http://perma.cc/7W4V-KJEL>]; see also Mark P. Nevitt, The Commander in Chief’s Authority to Combat Climate Change, 37 *Cardozo L. Rev.* 437, 443–48 (2015) (discussing the security threat posed by climate change).

118. U.N. Charter art. 23, ¶ 1. The permanent members of the Security Council include the United States, United Kingdom, France, China, and Russia. Current Members, United Nations Sec. Council, <http://www.un.org/en/sc/members/> [<http://perma.cc/E7C7-MFAD>] (last visited Sept. 9, 2016).

119. See U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

120. *Id.* art. 24, ¶ 2.

121. Under Article 39 of the U.N. Charter, before taking any substantive action, the Security Council must first determine whether a given situation represents a threat to peace. *Id.* art. 39. The exact contours of the Council’s discretion remain contested and beyond the scope of this Note. Many commenters believe that *politics* represent the only true limitation on the Council under Article 39; others suggest that this discretion is bounded to some degree by the terms of Article 39. See Erika de Wet, The Chapter VII Powers of the United Nations Security Council 133–40 (2004).

Council found that climate migration represents a “threat to the peace, breach of the peace, or act of aggression,”¹²² it may then employ Chapter VII powers, including economic sanctions (Article 41) and potentially the use of force (Article 42).¹²³

The Security Council has considered climate change on a few different occasions, including two formal debates (in 2007 and 2011) and two “Arria-Formula” meetings.¹²⁴ During nearly all of the debates, the Council has found itself divided—the United States, United Kingdom, and France have all supported an expanded role for the Council; Russia and China (backed by much of the developing world) oppose such action.¹²⁵ To date, the Security Council has taken no direct action on climate change apart from a 2011 Presidential Statement, which reaffirmed the UNFCCC as the primary body addressing climate change.¹²⁶ The Statement also expressed concern both “over the possible adverse effects of climate change that may, in the long run, aggravate certain existing threats to international peace and security” and for “possible security implications of loss of territory of some States caused by sea-level-rise may arise, in particular in small low-lying island States.”¹²⁷ This understanding could pave the way for future Security Council action.

As the foregoing analysis shows, current refugee law and the existing U.N. system are incapable of addressing climate change migration in their present form. Part II presents and analyzes various (though ultimately flawed) academic proposals for addressing this pressing issue.

122. U.N. Charter art. 39.

123. *Id.* arts. 41, 42.

124. For a full transcript of the 2011 and 2007 debates, see U.N. SCOR, 66th Sess., 6587th mtg., U.N. Doc. S/PV.6587 (Resumption 1) (July 20, 2011); U.N. SCOR, 62d Sess., 5663d mtg., U.N. Doc. S/PV.5663 (Apr. 17, 2007) [hereinafter 2007 Security Council Debate]. The closed-door 2013 Arria-Formula meeting received limited media coverage. See Flavia Krause-Jackson, *Climate Change’s Links to Conflict Draws UN Attention*, Bloomberg (Feb. 15, 2013), <http://www.bloomberg.com/news/articles/2013-02-15/climate-change-s-links-to-conflict-draws-un-attention> [<http://perma.cc/K8UD-U9CP>]. For a discussion of the 2015 debate, see Dane Warren & Nathan Utterback, *United Nations Security Council Holds Special Meeting on Climate Change*, Sabin Ctr. for Climate Change L.: Climate L. Blog (July 7, 2015), <http://blogs.law.columbia.edu/climatechange/2015/07/07/united-nations-security-council-holds-special-meeting-on-climate-change/#more-3336> [<http://perma.cc/2MSW-RRVD>].

125. While the Group of 77, a loose block of developing nations created to promote their collective economic interests, stood relatively united in opposition to Security Council action on climate change in 2007, see Permanent Representative of Pakistan to the U.N., Letter Dated 16 April 2007 from the Permanent Representative of Pakistan to the United Nations to the President of the Security Council, U.N. Doc. S/2007/211 (Apr. 16, 2007), the group seemed splintered by 2015. See Warren & Utterback, *supra* note 124.

126. S.C. Pres. Statement 2011/15, at 1 (July 20, 2011).

127. *Id.* at 1–2.

II. FINDING A WAY FORWARD: PROPOSALS FOR ADDRESSING CLIMATE CHANGE MIGRATION

Given the wealth of scientific evidence supporting anthropogenic climate change and displacement estimates, the world is staring down a migration crisis of unfathomable scope;¹²⁸ yet the existing international law protections remain inadequate. Section II.A investigates the existing refugee laws and the possibility of amending the 1951 Refugee Convention to include those displaced by climate change, concluding in large part that this option is wrongheaded.¹²⁹ Section II.B considers the scholarly literature recommending a new multilateral treaty to address climate migration,¹³⁰ including expanding migrants' rights and funding.¹³¹ Given the glacial pace of climate talks on mitigation,¹³² section II.C delves into existing U.N. bodies and their mandates to flesh out a potential role for the current structure of the United Nations,¹³³ concluding that the UNFCCC Conference of the Parties is best positioned to address climate change migration.

A. *The 1951 Refugee Convention: Current Inadequacy and Possible Amendments*

The 1951 Refugee Convention represents the seminal international legal mechanism protecting refugees, providing them with access to the judicial system, public education, a right to work, and protection against nonrefoulement.¹³⁴ This section first illustrates the inadequacy of traditional refugee law in protecting climate change migrants before addressing the possibility of amending the 1951 Convention.

128. Even if one rejects the anthropogenic nature of climate change, the migration issue still looms large (though this might affect one's opinion on the responsibility of more developed nations).

129. Previous amendments have not fundamentally changed the Convention. See *supra* note 100 and accompanying text (discussing the 1967 Protocol to the 1951 Refugee Convention).

130. This Note will focus on three academic proposals: Biermann & Boas, *supra* note 45; Docherty & Giannini, *supra* note 45; and Hodgkinson et al., *supra* note 57.

131. In reviewing the proposals, Professor Wyman divided her evaluation between the "rights gap" and "funding gap" that climate migrants face. See Wyman, Responses, *supra* note 40, at 175–85.

132. See, e.g., John Vidal, Suzanne Goldenberg & Jonathan Watts, Copenhagen Climate Change Talks Stall, *Guardian* (Dec. 14, 2009), <http://www.theguardian.com/environment/2009/dec/14/copenhagen-climate-change-talks-stall> [<http://perma.cc/5KWG-4CJX>].

133. Section II.C considers the U.N. General Assembly, the UNHCR, the UNFCCC, and the U.N. Security Council.

134. For introductory discussion on the Convention generally, see *supra* section I.B.

1. *Existing Refugee Law and a Legal Gap for Climate Change Migrants.* — Despite a few potential (very narrow) scenarios,¹³⁵ the vast majority of climate change migrants will almost certainly not fit the 1951 Refugee Convention's definition, which requires that applicants have a "well-founded fear" of persecution *coming from their own government* on the basis of "race, religion, nationality, or membership of a particular social group or political opinion."¹³⁶

While a small subset of commenters suggests that climate migrants fit under existing law,¹³⁷ the majority of commenters reject this view.¹³⁸ In fact, the New Zealand High Court recently held that a Kiribati man fleeing to New Zealand could not claim refugee status under the 1951 Convention,¹³⁹ finding the claims "novel" but "unconvincing."¹⁴⁰ While this decision would not bind other courts,¹⁴¹ it reflects the majority opinion. Some commenters have argued that the simplest solution to the climate migration issue would be to amend the existing 1951 Convention,¹⁴² which has been amended previously to account for changing global consensus. In 1967, the parties to the 1951 Convention amended the agreement to eliminate a temporal limitation that only covered persecution prior to 1951 but left the core elements of the

135. See *supra* notes 96–104 (noting narrow circumstances in which the 1951 Convention would apply).

136. 1951 Refugee Convention, *supra* note 67, art. 1.

137. See Heather Alexander & Jonathan Simon, "Unable to Return" in the 1951 Refugee Convention: Stateless Refugees and Climate Change, 26 *Fla. J. Int'l L.* 531, 571 (2014) (arguing that "forced migrants will qualify for refugee status, though they will not be persecuted"); Jessica B. Cooper, Student Article, Environmental Refugees: Meeting the Requirements of the Refugee Definition, 6 *NYU. Envtl. L.J.* 480, 488 (1998) (arguing that expansion "may require no more than an easy extension of human rights policy").

138. See, e.g., Docherty & Giannini, *supra* note 45, at 358 (noting the majority opinion that climate migrants would not meet Refugee Convention's definition); Wyman, Responses, *supra* note 40, at 179 (explaining the difficulties of categorizing climate migrants under the definition provided by the Refugee Convention).

