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Environmental Refugees? Rethinking What's in a Name

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Environmental Refugees? Rethinking What’s in a Name

Elizabeth Keyes†

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I. Introduction

The phrase “environmental refugee” summons a compelling image of someone forced to relocate due to climate change. The phrase has been used effectively to raise awareness of such diverse problems as the rising sea levels that are submerging some Pacific islands,¹ as well as the increased impact of natural disasters like hurricanes and earthquakes which cause a mixture of temporary and

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¹ See, e.g., Trevelyan Wing, *Submerging Paradise: Climate Change in the Pacific Islands*, CLIMATE INST. (Dec. 28, 2017), <http://climate.org/submerging-paradise-climate-change-in-the-pacific-islands/> [<https://perma.cc/Y674-QXHA>].

permanent migration.² As climate change accelerates, and its human costs become ever clearer, it is completely appropriate and necessary to respond to these migrations, and a number of international initiatives are underway to do so.

As these initiatives go forward, however, it will be increasingly important to be careful and precise about the phrase “environmental refugee.” First, as a legal term, the phrase is dubious. It implicitly harnesses the language, norms, and protections of the United Nations Convention Relating to the Status of Refugees (Refugee Convention),³ which fits only a small subset of climate change migrants. Second, at a time when the Refugee Convention itself is under enormous strain, the phrase, with its expansive umbrella of applicability, is also problematic from a policy standpoint. Regional refugee instruments are often broader than the Refugee Convention itself,⁴ but the Convention is the particular focus of this Article.

This Article begins with an assessment of the circumstances in which the word “refugee” is appropriate for climate change migrants and demonstrates that while the Convention can and will

² See generally, e.g., Sarah Opitz Stapleton et al., *Climate Change, Migration, and Displacement*, OVERSEAS DEV. INST. & U.N. DEV. PROGRAMME (Nov. 2017) (examining the links between human mobility and climate change).

³ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 62, 189 U.N.T.S. 150 [hereinafter 1967 Protocol].

⁴ For example, the African Union Refugee Convention (“AURC”) includes protection for those affected by “events seriously disturbing public order”—a broader framework than the individualized approach taken by the UN Refugee Convention. Cf. Refugee Convention, *supra* note 3, at art. 1(A)(2) (listing circumstances when an individual can be considered a refugee). A case study of Somali migration to Kenya shows how the AURC helped provide a framework for Kenya’s response. See Sanjula Weerasinghe (UNHCR Consultant), *In Harm’s Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change*, UNHCR DIVISION OF INT’L PROTECTION at 11 (Dec. 2018), <https://www.unhcr.org/5c1ba88d4.pdf> [<https://perma.cc/BX7M-GBY4>]. Likewise, the Cartagena Declaration encompasses “other circumstances which have seriously disturbed public order.” Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at <http://www.refworld.org/docid/3ae6b36ec.html> [<https://perma.cc/3T8B-8DXG>]. Mexico incorporated that broader definition into its domestic law, and the framework partly guided the country’s response to Haitian migration after the devastating 2010 earthquake. See Weerasinghe, *supra* note 4, at 66 (citing Ley de Migración [LM], No. 9.474, Diario Oficial de la Federación [DOF], 22-07-1997 (Mex.) (English translation available at: <https://www.refworld.org/pdfid/3f4dfb134.pdf>)).

cover individuals in some limited settings, it will be utterly inadequate to protect the broader range of populations needing to migrate. Having established these limitations, the Article then considers the costs of using the word in other contexts. Those costs include the diversion of resources into the project of expanding the Convention, through the slow and arduous work of developing new precedents and understandings to protect climate change. There is also a great risk of weakening the international system's support for the Convention itself as it stretches to address problems for which it was never designed. The Article ends with a justification for a complementary protection regime, and a brief examination of what such a regime might look like.

II. What's in a Name?

When we consider the impact of climate change on migration, it is clear that the impact spans a broad array of migration choices and realities. It encompasses voluntary and involuntary movement and migrations within and across borders.⁵ It includes the wealthy family selling frequently flooded property in South Carolina to move away from the coast, and the poor family who has to abandon land that is no longer arable in Niger and move to the capital in search of a livelihood. It includes people for whom the harms are in the distant future, and those for whom climate change has already destroyed their communities or livelihoods.