139. *Teitiota v. Chief Exec. of the Ministry of Bus. Innovation & Emp't* [2013] NZHC 3125 at [51].

140. *Id.*; see Xing-Yin Ni, Note, A Nation Going Under: Legal Protection for "Climate Change Refugees," 38 *B.C. Int'l & Comp. L. Rev.* 329, 342–43 (2015) (describing the result of *Teitiota's* case); see also Tara Brady, World's First Climate Change Refugee: Pacific Islander Asks New Zealand for Asylum as He Claims His Home Will Be Engulfed by Rising Seas, *Daily Mail* (Oct. 17, 2013, 6:30 PM), <http://www.dailymail.co.uk/news/article-2464282/Climate-change-refugee-Pacific-Islander-asks-New-Zealand-asylum.html> [<http://perma.cc/F8P6-SV88>].

141. See *Zicherman v. Korea Air Lines Co.*, 516 U.S. 217, 226 (1996) (noting that "we have traditionally considered as aids to its interpretation . . . the post-ratification understanding of the contracting parties").

142. See, e.g., Gaim Kibreab, Climate Change and Human Migration: A Tenuous Relationship?, 20 *Fordham Envtl. L. Rev.* 357, 401 (2010) (arguing an environmentally-displaced-person crisis "can be met within the framework of the existing international protection regime").

refugee definition unchanged.¹⁴³ However, such an action has run into staunch criticism¹⁴⁴ and might prove just as difficult as negotiating an entirely new treaty.¹⁴⁵

In lieu of a global solution, regional organizations could expand the 1951 Refugee Convention's definition on a local basis, although such an expansion would be limited in application. Two regional bodies have taken this path. The African Union¹⁴⁶ has expanded the definition to include those leaving their country of origin "owing to external aggression, occupation, foreign domination or *events seriously disturbing the public order* in either part or the whole of his country of origin or nationality."¹⁴⁷ Similarly, the Cartagena Declaration, a nonbinding declaration adopted by nations in Central America, expands the refugee definition to include "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or *other circumstances which have seriously disturbed public order*."¹⁴⁸ Under either expanded definition, a natural disaster could arguably constitute a circumstance that "disturb[s] the public order,"¹⁴⁹ but neither was explicitly intended to cover environmental displacement.¹⁵⁰

143. The original 1951 Convention Protocol was a product of World War II and only covered persecution that occurred prior to 1951. This limitation was eliminated in 1967. Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

144. Breanne Compton, Note, The Rising Tide of Environmental Migrants: Our National Responsibilities, 25 Colo. Nat. Resources Energy & Envtl. L. Rev. 357, 371-72 (2014) (describing various arguments against expanding the existing refugee definition, including weakening the rights of existing refugees).

145. See *infra* section II.A.2 (discussing modification of the 1951 Refugee Convention).

146. AU in a Nutshell, African Union, <http://www.au.int/en/about/nutshell> [<http://perma.cc/3M8A-ZXYN>] (last visited Aug. 17, 2016) (describing the goals of continental unification and removing vestiges of colonization).

147. Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, ¶ 2, Sept. 10, 1969, 1001 U.N.T.S. 45 (emphasis added).

148. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama art. III, ¶ 3, Nov. 22, 1984, <http://www.unhcr.org/45dc19084.html> (on file with the *Columbia Law Review*) (emphasis added).

149. See Atapattu, Climate Change, *supra* note 59, at 617 (arguing that "[i]t is likely that those who flee natural disasters such as a tsunami or an earthquake" would meet the "public order" definition).

150. See Elizabeth Burleson, Climate Change Displacement to Refuge, 25 J. Envtl. L. & Litig. 19, 21 (2010) (noting neither agreement mentions environmental issues); Fabrice Renaud et al., U.N. Univ. Inst. for Env't & Human Sec., Control, Adapt or Flee: How to Face Environmental Migration? 12 (2007) http://reliefweb.int/sites/reliefweb.int/files/resources/F85D742112C97E44C125741900366F86-UNU_may2007.pdf [<http://perma.cc/A46J-FLWZ>] ("[T]hese Conventions only apply to individuals living within the African and Latin-American regions and do not draw attention to environmental issues specifically.").

Despite this, neither of the above expansions ultimately provides a silver bullet. Unhelpfully, both of these frameworks only apply regionally (to Africa and Central America, respectively), not to Small Island Developing States. And although the African Union definition is binding on signatory states, the Cartagena Declaration is not. These regional mechanisms aside, the text of the 1951 Convention and the majority view of the academic literature suggest climate migrants will find little protection in existing law.

2. *Amending the 1951 Refugee Convention.* — One logical option for protecting climate change migrants is simply to expand the existing definition to include those displaced by climate change.¹⁵¹ The 1951 Refugee Convention protects individuals forced to flee from their home country due to “well-founded fear” of persecution on the basis of “race, religion, nationality, membership of a particular social group or political opinion.”¹⁵² As discussed above, this definition is unlikely to cover climate change migrants in its current form.¹⁵³

On first glance, amending the existing treaty might appear to present the path of least resistance. The 1951 Convention already has a well-developed system protecting refugees that provides for access to the judicial system, public education, the right to work, and nonrefoulement.¹⁵⁴ Further, countries already have domestic law implementing these provisions.¹⁵⁵ Additionally, the U.N. High Commissioner for Refugees, which protects those displaced by war or conflict, could provide the same support to those displaced by climate change.¹⁵⁶ One could even argue that the massive causation issues associated with climate

151. See, e.g., Kibreab, *supra* note 142, at 401 (arguing that the crisis “can be met within the framework of the existing international protection regime manifested in the 1951 U.N. Convention, the 1967 Protocol, the 1969 [Organization of African Unity (OAU)] Convention, the 1984 Cartagena Declaration and the 1998 Guidelines on the Principles of Internal Displacement”).

152. See 1951 Refugee Convention, *supra* note 67, art. 1, ¶ A(2).

153. See *supra* notes 137–141 and accompanying text (concluding most, if not all, climate change migrants would not fit under existing treaty definitions).

154. See 1951 Refugee Convention, *supra* note 67, arts. 16, 17, 22, 33, ¶ 1. Nonrefoulement would protect someone forced to move due to rising sea levels from being sent back to a home that no longer exists.

155. The United States joined the 1951 Convention (and its 1967 Protocol) in 1980, at which time the Refugee Act established procedures for accepting and integrating refugees. Refugee Law of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (2012)); see also Kara K. Moberg, Note, Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protections, 94 Iowa L. Rev. 1107, 1128–35 (2009) (arguing that protection for environmentally displaced persons should not come through refugee law for various reasons, including the strain on asylum system and insufficient protection for migrants).

156. See The 1951 Refugee Convention, United Nations High Comm’r for Refugees, <http://www.unhcr.org/pages/49da0e466.html> [<http://perma.cc/J2HY-PD42>] (last visited Aug. 17, 2016) (calling the 1951 Convention “the key legal document that forms the basis of our work”).

migration actually lend support to a more inclusive definition of refugees, similar to the one used in the African Union, which would include a broader array of people beyond even climate change migrants.¹⁵⁷

Despite these perceived advantages, amending the existing 1951 Convention will likely run into staunch criticism. First, many fear that amending the existing treaty “would devalue the current protection for refugees.”¹⁵⁸ Amending the Convention to include a broad and inclusive definition could also open up the floodgates and overwhelm an already over-stretched system.¹⁵⁹ Indeed, the Office of the U.N. High Commissioner for Refugees has already spoken out against expanding the 1951 definition.¹⁶⁰ While not controlling, the UNHCR’s position arguably serves as a fair voice of the refugee community. Amending the treaty would also provide protection only for a very narrow subset of migrants—those who move across borders—as the vast majority of migration will initially remain internal.¹⁶¹ Amending the 1951 Convention, then, would face an uphill battle and if successful, would only protect a small number of migrants.

While some perceived advantages could inure from placing climate migrants within the existing refugee system, such a decision would likely prove both too much and too little. It would prove too much because causation issues and pushback from the human rights community would stifle any attempt at an amendment; it would prove too little because it would provide only marginal relief by focusing solely on cross-border displacement. For both reasons, the vital protection of climate change migrants must come from outside the 1951 Convention.

157. See Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 147, art. 1, ¶ 2 (defining “refugee” broadly to include those displaced by “events seriously disturbing the public order”); see also Cartagena Declaration on Refugees, *supra* note 148, art. III, ¶ 3 (defining “refugee” similarly). However, one could just as easily argue that the causation issues caution against an expansive definition.

158. Atapattu, *Climate Change*, *supra* note 59, at 622; see also Compton, *supra* note 144, at 371–72 (describing various arguments against expanding the existing refugee definition, including weakening the rights of existing refugees); Keane, *supra* note 63, at 215–16 (same); Moberg, *supra* note 155, at 1128–35 (arguing that a broader definition would lead countries to “make access to asylum programs even more difficult, inhibiting all potential applicants, not just [environmentally displaced persons], from qualifying for asylum”).

159. See *supra* notes 13–14 and accompanying text (describing the overwhelming Syrian refugee crisis of nearly five million people).

160. See Benjamin Glahn, ‘Climate Refugees’? Addressing the International Legal Gaps, *Int’l Bar Ass’n* (June 11, 2009), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EB0F442> [<http://perma.cc/URJ3-SGSZ>] (“When it comes to climate change and displacement”, [José Riera, Senior Policy Adviser at UNHCR] says, ‘we have existing terminology and existing protections. We don’t need to call people anything different from what they are, which is displaced persons.’”).

161. See UNHCR *Climate Report*, *supra* note 40, at 3–4.

B. *Multilateral Treaty Proposals*

Having discussed and dismissed an amending Protocol to the 1951 Refugee Convention, this next section explores another possibility: a multilateral treaty. Various commenters have discussed the possibility of drafting such a treaty to address climate migration, though at present there seems to be little international momentum to do so.¹⁶² This section evaluates the prospects of a multilateral treaty.¹⁶³

1. *Leading Multilateral Treaty Proposals.* — Similar to the 1951 Refugee Convention, one could imagine a multilateral treaty (independent of the UNFCCC) to address climate change migration.¹⁶⁴ A multilateral treaty, defined as an agreement “between three or more states,”¹⁶⁵ could bridge the existing legal gaps by providing protected rights for climate change migrants (presumably mirroring the provisions in the 1951 Refugee Convention’s grant of nonrefoulement protection and providing basic human rights, such as access to the judiciary and public education).¹⁶⁶ A new multilateral treaty could be specifically tailored to climate change migrants and avoid conflict with the existing refugee community.

Very early discussions in this area advocated for a cap-and-trade mechanism that would allow countries to trade allocations of displaced people.¹⁶⁷ Although the most developed treaty proposals discussed below abandon that approach, the concept of a cap-and-trade mechanism in this area is not particularly surprising—cap-and-trade is commonly discussed as a possible strategy to cut emissions.¹⁶⁸ More recently, some have suggested that a treaty could allocate climate migrants based on historical emissions,¹⁶⁹ mirroring the concept of “common but

162. In fact, the international momentum seems to indicate a push toward addressing climate migration through the UNFCCC. See *infra* section II.C.3.

163. This Note focuses on three leading treaty proposals mentioned in *supra* notes 45 and 57.

164. See *supra* notes 81–89 and accompanying text (discussing sources of international law and multilateral treaty definitions).

165. Aust, *supra* note 84, at 9. The Vienna Convention on the Law of Treaties of 1969 “does not distinguish between bilateral and multilateral treaties.” *Id.*

166. See 1951 Refugee Convention, *supra* note 67, arts. 16, 22, 33, ¶ 1 (providing various rights).

167. See generally Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 *Yale J. Int’l L.* 243 (1997). However, one would do well to query the optics of equating those displaced by climate change to carbon emissions.

168. The United States nearly passed a cap-and-trade bill in 2009, but the bill ultimately died in the Senate. See John M. Broder, ‘Cap and Trade’ Loses Its Standing as Energy Policy of Choice, *N.Y. Times* (Mar. 25, 2010), <http://www.nytimes.com/2010/03/26/science/earth/26climate.html> (on file with the *Columbia Law Review*).

169. See Michael B. Gerrard, *Opinion, America Is the Worst Polluter in the History of the World. We Should Let Climate Change Refugees Resettle Here*, *Wash. Post* (June 25, 2015), http://www.washingtonpost.com/opinions/america-is-the-worst-polluter-in-the-history-of-the-world-we-should-let-climate-change-refugees-resettle-here/2015/06/25/28a55238-1a9c-11e5-ab92-c75ae6ab94b5_story.html (on file with the *Columbia Law Review*).

differentiated responsibilities” found in the UNFCCC.¹⁷⁰

Professors Frank Biermann and Ingrid Boas,¹⁷¹ Professors Bonnie Docherty and Tyler Giannini,¹⁷² and Professor David Hodgkinson et al.¹⁷³ have developed the most comprehensive multilateral treaty proposals in the literature,¹⁷⁴ but none provide the right combination of feasibility and comprehensiveness to adequately protect climate change migrants, and none of these commenters wrote with the benefit of current trends.

Professors Biermann and Boas focus primarily on what Professor Katrina Wyman calls the “funding gap” by emphasizing internal displacement funding.¹⁷⁵ Professors Biermann and Boas treat the issue as primarily one of development policy, focusing their proposed protocol on providing financial assistance to domestic resettlement programs in the form of a “Climate Refugee Protection and Resettlement Fund.”¹⁷⁶ While the proposal carefully reasons through the importance of providing funding for those displaced, by treating the issue as one of development policy and financial support alone, Biermann and Boas do not address the principle of nonrefoulement or cross-border displacement to any substantial degree. Their proposal defines the group in question underinclusively and then focuses primarily on funding domestic resettlement.¹⁷⁷

In contrast, Professors Docherty and Giannini and Professor Hodgkinson et al. support a rights-based approach with expansive

[hereinafter Gerrard, *America Is the Worst Polluter*] (arguing historic emissions should dictate responsibility to accept those displaced by climate change); see also Moberg, *supra* note 155, at 1135–36 (arguing for an Environmentally Based Immigration Visa Program to “allocate the number of immigration visas that each country should extend in proportion to the percentage of greenhouse-gas emissions that countries produce”).

170. U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, princ. 7, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992). The concept of “common but differentiated responsibilities” continues to hold weight, especially for developing countries. China and others emphasized the principle in a 2007 Security Council debate. See 2007 Security Council Debate, *supra* note 124, at 12.

171. Biermann & Boas, *supra* note 45.

172. Docherty & Giannini, *supra* note 45.

173. Hodgkinson et al., *supra* note 57.

174. Professor Wyman calls them the “three leading proposals” in academic literature. See Wyman, Responses, *supra* note 40, at 176.

175. See Biermann & Boas, *supra* note 45, at 79–82 (“[T]he best option appears also here to be the creation of an at least partially *sui generis* regime for the financing of the protection of climate refugees”); see also Wyman, Responses, *supra* note 40, at 211–13 (discussing the funding gap).

176. Biermann & Boas, *supra* note 45, at 81.

177. See Wyman, Responses, *supra* note 40, at 197 (describing the definition and scope of Professors Biermann and Boas’s proposal as potentially underinclusive). While Professors Biermann and Boas are certainly correct that most displacement caused by climate change will begin internally, it will not remain that way for SIDS. Biermann & Boas, *supra* note 45, at 73.

protections for climate migrants. Both approaches argue for a binding multilateral agreement that would provide nonrefoulement protection for those displaced by climate change (modeled after the 1951 Convention),¹⁷⁸ with rights expanding over time.¹⁷⁹

While both focus primarily on extending rights to those displaced, the two proposals do contain a few marked differences. Professors Docherty and Giannini explicitly limit their focus to cross-border displacement,¹⁸⁰ while Professor Hodgkinson et al. recognize that the majority of displacement will remain internal and envision a “Climate Change Displacement Fund” to support internally displaced persons.¹⁸¹ Professors Docherty and Giannini argue broadly for the creation of a new international agency to protect the human rights of those displaced by climate change, modeled after the UNHCR.¹⁸² Professor Hodgkinson et al. more explicitly develop the institutional structure of their newly minted “Climate Change Displacement Organization.”¹⁸³ Finally, Professor Hodgkinson et al. recognize the special position of small island states and suggest that these nations could negotiate bilateral agreements with neighboring countries based on proximity, self-determination, and culture.¹⁸⁴ While both treaty proposals admirably attempt to create broad, rights-based protections for migrants, both would likely fail due to feasibility issues and lack of comprehensiveness.

2. *Evaluation of Multilateral Treaty Options.* — An independent multilateral treaty that creates rights and funding protections for climate change migrants would likely fail for a number of reasons. First, such a treaty would prove difficult (if not impossible) to negotiate, and negotiations would likely move incredibly slowly.¹⁸⁵ Climate-related migration

178. See Docherty & Giannini, *supra* note 45, at 377 (“[T]he principle [of nonrefoulement] should prohibit forced return to a home state when climate-induced environmental change would threaten the refugee’s life or ability to survive.”); Hodgkinson et al., *supra* note 57, at 110 (arguing climate change displaced persons “should enjoy the right to *non-refoulement*”).