Global migration scholar Susan Martin has written a comprehensive study of the migration trends related to climate change and has laid out existing and inchoate policy responses to the same in her 2017 *Environmental Change and Human Mobility: Trends, Law and Policy*.⁶ In it, Professor Martin creates a helpful typology that looks at migration, displacement, and planned relocation as distinct phenomena, each of which needs a specific set of international policy responses.⁷ Within migration, she considers various drivers: (1) long-term trends like drought (where the land is so degraded it ceases to be livable) and rising sea levels (where the

⁵ See Stapleton, *supra* note 2, at 6 (defining terminology related to migration within the climate change context).

⁶ Susan Martin, *Environmental Change and Human Mobility: Trends, Law and Policy*, 42 COMP. POPULATION STUDIES 187 (2017).

⁷ *Id.* at 189.

land ceases to be available at all);⁸ (2) more frequent and intense natural disasters, which might lead to both temporary and permanent decisions to migrate;⁹ and (3) political upheavals connected to the environment.¹⁰

Each of these drivers merits careful inquiry as we consider whether and how climate change migrants might be considered refugees. The Convention definition of a refugee requires not just that people face severe harm, but that the harm is happening *because* of a protected characteristic: race, religion, nationality, political opinion, or membership in a particular social group.¹¹ This nexus between the harm and the protected characteristic is where a casual use of the term “environmental refugee” reveals its imprecision. As Professor Ramji-Nogales has noted (in discussing the binary between “economic migrants” and “asylum-seekers”), “[t]here are many compelling drivers of migration that do not fall within the narrow international legal definition of a refugee.”¹² I have previously written about such non-binary migrants as being “unconventional” refugees and argued, as I will here, that it is better to find legal protections and policy solutions that fit these new situations instead of trying to stretch an already stressed Convention to a breaking point.¹³

⁸ *Id.* at 191.

⁹ *Id.* at 195–96.

¹⁰ *Id.* at 196–202.

¹¹ Refugee Convention, *supra* note 3, at art. 1(A)(2). Convention drafters intended that this definition be quite narrow: the narrow availability of asylum was by design. *See* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 145 (1990). The states drafting the convention needed to balance protection with pressures for restriction. *Id.* As James Hathaway writes:

The subjectivity of the refugee definition has provided a means of legitimating this restrictionist tendency: the strong political and economic links that exist between the West and many Third World states of origin have led to a predisposition to question the likelihood that those states could reasonably be expected to engage in persecutory behavior. . . . As a result, the persecution-based standard now poses a major political impediment to the recognition of large numbers of refugee claims, humanitarian or human rights concerns notwithstanding.

Id. at 169–70.

¹² Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 611 (2017).

¹³ *See generally* Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89 (2017) (arguing that improving conditions in home countries could be part of a long-term strategy towards root causes while a temporary protection regime might be a short-term and inadequate solution).

Consider the first driver: long-term environmental trends. When the Pacific Ocean finally submerges the island of Kirabati,¹⁴ we can imagine its last residents in boats literally seeking a safe shore, with incalculable harm done to their well-being in every respect. But who is the agent persecuting the people of Kirabati? Under the Refugee Convention, it needs to be either the government itself, or a private entity the government is unable or unwilling to control.¹⁵ Neither applies to the Kirabati situation, where the government itself is a victim of a crime for whom culpability is highly indirect and attributable to a broad swath of nation-states and corporations.¹⁶ Even if we posit that those nation-states and corporations constitute entities that the Kirabati government is unable to control,¹⁷ those entities are not motivated to harm the people of Kirabati because of their nationality, race, or other protected characteristics. Indeed, a piece of the harm done to Kirabati is the sheer lack of consideration it is not motivated by hatred but by cruel indifference.

By contrast, the third-driver, political upheaval, offers more obvious possibilities for application of the Convention. Martin writes that:

Competition over natural resources may exacerbate pressures contributing to conflict, which in turn precipitates movements of people. Prolonged drought appears to have exacerbated tensions in Syria, contributing to the 2011 demonstrations against the Assad regime, which in turn led to the protracted conflict that has displaced millions of people.¹⁸

Similarly, scholars of the Rwandan genocide have noted how environmental pressure contributed to the population's susceptibility to anti-Tutsi propaganda,¹⁹ leading to persecution on

¹⁴ See, e.g., Mike Ives, *A Remote Pacific Nation, Threatened by Rising Seas*, N.Y. TIMES (July 2, 2016), <https://www.nytimes.com/2016/07/03/world/asia/climate-change-kirabati.html> [<https://perma.cc/3P5F-PD5W>].

¹⁵ Refugee Convention, *supra* note 3, at art. 1(A)(2).

¹⁶ See Ives, *supra* note 14.