179. See Docherty & Giannini, *supra* note 45, at 377 (“Host states must . . . facilitate naturalization of the refugee.”); Hodgkinson et al., *supra* note 57, at 110 (arguing that, like the 1951 Refugee Convention, “rights [for Climate Migrants] should expand on an incremental basis”).

180. See Docherty & Giannini, *supra* note 45, at 369 (noting the importance of state sovereignty).

181. Hodgkinson et al., *supra* note 57, at 84, 118.

182. Docherty & Giannini, *supra* note 45, at 388–89 (“In designing its structure and policies, this [proposed] agency should learn from the experiences of UNHCR, borrowing its organization and methods where appropriate and improving them where necessary.”).

183. See Hodgkinson et al., *supra* note 57, at 91–117 (describing detailed institutional architecture, including financing, committee structure, and rights-based protections).

184. See *id.* at 111–15.

185. See McAdam, *Swimming Against the Tide*, *supra* note 48, at 15–18; see also Martyn D. Taylor, *International Competition Law: A New Dimension for the WTO?* 138 (2006) (noting in the context of the World Trade Organization, “multilateral negotiations

is sufficiently imminent that those who will be displaced (at least in part) by climate change cannot wait for the development of a complex international architecture with rights-based protections.¹⁸⁶ Second, multilateral treaties often provide only the “lowest common denominator” solution to a problem.¹⁸⁷ Given both time and political constraints, efforts to secure the full scope of refugee-like rights for climate migrants would likely fail. Third, a rights-based treaty would encounter substantial (and likely insurmountable) political hurdles in the United States.¹⁸⁸ Instead, this Note argues for a regional approach to the problem, coordinated by an existing international architecture, that would provide the optimal protection for migrants.

Additionally, the incredibly complex causation problems in climate migration would likely prove far too much for a massive multilateral instrument to manage. In order for someone to attain “refugee-like” status under such an agreement, a decisionmaker would have the impossible task of determining that climate change caused a specific event and then pinning an individual migrant’s decision to move on that specific event (in a situation in which poverty and other factors likely played a role).¹⁸⁹ Defining a workable “status” under a multilateral treaty might require narrowing the scope of those covered to cross-border displacement or disappearing states, for example. Narrowing the scope in this way would inevitably fail to provide adequate protection for all those affected by climate change displacement, as most of those displaced will move internally, at least at first.¹⁹⁰

Due to the feasibility and comprehensiveness concerns discussed above, a multilateral treaty that focuses on expansive rights protections (like the 1951 Refugee Convention) would not fully protect climate migrants. Instead, this Note argues for a regional approach to the problem, coordinated through the existing structure of the United Nations, that would provide the optimal protection for climate change migrants.

would be slow, cumbersome, expensive and uncertain, frequently achieving lowest common denominator results” due to the unanimous-consent requirement).

186. UNHCR Climate Report, *supra* note 40, at 3.

187. See, e.g., Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 *Harv. Int’l L.J.* 323, 367 (2008) (noting fear of lowest-common-denominator solutions resulting from path dependencies); see also Raustiala, *supra* note 87, at 602 (discussing the “phenomenon of lowest-common-denominator treaties”).

188. See *infra* notes 253–257 (discussing the political barriers in the United States).

189. See McAdam, *Swimming Against the Tide*, *supra* note 48, at 12–15 (describing complicated causation issues associated with labeling someone a refugee under a multilateral agreement).

190. See UNHCR Climate Report, *supra* note 40, at 4.

C. *Existing Bodies of the United Nations*

Having concluded that an expansion of the existing Refugee Convention or a rights-based multilateral treaty will not sufficiently protect climate change migrants, this section explores the potential role of various U.N. bodies in addressing climate migration.¹⁹¹

1. *General Assembly*. — While the General Assembly represents the primary democratic body within the U.N., it is ill suited to address climate migration within its narrow mandate.¹⁹² Despite its limited role, one scholar has argued that the General Assembly should take a lead role in addressing climate migration.¹⁹³ Professor Benoit Mayer argues that the Security Council should pass a resolution “recognizing the security challenge posed by climate-induced migration and the necessity for international action.”¹⁹⁴ Then, according to Mayer, the General Assembly could create a global fund, agency, and panel dedicated to the issue.¹⁹⁵ While it is true that the General Assembly has the authority to create subsidiary bodies,¹⁹⁶ such bodies are often tasked with implementing specific treaties or providing support to governments.¹⁹⁷

The traditionally limited scope of the General Assembly makes such an expansive role unlikely. No other scholar has suggested a sizable role for the U.N. General Assembly, likely due to its traditionally passive role.¹⁹⁸ It is true that a General Assembly–led program presents some democratic advantages, since resolutions require a majority vote,¹⁹⁹ but the UNFCCC has similar democratic advantages and already addresses climate change.²⁰⁰

2. *Office of the U.N. High Commissioner for Refugees*. — While the UNHCR currently protects refugees from conflict and political oppres-

191. For an introduction to the legal mandates of these bodies, see *supra* section I.C.

192. The General Assembly has limited authority within the U.N. system—it primarily makes recommendations and initiates studies, see *supra* section I.C.1, and has created U.N. bodies to implement various treaties, see *infra* notes 196–197 and accompanying text.

193. See Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 *Colo. J. Int’l Envtl. L. & Pol’y* 357, 410–15 (2011).

194. *Id.* at 411.

195. *Id.* at 413–16.

196. U.N. Charter art. 22.

197. See G.A. Res. 428 (V), annex, *supra* note 108, ¶ 8 (charging the UNHCR with “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”).

198. Although they do not always directly lead to policy changes on their own, U.N. General Assembly meetings often attempt to build a political coalition and advance public support for upcoming negotiations. See *supra* note 107 and accompanying text.

199. U.N. Charter art. 18, ¶ 3.

200. See *infra* section II.C.3 (arguing for a UNFCCC-led program to address displacement).

sion, it cannot actively protect climate change migrants under its mandate to implement the 1951 Refugee Convention.²⁰¹ Moreover, the UNHCR itself seems unwilling to directly tackle climate migration; a Senior Policy Advisor at the UNHCR recently stated as much in an interview with the International Bar Association.²⁰²

While climate change displacement clearly has human rights implications and conjures up images of traditional refugees, it does not necessarily follow that human rights and refugee law should address climate-related displacement, as this would further fragment the response of the international community to climate change. Given the real and persuasive arguments against associating climate change displacement directly with existing refugee law,²⁰³ this Note argues that the issue should be dealt with through the UNFCCC process.

3. *UNFCCC*. — The UNFCCC is best suited to address climate change migration through the newly proposed (but not yet fully considered) Climate Change Displacement Coordination Facility.²⁰⁴ The UNFCCC represents the primary international mechanism for addressing climate change.²⁰⁵ It operates as the framework Convention under which all other climate change agreements are situated.²⁰⁶ As noted above, most commenters who have considered this issue have argued for one of two things: adapting the 1951 Refugee Convention or negotiating a new multilateral treaty.²⁰⁷ This is likely because most authorities believed that the UNFCCC process could not handle this issue given the historical failure of the UNFCCC system to properly address emissions. Further, commenters have correctly noted that the Framework Convention was never intended to handle human rights issues of this scope. As Professors Docherty and Giannini put it, “[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” and “is also preventive in nature and less focused on the remedial actions . . . needed in a refugee context.”²⁰⁸

201. See *supra* section I.C.2 (discussing the limited mandate of the UNHCR).

202. The UNHCR has argued against granting refugee status while recognizing that climate change can theoretically lead to forced migration. See Glahn, *supra* note 160 (quoting Senior Policy Advisor at UNHCR Riera as arguing that for climate change migrants, “we have existing terminology and existing protections. We don’t need to call people anything different from what they are, which is displaced persons”).

203. See *supra* section II.A.2 (discussing arguments against expanding the refugee definition under the 1951 Refugee Convention).

204. See *supra* note 19 and accompanying text (discussing Coordination Facility origins).

205. See *supra* section I.C.3 (discussing UNFCCC).

206. See *supra* notes 112–113 and accompanying text (introducing UNFCCC system).

207. See *supra* sections II.A–B (discussing common proposals).

208. Docherty & Giannini, *supra* note 45, at 358; see also Hodgkinson et al., *supra* note 57, at 77 (agreeing with and citing Professors Docherty and Giannini).