¹⁷ *Id.*

¹⁸ Martin, *supra* note 6, at 191 (internal citations omitted).

¹⁹ William B. Wood, *Geographic Aspects of Genocide: A Comparison of Bosnia and Rwanda*, 26 TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHERS 57, 64 (2001) ("In an impoverished 'ethnocratic' state like Rwanda, 'ethnicity is also the ruling principle of

account of race—persecution that fit within the Refugee Convention.²⁰ Drought in the Darfur region of Sudan likewise created intense competition for resources that led to the deaths of countless Sudanese Christians on account of an interrelated mix of political opinions, religion, and race.²¹ These latter examples tie climate change more closely to harms traditionally understood to fall within the ambit of the Refugee Convention if not quite directly.

In between these two examples are subtler situations. Thinking again about Kiribati, while the entire island will be lost in the long-term,²² in the immediate future, the costs of climate change are born unevenly across the population. Unsurprisingly, the costs are born by the more economically vulnerable members of the population across the world. From Kirabati to New Orleans, poorer communities live most immediately with environmental destruction or on land at greatest risk for natural disasters.²³

These diverging examples show the necessity of fine-tuning how and when we believe that the Refugee Convention can apply to climate-driven migration. This Article will offer perspectives on how and when the Convention might apply, even to migration driven by long-term trends. There is an obvious importance to ensuring that some number of climate-change migrants benefit from Convention protection when such protection is legally appropriate. After detailing that appropriateness, the Article turns briefly to the issue of how an overbroad misuse of the word “refugee” may hurt the protection scheme overall. Finally, the Article considers the alternatives to the Refugee Convention framework for addressing

economic and social differentiation’, with ethnic groups then forced to ‘confront each other in the process of competition for material and social resources’”) (quoting J. Markakis, *Ethnic Conflict and the State in the Horn of Africa*, in *ETHNICITY AND CONFLICT IN THE HORN OF AFRICA* 217, 236 (1993)).

²⁰ *See id.*

²¹ *See* Julian Borger, *Darfur Conflict Heralds Era of Wars Triggered by Climate Change*, *U.N. Report Warns*, *GUARDIAN* (June 23, 2007), <https://www.theguardian.com/environment/2007/jun/23/sudan.climatechange> [<https://perma.cc/P47Z-TYFU>].

²² *See* Ben Doherty, ‘*Our Country Will Vanish*’: *Pacific Islanders Bring Desperate Message to Australia*, *GUARDIAN* (May 13, 2017), <https://www.theguardian.com/world/2017/may/14/our-country-will-vanish-pacific-islanders-bring-desperate-message-to-australia> [<https://perma.cc/VBQ6-6YNV>].

²³ *See* Suzanne Goldenberg, *Climate Change: The Poor Will Suffer Most*, *GUARDIAN* (Mar. 30, 2014), <https://www.theguardian.com/environment/2014/mar/31/climate-change-poor-suffer-most-un-report> [<https://perma.cc/G5Q7-NAH8>].

climate-related forced migration.

III. Identifying Climate-Change Refugees

The Refugee Convention will be insufficient to meet the migration needs of all climate-change migrants, but it would be an oversimplification to dismiss the Convention and its possibilities out of hand. As Sanjula Weerasinghe notes in an important UNHCR study of state responses to disaster and climate change,

Sometimes, popular perceptions and narratives on the ‘causes’ prompting flight may lead to the disregard of refugee law frameworks. This may be more likely when prominent or proximate triggers relate to root causes, which are not regarded as traditional causes of refugee flight. In this context, ensuring refugee law frameworks remain within a ‘toolbox’ of responses to address cross-border movement in the context of nexus dynamics may be a key policy challenge.²⁴

In this section, I will look at a few of the interlocking pieces of the refugee definition²⁵ to see whether and how climate change migrants can benefit from the Convention’s protections. As the final section of this Article will contend, we must look beyond the Convention for protection that will meet the broad demands of climate-change migration, but it is clear that in some specific subset of circumstances, the Convention *will* be an important tool.

A. Persecution: Direct Environmental Harm and Indirect Other Forms of Harm

To merit Convention protection, the harm an individual is fleeing must constitute “persecution.”²⁶ As the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”)²⁷ notes, “[t]here is no universally accepted

²⁴ Weerasinghe, *supra* note 4, at 11.

²⁵ See Refugee Convention, *supra* note 3, at 14.

²⁶ UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/4/Eng/Rev.1 ¶ 36 (Jan. 1992) [hereinafter UNHCR HANDBOOK].

²⁷ *Id.* at ¶ 51.

definition of ‘persecution.’”²⁸ Persecution encompasses threats to life or freedom, and has been found in such harms as rape, beatings, attempted murder, and threats of these things, among many other serious harms.²⁹ Persecution is also inextricably linked to the motivation for the actions. Some acts that may be persecution in one context might not be in another, specifically where those actions are not motivated by animus or—in language that has evolved through U.S. case law—a desire to overcome a characteristic deemed “offensive.”³⁰

Highly relevant to climate-change refugees is whether and when *discrimination* fits under the umbrella of persecution. The *UNHCR Handbook* states, “[w]here measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity *as regards his future existence*.”³¹ Government actions and inactions on climate often affect different sub-groups of the country differently and are classic examples of discrimination; such discrimination might rise to the level of persecution if it means members of those sub-groups are reasonably fearful for their future existence.³²

The critical piece for whether such fears constitutes persecution is whether there is an intentionality to the government’s actions or inactions.³³ As Professor Gaim Kibraeb states, “[t]he only time environmentally-induced displacees may be regarded as ‘refugees’ is when the state uses environment as an instrument of political oppression. This requirement exists because at the heart of the notion of persecution lies state failure to provide protection.”³⁴ Even within this concept of protection, there is a spectrum of governmental culpability. At one end of the spectrum, we can

²⁸ *Id.*

²⁹ Jose H. Fischel De Andrade, *On the Development of the Concept of ‘Persecution’ in International Refugee Law*, 2 III ANUARIO BRASILEIRO DE DIREITO INTERNACIONAL 114, 127–28.

³⁰ See *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 647 (9th Cir. 1997).

³¹ UNHCR HANDBOOK, *supra* note 26, at ¶ 55 (emphasis added).

³² See Gaim Kibraeb, *Climate Change and Human Migration: A Tenuous Relationship?*, 20 FORDHAM ENVTL. L. REV. 357, 393 (2009).

³³ See *id.* at 385.

³⁴ *Id.*

imagine a country where the government forces certain sub-groups to bear the brunt of the environmental harm (leaving them in low-lying, flood-prone areas while other groups are moved to higher ground).³⁵ Such discrimination lies at the heart of a refugee claim from Kiribati, which failed on other grounds.³⁶ It is also a cousin to the kind of discrimination that we see throughout the United States, from Hurricane Katrina, where structural racism led to a highly disparate impact on New Orleans' African-American community,³⁷ to the shores of Alaska where Native Alaskans are struggling with little support from the government to save their communities.³⁸ At the other end of the spectrum might be a country like Tuvalu, where the whole population faces a similar risk, caused by distant forces and not by the government itself.³⁹

Much environmental harm is not a villain-less phenomenon. As Geographer William Wood has written,

Forced ecomigration may be defined as a type of migration that is propelled by economic decline and environmental degradation. Groups unable to sustain themselves at a minimal level face a

³⁵ See Shabnam Dastgheib, *Kiribati Climate Change Refugee Told He Must Leave New Zealand*, GUARDIAN (Sept. 22, 2015), <https://www.theguardian.com/environment/2015/sep/22/kiribati-climate-change-refugee-told-he-must-leave-new-zealand> [<https://perma.cc/WQH8-E2PX>].

³⁶ See *id.*

³⁷ See Kibreab, *supra* note 32, at 390 (highlighting the temporary displacement of over a million people after Hurricane Katrina devastated the Gulf Coast in August 2005).

³⁸ See FACING THE STORM: INDIAN TRIBES, CLIMATE-INDUCED WEATHER EXTREMES, AND THE FUTURE FOR INDIAN COUNTRY, CONFRONTING GLOBAL WARMING REPORT 19 (Nat'l Wildlife Fed'n ed., 2011) ("Compared to state and local governments, Tribes receive much less federal funding and other resources to deal with these [environmental] issues. Within federal funding streams, Tribes are either expressly excluded, not mentioned at all, or are ineligible for other reasons, leaving a gap that they are unable to fill. When the federal government does allocate funding to Tribes, it is often a very small percentage compared to funds allocated to other entities.").