While Professors Docherty and Giannini were correct at the time of writing, recent developments make clear that the UNFCCC considered a “Climate Change Coordination Facility” at the 2015 Paris COP21.²⁰⁹ Ultimately, the Paris Agreement focused primarily on emissions limits (through the Intended Nationally Determined Contributions process) and Loss and Damage; it left displacement for future consideration.²¹⁰ However, given the current international momentum, the UNFCCC is best suited to address climate migration.

First, by treating displacement as a climate change issue, the UNFCCC has essential institutional capital that would aid negotiations.²¹¹ Further, by situating displacement within the UNFCCC, countries can negotiate emissions targets and other climate-related issues in one place, providing maximum negotiation flexibility.²¹² Finally, while the UNFCCC has not historically addressed human rights issues,²¹³ the UNFCCC has begun to tackle Loss and Damage and the fact that displacement was on the agenda suggests the global community is moving in that direction.²¹⁴ Given the timing of these developments in Paris, no commenter has explored what a Displacement Facility might look like in practice²¹⁵—that is precisely what this Note seeks to do.

4. *U.N. Security Council.* — Given its expansive role in the international system to protect “peace and security,” the Security Council

209. See *supra* note 19 and accompanying text (discussing Coordination Facility talks leading up to COP21).

210. See Paris Agreement, *supra* note 18, ¶¶ 48–52.

211. The UNFCCC began operation in 1992, see *supra* note 9 and accompanying text, and has coordinated twenty-one conferences with global leaders, culminating in numerous multilateral treaties. See *supra* notes 9, 18, 113, 115 (citing various agreements negotiated under the UNFCCC).

212. This occurred specifically in the Paris Agreement negotiations, in which small island nations pushed for a one-and-a-half-degree target in exchange for concessions on Loss and Damage. Mark Hertsgaard, *In the Final Hours of the Climate Talks, a 1.5 Degrees C Target Is Still on the Table—but Is that a Good Thing?*, *Nation* (Dec. 9, 2015), <http://www.thenation.com/article/in-final-hours-of-climate-talks-a-1-5-degrees-c-target-is-still-on-the-table-but-is-that-a-good-thing/> [<http://perma.cc/Y94Q-3K9Z>]; see also Paris Agreement, *supra* note 18, ¶ 48–52 (addressing Loss and Damage).

213. See *supra* note 208 and accompanying text (discussing commenters who argue that the UNFCCC was never intended to address human rights issues like it was forced migration).

214. See *supra* notes 115–116 (discussing the Paris Agreement’s Loss and Damage and displacement provision).

215. The only exception to this seems to be a brief but informative treatment by the Sabin Center for Climate Change Law outlining topics for discussion leading up to the Paris COP21. Jessica Wentz & Michael Burger, *Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21* (Sept. 2015), http://web.law.columbia.edu/sites/default/files/microsites/climate-change/unfccc_climate_change_displacement_coordination_facility.pdf [<http://perma.cc/FD6J-7PD2>].

could play a role in addressing climate displacement.²¹⁶ Various commenters have addressed the Council's role in tackling climate change, though all of them focus exclusively on reducing emissions.²¹⁷ First, the Council could clearly address discrete security threats caused (to whatever degree) by climate change displacement, just as it would in dealing with any other global crisis that threatens peace and security.²¹⁸ A few commenters have argued that the Council could go further and act as a compliance arm of the UNFCCC to enforce emissions targets, or perhaps create entirely new emissions targets independent of the UNFCCC.²¹⁹ Importantly, any Security Council action would first require a finding that climate change represents a threat to peace and security,²²⁰ a step the Council has yet to take. However, the Council has already "expressed concern" that instability and sea level rise could create peace and security issues²²¹ and migration has sparked Security Council action in the past.²²²

Political difficulties notwithstanding, the Security Council could play a substantial backstop or enforcement role in addressing climate change displacement. As the previous analysis shows, practical and legal difficulties abound in amending the 1951 Refugee Convention or negotiating a rights-based multilateral treaty modeled after existing refugee law; neither would adequately protect climate change migrants

216. See *supra* section I.C.4 (describing the Security Council's mandate and limitations).

217. See Darragh Conway, *The United Nations Security Council and Climate Change: Challenges and Opportunities*, 1 *Climate L.* 375 (2010) (discussing the role of the Security Council in reducing emissions); Trina Ng, *Safeguarding Peace and Security in Our Warming World: A Role for the Security Council*, 15 *J. Conflict & Security L.* 275 (2010) (same); Christina Voigt, *Security in a 'Warming World': Competences of the UN Security Council for Preventing Dangerous Climate Change*, in *Security: A Multidisciplinary Normative Approach* 291 (Cecilia M. Bailliet ed., 2009) (same).

218. See *supra* notes 117–123 and accompanying text (describing powers of the U.N. Security Council).

219. See Conway, *supra* note 217, at 399–407 (discussing issues surrounding the establishment of a subsidiary body to enforce the emissions targets of the UNFCCC); Voigt, *supra* note 217, at 303–11 (discussing the weakness of UNFCCC compliance measures and competencies of the Security Council). This Note will not focus on the emissions side of potential Security Council action—either approach faces drawbacks. Enforcing UNFCCC commitments runs into delegation problems with the *delegatus non potest delegare* doctrine. See Conway, *supra* note 217, at 399–407. And allowing the Council to create its own binding emissions targets would run into criticism regarding the antidemocratic nature of the Security Council itself. See Shirley V. Scott, *Climate Change and Peak Oil as Threats to International Peace and Security: Is It Time for the Security Council to Legislate?*, 9 *Melb. J. Int'l L.* 495, 510–11 (2008).

220. U.N. Charter art. 39.

221. See S.C. Pres. Statement, *supra* note 126.

222. The Security Council has often justified intervention based on a connection to refugee issues. See, e.g., S.C. Res. 794, ¶ 5 (Dec. 3, 1992) (framing Somalia's food crisis around refugee concerns); see also DeWitte, *supra* note 41, at 234–36 (discussing the security implications of migration).

given the scope of climate migration on the horizon. Part III provides a way forward through a cooperative UNFCCC solution.

III: A REASONED SOLUTION: UNFCCC, REGIONAL COOPERATION, AND THE SECURITY COUNCIL

Early negotiation documents for the Paris COP21 discussed a “Climate Change Displacement Coordination Facility,” housed within the UNFCCC, to protect the rights of those displaced by climate change. This Part builds on the broad strokes from these early discussions to illustrate how a Displacement Coordination Facility would operate in practice to best protect the rights of migrants.²²³ The negotiation documents represent the inspiration for this work, but no details were provided in the documents and no commenter has developed an institutional framework around this issue.

Section III.A advances the argument in favor of a regional approach to cross-border displacement, with a particular focus on the importance of self-determination. Section III.B outlines the short-term vision for the Facility, which would focus on soft-law approaches, funding internal displacement through the Green Climate Fund, and long-term displacement research. Section III.C embraces the long-term goal: allowing the Facility to act as a clearinghouse for regional and bilateral agreements (and potentially to evolve into a more formal refugee system as necessary). Finally, section III.C also outlines a role for the U.N. Security Council to address climate change displacement. This Part concludes that soft-law and regional/bilateral agreements would best protect the rights of climate change migrants in a politically feasible way.

A. *The Case for a Regional Approach and Self-Determination for Cross-Border Displacement*

Before addressing the structure and purpose of the Coordination Facility, including funding mechanisms to address internal displacement, this section introduces a key aspect of the proposal related to cross-border displacement: regional self-determination. Regional agreements, as opposed to a large-scale multilateral agreement, would grease the wheels of negotiation and avoid the lowest-common-denominator solution that occurs in international negotiations.²²⁴

223. While a September 2015 UNFCCC negotiating document introduced a Displacement Coordination Facility, the Paris Conference did not address displacement directly. See Paris Agreement, *supra* note 18, ¶ 50. This Note charts completely new territory by developing an institutional architecture for a Facility that would use soft-law and regional/bilateral treaties, along with internal displacement funding, to address climate change migration. See *infra* sections III.B–C.

224. See Blum, *supra* note 187, at 367 (discussing the lowest-common-denominator problem in international negotiations).