³⁹ Leslie Allen, *Will Tuvalu Disappear under the Sea?*, SMITHSONIAN MAG. (Aug. 2004), <https://www.smithsonianmag.com/science-nature/will-tuvalu-disappear-beneath-the-sea-180940704/> [<https://perma.cc/CK3C-DS35>] ("Unlike other current or predicted environmental catastrophes, Tuvalu's problem is one that people worldwide are believed to create by burning fossil fuels that release carbon dioxide into the atmosphere, contributing to global warming. In that sense, my habit of leaving lights on around my house, in Washington, D.C., a neighbor's of constantly driving his large SUV to go just a few city blocks and another neighbor's preference for a toasty house in winter would play a role in Tuvalu's fate.").

crisis that is both ecological and economic. Forced ecomigrations result when those conditions become immediately life-threatening . . . *inequitable access to arable land is as much a social problem as an environmental one.*⁴⁰

Extreme environmental harms that threaten the existence of sub-groups of a nation could constitute persecution when the government's policies are explicitly directed at and against those sub-groups. As Professor Kibraeb writes,

This sub-category [of true 'environmental refugees'] includes people who are victimized by an explicit 'ecocidal' policies or activities of oppressive regimes. The Marsh Arabs in southern Iraq or refugees whose repatriation opportunities are stifled by the littering of their homelands with landmines or destruction of infrastructure by combatants or government forces The question to ask however is why the Marsh Arabs of Southern Iraq cannot be considered political refugees rather than 'environmental refugees.'⁴¹

I contend that this understanding of persecution is both too broad and too narrow. It is too broad because it encapsulates "state failure to provide protection"⁴² that might not be motivated by any impermissible animus. In Haiti, for example, deforestation has made much of the land unlivable, but the government's failure to offer protection against these environmental harms appears not to be linked to ethnic or political animus, and extends generally across the population.⁴³ While the devastation might be comparable to that

⁴⁰ William B. Wood, *Forced Migration: Local Conflicts and International Dilemmas*, 84 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 607, 617–18 (1994) (citation omitted) (emphasis added).

⁴¹ Kibraeb, *supra* note 32, at 386. Hussein drained the land that was home to the Marsh Arab Shia population under the pretext of "an agricultural improvement plan which [would] benefit the people of the region." Michael Wood, *Saddam Drains the Life of the Marsh Arabs of Southern Iraq*, INDEP. (Aug. 28, 1993), <https://www.independent.co.uk/news/world/saddam-drains-the-life-of-the-marsh-arabs-the-arabs-of-southern-iraq-cannot-endure-their-villages-1463823.html> [https://perma.cc/AP5Z-AYDB].

⁴² *Id.* at 385.

⁴³ William B. Wood, *Ecomigration: Linkages Between Environmental Change and Migration*, in GLOBAL MIGRANTS GLOBAL REFUGEES: PROBLEMS & SOLUTIONS 42, 55 (Aristide R. Zolberg & Peter M. Benda eds., 2001) ("Haiti's alarming levels of land

resulting from intentional ecocidal policies,⁴⁴ the lack of persecutory motivation removes it from the ambit of the Convention's protections.

However, the understanding is also too narrow. As we consider how these sub-groups might adapt to climate change through (perhaps as a first effort) internal migration, we can unfortunately envision other forms of harm resulting from the vulnerabilities inherent to being forced internal migrants: women and sexual minorities settling in urban areas where they face intensified risks of gender-based violence,⁴⁵ or children sent to earn a living in an urban area where they face the predations of organized crime.⁴⁶ In these scenarios, the persecution is not directly related to climate change itself, but climate change creates the migrations which lead to new vulnerabilities to persecution.⁴⁷

B. Protected Characteristics and Nexus

A second set of issues arises when we consider what protected characteristics might be at stake. The Convention requires that persecution be on account of one of five protected characteristics: race, religion, political opinion, nationality, or membership in a

degradation, exacerbated by decades of misguided agrarian policies, is intertwined with desperate living conditions in rural areas and is a major factor in rural to urban migration and even emigration from Haiti's shores. (Catanese 1990-91). Haiti's over six million people have endured successive generations of intensifying poverty, soil erosion, deforestation, and shrinking average farm sizes, leaving many peasant families unable to meet bare subsistence levels.”).

⁴⁴ Kibreab, *supra* note 32, at 385.

⁴⁵ See U.N. High Comm'r for Refugees (UNHCR), Guidelines on Int'l Prot.: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 3, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR Guidelines] (“Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.”).

⁴⁶ UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Crime, ¶ 7 (Mar. 31, 2010) (“Some gangs, such as the Maras, rely heavily on forced recruitment to expand and maintain their membership. They typically recruit young people who are poor, homeless and from marginalized segments of society or particular neighborhoods.”).

⁴⁷ See UNHCR, Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention & Response, at 111 (May 2003) (noting that even “[a]dopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status”).

particular social group.⁴⁸ While it is difficult to disaggregate a protected characteristic from the element of nexus, the following sections briefly attempt this to show that protected characteristics *are* likely to be found in climate change migration, but that nexus is a harder element to meet.

1. *Where the Case Is Easily Made: Political Opinion*

It is evident in many migrations forced by climate-change that different protected characteristics are or could be implicated. Briefly, climate change will likely give rise to new political groups and dynamics and, therefore, to political opinions opposed to the direct and indirect government policies and actions on climate-change. For example, someone might oppose a government that refused to take any adaptive actions, or one that took actions whose costs were borne disproportionately by one or more sub-groups of the population. Additionally, a new party might arise with a climate-change focus, and its members be perceived as threatening to the ruling party.

In these ways, climate change does not differ at all from political opinion claims that arise from a host of other issues already seen as cognizable under the Convention.⁴⁹ An activist or party member motivated by a climate-change issue, who fears persecutory retaliation from the government *because of* their political opinions, presents a straightforward application of the Refugee Convention.⁵⁰

⁴⁸ Refugee Convention, *supra* note 3, at art. 1(A)(2) (“As a result of events occurring before 1 January 1951 and owing to 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, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

⁴⁹ See UNHCR HANDBOOK, *supra* note 26, at ¶ 75 (“The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of persecution or danger of persecution. It may not *always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion* when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific ‘nationality.’”) (emphasis added).

⁵⁰ See *id.* ¶ 66 (“In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons [race, religion, nationality, membership of a particular group or *political opinion*] stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It

2. *Where the Case is More Attenuated: Race and Membership in a Particular Social Group*

Other protected grounds raise interesting possibilities, but may encounter a nexus problem when trying to fit under the Convention. We can imagine, for example, racial sub-groups being harmed in particular and uneven ways by climate change. Likewise, particular social groups—including such groups as women—may endure special kinds of harms, distinct from the general population.

Claims based upon membership in a particular social group will confront the necessity that any such group be centered on an innate or immutable characteristic, and that the group not be defined by the harm itself.⁵¹ As we consider sub-populations affected by climate change, we can imagine a strong social identity building among those most affected—but a group defined by that affinity is defined by the very harm the group fears.⁵² Likewise, communities in low-lying areas or increasingly arid areas may not be centered on an immutable characteristic as property ownership and economic circumstances are often (perhaps incorrectly, but jurisprudentially) considered changeable: people can sell land and move, and people's economic fortunes can rise and fall.⁵³ There will certainly be ways to formulate particular social groups that do meet the Convention's requirements; if climate change affects women more than men, then

is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.”).

⁵¹ *See id.* ¶ 77 (explaining that refugee status based on a particular social group “normally comprises persons of a similar background, habits, or social status” and therefore is centered on an innate or immutable characteristic).

⁵² *See* UNHCR, *The Environment & Climate Change: The Nansen Initiative – A ‘Protection Agenda’ For Cross-Border Disaster Displacement*, ¶ 2.2 (Oct. 2015) (“Those who cross borders in the context of climate change and disasters would not normally qualify as refugees under the 1951 Convention relating to the Status of Refugees. The 1951 Refugee Convention speaks in terms of ‘a well-founded fear of persecution’ on the basis of five grounds: race, religion, nationality, membership of a particular social group or political opinion. Therefore, the Convention does not normally apply to the situation of persons displaced across borders by disasters and climate change and there are at present no widely accepted principles or rules governing their entry and stay in another country.”).

⁵³ Well beyond the scope of this Article, this notion of economic mobility deserves to be challenged within the refugee framework, as in some societies economic mobility is illusory at best, and there is an overwhelming likelihood of people who are born into poverty remaining in poverty. *See* Clionadh Raleigh, *Assessing the Impact of Climate Change on Migration and Conflict* 38 (Social Dev. Dep’t, The World Bank Grp., Working Paper) (highlighting that “both internal and international migration is an initial economic strain on rural families” suggesting the financial difficulty in migration).

the particular social group of “women” would be sufficient (without considering the nexus requirement, to which the essay turns momentarily).⁵⁴ The point here is to realize that the social affinity of facing this challenge collectively in some sub-group of a nation’s population will not be enough.