Regional agreements, rather than a large multilateral agreement based on *common but differentiated responsibilities*,²²⁵ would allow displaced persons a chance to retain some level of cultural integrity. While common but differentiated responsibilities should certainly play a role, those displaced from small island nations should have some say (at least through their government) in their ultimate relocation in order to preserve their cultural integrity.²²⁶ Some might argue that cultural identity and integrity represent an idealistic (bordering on naïve) benchmark and that climate migrants will ignore such considerations when they are faced with the realities of mass displacement. However, these background principles of international law should not be so readily discarded. The concept of self-determination remains a central tenet of international law—the International Covenant on Civil and Political Rights states, “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.”²²⁷ The Coordination Facility should honor this by fostering regional or bilateral agreements that allow for self-determination.²²⁸

Detractors would argue that under the principle of common but differentiated responsibilities, those most responsible for climate change should bear the largest burden in addressing its adverse effects.²²⁹ Under such a formulation, the United States, for instance, should perhaps accept the most refugees based on historical emissions.²³⁰ Some have

225. For a discussion of common but differentiated responsibilities, see *infra* note 229 and accompanying text.

226. See Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 Wash. J. Envtl L. & Pol’y 1, 16–17 (2014) [hereinafter Atapattu, *Disappearing States*] (“[I]n order to preserve nationality, cultural identity, and territorial integrity, it may be better to relocate populations en masse, provided that this is done in a systematic, cooperative manner with the participation of the population concerned as part of adaptation plans.”).

227. International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, S. Exec. Doc. D, 95-2, 999 U.N.T.S. 171.

228. See Atapattu, *Disappearing States*, *supra* note 226, at 16–17 (arguing that people should be allowed to migrate en masse or individually in a migrant-worker program).

229. See UNFCCC, *supra* note 9, art. 3, ¶ 1 (“The Parties should protect the climate system . . . on the basis of equity and in accordance with their *common but differentiated responsibilities* and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” (emphasis added)); see also Fiona Harvey, *Paris Climate Change Agreement: The World’s Greatest Diplomatic Success*, *Guardian* (Dec. 14, 2015), <http://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations> [<http://perma.cc/56CV-R9WE>] (“For China, a key sticking point was differentiation—the concept that developing countries have less responsibility for climate change.”).

230. See Gerrard, *America Is the Worst Polluter*, *supra* note 169 (arguing America should take the most climate refugees).

even argued for a type of cap-and-trade for refugee quotas.²³¹ Pigeonholing climate change migrants into certain parts of the world based on quotas (perhaps based on historical emissions) could satisfy one's sense of fairness, but it might not represent the preferences of those actually displaced, which ought to remain a primary concern.²³² This has been underscored by commenters such as Professor Jane McAdam, who notes that "a protection-like response may not necessarily respond to communities' human rights concerns, especially those relating to cultural integrity, self-determination and statehood."²³³

Any international effort to help those displaced by climate change should encompass the option for regional and bilateral treaties to allow migration of populations within SIDS to move en masse to another territory. Admittedly, the concept of en masse migration presents difficulties associated with retaining nationality and whether en masse migration would then allow for some quasi-statehood designation.²³⁴ Analysis of these difficulties is beyond the scope of this Note. But the core point nonetheless remains: Those living on SIDS should have the option to negotiate regional or bilateral agreements that would allow people to retain their cultural identity. En masse migration certainly presents feasibility concerns, but self-determination and preserving cultural heritage are goals the international community should not readily abandon at the first sign of difficulty.

Countries like the United States, presumably hoping to avoid an influx of immigrants, might attempt to eschew responsibility for accepting displaced people by providing funds to the Green Climate Fund to aid migration (either internal or external) instead of accepting migrants through a bilateral treaty. This type of xenophobia is admittedly a concern, and a regional approach clearly relies on negotiation of regional and bilateral mechanisms that may ultimately require a

231. See Moberg, *supra* note 155, at 1135–36 (arguing that any program "should allocate the number of immigration visas that each country should extend in proportion to the percentage of greenhouse-gas emissions that countries produce"); cf. Schuck, *supra* note 167 (discussing refugee burden sharing generally).

232. While providing strong rights-based protection is a laudable goal, it would face political opposition, see *infra* notes 253–257 and accompanying text, and ignores the valuable considerations outlined by the International Covenant on Civil and Political Rights, see *supra* note 227.

233. McAdam, *Swimming Against the Tide*, *supra* note 48, at 17.

234. See Kittel, *supra* note 23, at 1246–50 (arguing for a multilateral treaty providing for a "state-in-exile" designation). This option seems to borrow from the decision to create Israel (perhaps the most extreme example of relocating a large group of people). See *The Arab-Israeli War of 1948*, Office of the Historian, <http://history.state.gov/milestones/1945-1952/arab-israeli-war> [<http://perma.cc/XUA8-22D4>] (last visited Sept. 18, 2016) (discussing the conflict that arose immediately after the formal creation of Israel). This Note does not advocate for such a solution but instead supports en masse migration to existing states to retain cultural integrity.

backstop.²³⁵ This also raises the question of self-determination for those accepting migrants and whether state and local governments would have a say in the matter.²³⁶ Political concerns aside, cultural integrity should represent the underpinning of the Coordination Facility's work, and supporting regional and bilateral agreements would allow individual small island nations to guide their own paths.

B. *Short Term: Regional Cooperation and "Soft-Law" Approaches*

This section addresses the short-term work of the Climate Change Displacement Coordination Facility, which should focus primarily on a few key goals. First, the Facility should work with the Nansen Initiative to support regional soft-law agreements to address early displacement.²³⁷ This would also include providing support to negotiating states in the form of guiding principles, which could involve combining existing mechanisms (for example, the Guiding Principles on Internal Displacement and the Nansen Initiative's Cross-Border Displacement Principles). The Facility should also conduct studies on which areas are most suitable for accepting displaced climate change migrants to allow for en masse migration. Finally, the Facility should use existing UNFCCC mechanisms to address internal displacement by filling the funding gap through the Green Climate Fund.

Even if a Coordination Facility is created, some migration may begin to occur before binding regional or bilateral treaties are negotiated between states. In the event that this occurs, the Facility should act as a coordination body, in conjunction with the Nansen Initiative,²³⁸ to promote a "soft-law" approach to addressing climate change displacement.²³⁹ Since the Nansen Initiative has created substantial institutional structure, including guiding principles,²⁴⁰ starting from scratch would prove superfluous. The Facility should build on these existing structures, adopting identical or similar guiding principles when necessary, and work with the Nansen Initiative to support those displaced by climate change in the early stages. Since the Nansen Initiative is a

235. This "backstop" for protecting climate change migrants could come from the Security Council. See *infra* section III.C.2.

236. While local stakeholder involvement would prove crucial, federal preemption might be necessary (as with most immigration matters). See Patrick Healy & Julie Bosman, G.O.P. Governors Vow to Close Doors to Syrian Refugees, *N.Y. Times* (Nov. 16, 2015), <http://www.nytimes.com/2015/11/17/us/politics/gop-governors-vow-to-close-doors-to-syrian-refugees.html> (on file with the *Columbia Law Review*) (discussing opposition from state governors to immigration policy).

237. See *supra* notes 86–89 and accompanying text (discussing soft-law approaches).

238. See *supra* notes 52–54 (introducing Nansen Initiative).

239. See *supra* notes 86–89 (discussing soft-law approaches). Despite being non-binding, a soft-law strategy might prove politically necessary in the short term and would include political pressure to keep commitments.

240. Nansen Initiative, Protection Agenda, *supra* note 68, at 5–6.

nongovernmental organization,²⁴¹ a cooperative relationship between the Nansen Initiative and the UNFCCC's Climate Change Displacement Coordination Facility would enhance the legitimacy and scope of both operations. Since the Facility would ideally encourage en masse migration to retain cultural integrity, the Facility should begin early research on which areas are suitable for accepting large populations (i.e., those with adequate land and water resources without too many current residents).

While one might argue that the UNFCCC should not actively address climate change displacement since it was never designed to handle human rights issues of this scale,²⁴² this ignores the political reality of the current situation. While the Paris Agreement essentially agrees to continue discussing Loss and Damage,²⁴³ global leaders seem to be honing in on a one-stop international body to address all climate-related issues, which would include displacement and other adaptation problems.²⁴⁴ Further, the Paris negotiations recently demonstrated the value of allowing parties to compromise on adaptation issues for concessions on emissions mitigation.²⁴⁵

Additionally, the Coordination Facility would not simply replace or supplement the Nansen Initiative. The Nansen Initiative, which is a nongovernmental organization, focuses entirely on cross-border displacement. This "soft-law" method could combine the Nansen Initiative's approach to cross-border displacement with the UN Guiding Principles on Internal Displacement²⁴⁶ to create a holistic set of guiding principles to address climate displacement. Finally, the Coordination Facility could operate as the clearinghouse under which nonbinding agreements are negotiated to ensure that climate change migrants are adequately protected. A clearinghouse structure would provide states with self-determination and an institutional structure to support negotiations and protect the rights of migrants.