Once a protected characteristic is identified, a separate issue then arises: nexus, or the need to prove that the feared harm would happen *because of* that protected characteristic.⁵⁵ This will be possible in certain contexts where government policies explicitly target communities or groups. Examples include if one ethnicity is forbidden to leave unusable land (like the Bantustan policies in apartheid-era South Africa),⁵⁶ or if fiscal resources for adaptation deliberately exclude portions of the population because of their political opinions, race, or other protected characteristic.⁵⁷ The New Zealand Supreme Court, while denying a particular applicant’s refugee claim, left that possibility open:

[W]e note that both the Tribunal and the High Court, emphasized their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case *should not be taken as ruling out that possibility in an appropriate case.*⁵⁸

⁵⁴ See Chaloka Beyani, *The Needs of Refugee Women: A Human-Rights Perspective*, 3 GENDER & DEV. 29, 31 (1995) (“It is well known that the definition of refugees contained in the 1951 Convention Relating to the Status of Refugees omits the category of sex as a ground upon which refugee status may be determined. As a consequence of this omission, the claim of women to be protected from persecution on the basis of their sex or gender cannot be adequately addressed within the framework of the Convention, which is the main instrument governing the protection of refugees in international law.”).

⁵⁵ See *Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010); 8 U.S.C. § 1158 (b)(1)(B)(i) (2012).

⁵⁶ Omar Sattaur, *How Apartheid is Destroying South Africa’s Environment*, NEW SCIENTIST (May 12, 1990), <https://www.newscientist.com/article/mg12617160-700-how-apartheid-is-destroying-south-africas-environment/> [<https://perma.cc/PH56-E4DE>] (“The Bantustans were fragile initially with thin topsoil, scarce rainfall and sloping, rocky ground. Now, politically enforced overpopulation, labour scarcity and poverty have made many of the homelands look more like lunar landscapes than rural communities[.]”).

⁵⁷ *Teitiota v. Chief Executive Ministry of Business, Innovation & Emp.* [2015] NZSC 107, at 13 (N.Z.).

⁵⁸ *Id.*

Another New Zealand Tribunal acknowledged in the AF case that nexus could be possible, but denied a claim because of insufficient facts in the particular case:

While there is no presumption of non-applicability [of Refugee Protection to the climate-change context], no special rules exist either. It is indubitably correct that natural disasters and environmental degradation can involve significant human rights issues. Nevertheless . . . the claimant must still establish that they meet the legal criteria set out in Article 1A(2) of the Refugee Convention (or, for that matter, the relevant legal standards in the protected person jurisdiction). This involves an assessment not simply of whether there has been breach of a human right in the past, but the assessment of a future risk of being persecuted. In the New Zealand context, the claimant's predicament must establish a real chance of a sustained or systemic violation of a core human right demonstrative of a failure of state protection *which has sufficient nexus to a Convention ground*.⁵⁹

Thus, future cases *may* provide sufficient factual bases between harms feared and a protected ground under the Refugee Convention, but they will need to be determined on an individualized basis, like the vast majority of refugee claims.⁶⁰

And what of policies or harms that are more indirect? To take one example, it is beyond reasonable dispute that structural racism explains why African-Americans were more vulnerable to Hurricane Katrina's impacts than any other group in New Orleans.⁶¹ As a theoretical matter, a strong case can be made that the suffering that group endured was on account of race. But the complex factors underpinning the reasons why African-Americans overwhelmingly

⁵⁹ AF (Kiribati) [2013] NZIPT 800413, at 65 (N.Z.).

⁶⁰ UNHCR, *Summary of Deliberations on Climate Change and Displacement*, ¶ 8, (2011), available at <https://www.unhcr.org/4da2b5e19.pdf> [<https://perma.cc/N286-P7ZY>] (“[I]t is clear that the 1951 Convention may apply in specific situations, for instance, where ‘victims of natural disasters flee because their government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of five [Convention] grounds.’”).

⁶¹ See Reilly Morse, *Environmental Justice Through the Eye of Hurricane Katrina*, JOINT CENTER FOR POL. AND ECON. STUD. HEALTH POL'Y INST. (2008) (discussing how in New Orleans, “historical patterns of environmental racism” contributed to the disproportionate impact that Hurricane Katrina had on African-Americans).

lived in flood-prone low-lying areas may be too diffuse and indirect to gain actual protection under the Refugee Convention with its focus on the risks individuals, not communities, face.⁶² Likewise, if we found that women suffered far more harm than men in a given country because they had fewer possibilities of relocating internally (from cultural norms to issues surrounding land-title), would that be persecution on account of membership in the particular social group of women? Theoretically, yes, but without a specific action directed at women *because* they are women, it would be extremely difficult for such women to qualify for asylum were they to flee their countries.⁶³