Since most migration will begin internally, the Facility initially should focus on addressing funding issues associated with internal displacement. The funding gap could potentially be met through existing UNFCCC mechanisms, namely the Green Climate Fund, which was designed (in part) to help vulnerable communities adapt to climate

241. See Nansen Initiative, About Us, *supra* note 52.

242. See Docherty & Giannini, *supra* note 45, at 358 (arguing against UNFCCC involvement); see also Hodgkinson et al., *supra* note 57, at 77 (agreeing with and citing Professors Docherty and Giannini).

243. See Paris Agreement, *supra* note 18, ¶¶ 48–52.

244. See *supra* note 212 and accompanying text (discussing the compromises reached at the Paris Conference).

245. See *supra* note 212 and accompanying text (discussing the crucial political compromise reached on Loss and Damage at the Paris Conference negotiations).

246. See Guiding Principles, *supra* note 47.

change.²⁴⁷ While the Green Climate Fund has been inadequately funded thus far,²⁴⁸ it represents the primary UNFCCC mechanism designed to handle adaptation issues. While the Paris Agreement's Loss and Damage provisions "[do] not involve or provide a basis for any liability or compensation,"²⁴⁹ developed countries seem willing to discuss adaptation measures like Loss and Damage (so long as it does not expressly create international legal liability).²⁵⁰ Finally, the UNFCCC has thus far acted mainly in the mitigation context to reduce emissions.²⁵¹ Instead of waiting for a natural disaster to occur or the seas to rise, the Coordination Facility should proactively strengthen local communities where displacement is likely to occur by improving resilience and planned migration/disaster response to avoid some displacement altogether.²⁵²

Further, domestic U.S. politics make it extremely unlikely that a top-down, rights-based treaty that requires acceptance of climate change migrants will be ratified, at least in the near future. The United States is currently in the midst of a wave of anti-immigration sentiment,²⁵³ which arguably borders on racism and xenophobia.²⁵⁴ Additionally, many of

247. See United Nations Framework Convention on Climate Change, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, ¶ 102, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

248. See Karl Mathiesen, *Climate Change: Western States Fail to Fulfill Pledges to Developing Countries*, *Guardian* (Sept. 4, 2015), <http://www.theguardian.com/global-development-professionals-network/2015/sep/04/climate-change-western-states-fail-to-fulfil-pledges-to-developing-countries> [<http://perma.cc/MNF9-G2ZM>] ("Billions were pledged to help poor nations adapt to global warming but trust is eroding as countries such as the US fail to put up the cash.").

249. See Paris Agreement, *supra* note 18, ¶ 52.

250. See *supra* note 212 and accompanying text (discussing compromises reached at the Paris Conference).

251. See Kyoto Protocol, *supra* note 113 (focusing on emissions targets).

252. See Wyman, *Responses*, *supra* note 40, at 204–15 (highlighting "responses to the rights and funding gaps that might reduce the vulnerabilities to climate change that give rise to climate migration concerns"); see also Nansen Initiative, *Protection Agenda*, *supra* note 68, at 4–5 (noting importance of "disaster risk reduction, disaster response and recovery" and "finding durable solutions"). Even those opposing immigration should want to avoid a crisis that turns internal displacement into cross-border displacement.

253. See Jim Tankersley & Scott Clement, *It's Not Just Donald Trump: Half of Republicans Share His Views on Immigrants and Refugees*, *Wash. Post* (Nov. 24, 2015), <http://www.washingtonpost.com/news/wonk/wp/2015/11/24/its-not-just-donald-trump-half-of-republicans-shares-his-views-on-immigrants-and-refugees/> (on file with the *Columbia Law Review*) ("Almost half of Republican voters favor deporting all immigrants here illegally and barring Syrian refugees from entering the United States . . .").

254. Of course, some might oppose immigration on economic grounds. See Jared Bernstein, *Donald Trump Does Not Understand the Economics of Immigration*, *Wash. Post* (Aug. 19, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/08/19/donald-trump-does-not-understand-the-economics-of-immigration/> [<http://perma.cc/ZZ5A-DNB9>] (explaining the economic argument against immigration, which focuses on

those who staunchly oppose accepting refugees from war-torn Syria also deny climate change.²⁵⁵ At best this combination creates an additional barrier to a rights-based approach; at worst it represents a source of climate change denial. Whatever underlies these positions (and whatever their merit), it is unimaginable that the U.S. Senate would provide advice and consent on a treaty that requires acceptance of climate migrants.²⁵⁶ Accordingly, the Facility should narrow its short-term focus to studying the viability of certain areas for resettlement, along with supporting soft-law and regional/bilateral negotiation support. This approach might even find favor with those who are dubious of U.S. participation in climate change negotiations.²⁵⁷ The solution proposed herein attempts to protect climate change migrants from having to flee to the United States without a right to enter an already overburdened immigration system. The proposed solution creates no obligation to accept large populations of climate change migrants, at least in the short term, and would thus prove more politically palatable to conservative factions in the United States.

short-term decreases in wages for certain workers). This merely highlights the staunch opposition to a top-down, rights-based approach.

255. Many Republicans deny climate change outright; others deny that human activity causes climate change. See Dana Nuccitelli, *The Republican Party Stands Alone in Climate Denial*, *Guardian* (Oct. 5, 2015), <http://www.theguardian.com/environment/climate-consensus-97-per-cent/2015/oct/05/the-republican-party-stands-alone-in-climate-denial> [<http://perma.cc/DB5X-A9XJ>].

256. See Harvey, *supra* note 229 (noting that the United States negotiated heavily at the Paris talks to avoid binding obligations and thus avoid Senate approval). This later became a political issue in the United States when the Obama Administration formally joined the Paris Agreement without Senate ratification. See Chris Mooney, Steven Mufson & William Wan, *The U.S. and China Just Joined the Paris Climate Deal—Which Could Be Bad News for Donald Trump*, *Wash. Post* (Sept. 3, 2016), http://www.washingtonpost.com/news/energy-environment/wp/2016/09/03/u-s-and-china-just-ratified-the-paris-climate-agreement-which-could-be-bad-news-for-donald-trump/?utm_term=.ccc85c56a6c3 [<http://perma.cc/5RJC-HL95>] (“Some Republican critics of the accord say it is a treaty that should be submitted to the Senate for ratification, but the Obama administration says that the president has the authority to commit to the Paris agreement just as President George H.W. Bush did when he signed the [UNFCCC].”) Just as Obama could unilaterally join the Paris Agreement on behalf of the United States, Trump can unilaterally remove the United States from the agreement. See John Upton, *3 Ways Trump Could Abandon the Paris Climate Pact*, *Climate Cent.* (Sept. 19, 2016), <http://www.climatecentral.org/news/trump-could-abandon-paris-climate-agreement-20711> [<http://perma.cc/9QJL-X36G>]. Trump’s threat to withdraw the United States from the Agreement is particularly credible because he has called climate change a “Chinese hoax.” See Louis Jacobson, *Yes, Donald Trump Did Call Climate Change a Chinese Hoax*, *Politifact* (June 3, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/> [<http://perma.cc/PQH7-WELS>].

257. See David M. Herszenhorn, *Votes in Congress Move to Undermine Climate Pledge*, *N.Y. Times* (Dec. 1, 2015), <http://www.nytimes.com/2015/12/02/us/politics/as-obama-pushes-climate-deal-republicans-move-to-block-emissions-rules.html> (on file with the *Columbia Law Review*) (discussing Republican opposition to climate talks).

C. *Long Term: Regional and Bilateral Treaties and a Role for the U.N. Security Council*

This section explores a long-term role for the Displacement Coordination Facility. First, the UNFCCC's Facility should act as a clearinghouse for regional and bilateral agreements to address cross-border displacement. Second, the Facility should lay the groundwork for a potential expansion to a rights-based treaty if regional agreements do not develop quickly enough. Lastly, the UNFCCC's Coordination Facility could act in concert with the U.N. Security Council to serve as a stopgap and enforcement wing to protect the rights of displaced people.

1. *Long-Term Strategy: Binding Regional Agreements.* — In the long term, the UNFCCC should act as the primary umbrella organization under which regional and bilateral agreements between states are negotiated to address climate change displacement.²⁵⁸ Further, the UNFCCC could even establish a panel of member states to review and approve regional or bilateral agreements for the protection of those involved.²⁵⁹ Regional agreements provide the most flexibility for those displaced by climate change, including ways for them to retain their cultural identity,²⁶⁰ but the Facility must provide some additional assurance that a regional or bilateral agreement guarantees the rights of displaced migrants. The solution should be informed by current failures to protect the rights of displaced migrants. For instance, Australia has utilized the controversial practice of intercepting migrants coming into the country by boat and paying nearby countries to accept them into asylum camps.²⁶¹ The conditions at these camps have been widely

258. The closest anyone has come to supporting this type of proposition is Williams, *supra* note 64, at 517–20. Reflective of its time, Professor Angela Williams's article did not have the benefit of more recent developments, including discussions of a Coordination Facility, nor does she provide the detailed institutional framework contained herein. See *id.*

259. Admittedly, this proposal could introduce autonomy problems. Treaties represent a contractual relationship or a “consent to be bound” under international law. See Aust, *supra* note 84, at 87. Reviewing treaties *ex ante* is not especially consistent with this notion. Such a review process would prove appropriate in this unique context. The Coordination Facility would act as an overarching entity to oversee the rights of climate migrants, but a regional approach provides displaced people with autonomy and self-determination. An *ex ante* review provision would compromise between the two approaches and ensure that the individual rights of migrants are protected by regional or bilateral agreements.

260. See *supra* notes 232–234 and accompanying text (discussing the importance of self-determination and cultural identity for displaced peoples).

261. See Papua New Guinea: The Camps Where Australia Sends Asylum Seekers, BBC (June 12, 2015), <http://www.bbc.com/news/world-asia-33114230> [<http://perma.cc/LPM8-GD9J>] (“The migrants, who come from some of Asia’s poorest countries, are sent to Papua New Guinea in the Pacific where they live in a holding camp. There have been recent allegations of violence, and mistreatment.”).

criticized, supporting the notion that the Facility should play some role in protecting climate change migrants on the ground where necessary.²⁶²

The primary critique of this regional/bilateral approach is that it relies essentially on states to volunteer to accept entire large groups of climate change migrants. Admittedly, without an international treaty creating this obligation explicitly, as the 1951 Refugee Convention does, this approach assumes a lot.²⁶³ However, the benefits of autonomy and cultural integrity necessitate that the global community gives countries an opportunity, within a structured UNFCCC environment, to negotiate regional agreements. In addition to the benefits of a regional approach, the political environment likely would not support a top-down multilateral treaty like the 1951 Refugee Convention.²⁶⁴ Moreover, the Facility could lay the proper groundwork for a potential expansion. The Facility could study which areas are most suitable for large-scale migration and support regional and bilateral agreements before shifting toward a more difficult-to-negotiate rights-based agreement.

2. *Role for the U.N. Security Council.* — Finally, the U.N. Security Council could act either as a stopgap body to protect the rights of climate change migrants if agreements are slow or ineffectual or play a role in enforcing regional or bilateral agreements. Following an Article 39 determination that climate change displacement represents a threat to international peace and security,²⁶⁵ the Council could wield its substantial enforcement power under Chapter VII of the Charter. Chapter VII gives the Council the power to use, among other things, economic sanctions against a noncomplying party.²⁶⁶ The Council could act as the body of last resort for climate change migrants absent a protection regime, but this would likely run into substantial criticism from developing nations.²⁶⁷ Instead, a cooperative relationship between the Facility and the Security Council represents the optimal solution.

Given the weakness of the UNFCCC record on setting and enforcing binding emissions targets, some commenters have argued that the Security Council should actively enforce emissions targets set by a post-

262. This is commonplace for the UNHCR, which supports refugees covered by the 1951 Refugee Convention. See G.A. Res. 428(V), annex, supra note 108, ¶ 8 (discussing the role of the UNHCR).

263. See supra notes 80–95 and accompanying text (outlining the basic rights afforded to traditionally defined refugees).

264. See supra notes 253–257 (discussing U.S. politics with respect to a rights-based agreement). The U.S. political environment might be more receptive to a rights-based approach in the future, especially when the effects of climate change prove more acute.

265. U.N. Charter art. 39.

266. U.N. Charter art. 41.

267. Developing nations have voiced substantial resistance to the Council taking a leading role on climate change, see supra notes 124–125 and accompanying text, although this might change if the Security Council accepted a secondary role of an enforcement entity of last resort.

Kyoto agreement.²⁶⁸ This seems extremely unlikely, especially since the emissions targets set in Paris are nonbinding by their own terms.²⁶⁹ While some might question the relationship between climate change and security issues within the Council's purview, the vast majority of nations (including developing ones) have recognized the link between climate change and security issues.²⁷⁰ Further, forced migration as a result of climate change arguably presents a clearer threat to human security than climate change writ large does.²⁷¹ Perhaps the best argument against the involvement of the Security Council remains its antidemocratic nature, as the five permanent members retain veto power over all Council actions.²⁷² This cuts against the Security Council taking independent action but is arguably less problematic if the Council acts only in a supporting role for the UNFCCC when necessary.

The Council could also legally create a subsidiary body to act as an enforcement arm of the Coordination Facility. Delegation of authority to a subsidiary, however, remains complicated by the *delegatus non potest delegare* doctrine, which essentially holds that the Council may not delegate that which is central to its own authority and must retain the right to overrule the subsidiary.²⁷³ The theoretical advantage of a subsidiary lies in its ability to divorce an issue from the politics of the Council. But the fact that the Council must retain the ultimate authority to overrule the subsidiary substantially weakens this proposal. Alterna-

268. See, e.g., Conway, *supra* note 217, at 398–407 (discussing a possible role for the Security Council in improving compliance systems of UNFCCC on emissions targets); Voigt, *supra* note 217, at 303–06 (discussing the failure of the Kyoto Protocol, in both its design and compliance record).

269. See Paris Agreement, annex, *supra* note 18, art. 4 (using nonbinding language, such as “parties *aim to reach*” and “all parties *should* strive to formulate and communicate long-term low greenhouse gas emission development strategies” (emphasis added)); see also Michael B. Gerrard, Legal Implications of the Paris Agreement for Fossil Fuels, Sabin Ctr. for Climate Change L.: Climate L. Blog (Dec. 19, 2015), <http://blogs.law.columbia.edu/climatechange/2015/12/19/legal-implications-of-the-paris-agreement-for-fossil-fuels/#more-3936> [<http://perma.cc/26TU-BSAC>].

270. At the most recent Arria-Formula meeting, Brazil was the only participating country to deny the connection between climate change and security issues. See Warren & Utterback, *supra* note 124.

271. The current refugee crisis aptly demonstrates the threat to human security. See Nicholas Kristof, Opinion, Refugees Who Could Be Us, N.Y. Times (Sept. 4, 2015) <http://www.nytimes.com/2015/09/06/opinion/sunday/nicholas-kristof-refugees-who-could-be-us.html> (on file with the *Columbia Law Review*) (noting “horrific images” of the Syrian refugee crisis); see also Chirstine Gray, Climate Change and the Law on the Use of Force, in *International Law in the Era of Climate Change* 219, 221–29 (Rosemary Rayfuse & Shirley V. Scott eds., 2012) (discussing human security and the Security Council).

272. U.N. Charter art. 27.

273. While the Security Council may delegate discretionary decisions to a subsidiary body, the *delegatus non potest delegare* doctrine provides that the Council must retain the right to override the subsidiary's decisions after the fact. See Conway, *supra* note 217, at 400–07 (discussing a potential subsidiary body created to enforce emissions targets).

tively, the Coordination Facility could simply handle enforcement on its own terms but refer problematic cases to the Council.²⁷⁴

Finally, the Security Council could simply create its own climate migration requirements under an activist legislative role.²⁷⁵ Though this represents an option of last resort, especially in the wake of anti-democratic sentiments within the Security Council, it is legally possible. The Council could also take a softer course and initiate a study of the likely effects of climate migration based on the outcome of the 2015 Paris Conference,²⁷⁶ creating a cooperative relationship between the Security Council and the UNFCCC's own long-term studies.

CONCLUSION

The issue of climate change displacement is one of startling magnitude. It is also one that international law currently has no mechanism to address. This Note considers which existing body of the United Nations is best positioned to address the upcoming crisis, concluding that the newly proposed UNFCCC Climate Change Displacement Coordination Facility, perhaps in conjunction with the Security Council, is best positioned to address climate change migration.

274. See *id.* at 405–07 (advocating this approach in the emissions context).

275. The Council has taken a legislative role in two previous instances. See S.C. Res. 1540 (Apr. 28, 2004) (addressing nonproliferation of nuclear, chemical, and biological weapons); S.C. Res. 1373 (Sept. 28, 2001) (calling for international cooperation to combat terrorism following the September 11 attacks). Some scholars have criticized these moves by the Council. See generally Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 *Fordham Int’l L.J.* 542, 543–44 (2005) (discussing criticism of the Security Council and accusations that it acted as a “global legislator” in adopting Resolutions 1373 and 1540).

276. See Gerrard, *Security Council Statement*, *supra* note 7.