Asylum law would need to move toward something like the disparate impact doctrine in U.S. civil rights law, where there is liability even in cases where the discrimination or animus is concealed.⁶⁴ As of now, the doctrine is more analogous to the intentional discrimination doctrine, where evidence of intent is required.⁶⁵ The previously discussed AF Tribunal decision emphasized the necessity of such an individualized showing by holding that the appellant's facts did not link the climate degradation of Kiribati to a particular risk of persecution he personally faced.⁶⁶ The Tribunal noted that conflicts related to environmental degradation exist in Kiribati, but stated that in this instance, "the appellant himself had not been subjected to any such dispute in the past and is not involved in any land dispute."⁶⁷

3. *The Impossible Cases: Where No Protected Ground Is Claimed*

Some claims for refugee protection have been brought where the harm is to an entire population, not to a protected sub-group within

⁶² See Refugee Convention, *supra* note 3.

⁶³ See UNHCR Guidelines, *supra* note 45, at ¶ 14.

⁶⁴ *Antonelli v. N.J.*, 419 F.3d 267, 274 (3d Cir. 2005) ("Intentional discrimination can be shown when: (1) a law or policy explicitly classifies citizens on the basis of race; (2) a facially neutral law or policy is applied differently on the basis of race; or (3) a facially neutral law or policy that is applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact.") (citations omitted).

⁶⁵ See *Doe ex. rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 543 (3d Cir. 2011) (holding that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

⁶⁶ See AF (Kiribati) [2013] NZIPT 800413, at 72 (N.Z.).

⁶⁷ *Id.*

the population; however, those claims have failed.⁶⁸ In claims heard in New Zealand, migrants from Kirabati's neighbor, Tuvalu, asserted that "[e]xposure to the sea along the coastline makes land erosion a serious problem and the country suffers from rising sea levels, storms and king tides. They believe that life will no longer be sustainable on Tuvalu because of rising sea levels."⁶⁹ While finding that the Tuvalu appellant would suffer harm in Tuvalu, the Court held that "there is no basis for finding that any harm they do face as a result of the adverse impacts of climate change *has any nexus whatsoever* to any one of the five Convention grounds."⁷⁰ For nations where the entire population is equally harmed by climate change, the Refugee Convention will simply be the wrong mechanism for seeking refuge.⁷¹ This assessment might differ in a region like Africa or Latin America that has embraced a broader definition of refugee⁷²—but under the Refugee Convention itself, claims that do not fit within the five protected categories simply do not fall within the Convention's protections.

IV. Why Precision Matters

With application of any convention, statute, or regulation to an individual case, precision and care clearly matter, and the Refugee Convention is no different. But in the turbulent international and domestic contexts of the early-to-mid 21st century, precision matters to the enduring power and availability of the Convention itself.

There is no question that the Refugee Convention and its core obligation of *nonrefoulement* are under tremendous pressure and, often, under attack.⁷³ As racist "nationalist" movements move from

⁶⁸ *See id.*

⁶⁹ Gill Bonnet, *Climate change refugee cases rejected*, RADIO N.Z. (Oct. 24, 2017), <https://www.radionz.co.nz/news/national/342280/climate-change-refugee-cases-rejected> [<https://perma.cc/5AZR-68PD>].

⁷⁰ *Id.* (emphasis added).

⁷¹ *See id.*

⁷² *See* UNHCR, Expert roundtable Interpretation of the extended refugee definition contained in the 1984 Cartagena Declaration on Refugees, Part B, (July 7, 2014) [hereinafter UNHCR, Expert roundtable interpretation] (expanding the definition of refugee to include "persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order").

⁷³ Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CHI. J. INT'L L. 81, 86 (2015) ("The Refugee

the political fringes to the political mainstream from the United States to Germany and beyond, anti-refugee rhetoric has provided a reliable source of political power and mobilization.⁷⁴ Donald Trump came to power in the United States in part by stoking the fears of an immigrant invasion; his attacks on asylum-seekers in particular have been constant and go beyond rhetoric to actual policies dismantling the Convention's applicability.⁷⁵ Angela Merkel's relative generosity toward Syrian refugees weakened her politically and led to the rise of far-right Alternative for Germany.⁷⁶ Anti-asylum fervor has stoked racist political movements in countries from Austria to Sweden, from France to Poland.⁷⁷

In such a context, where even the relatively narrow existing framework is under intense stress, using the word "refugee" to encompass all climate-change migrants feeds the dangerous perception that the world can no longer afford the Refugee Convention. That the numbers seeking its protections are simply too big. In the face of problems that seem overwhelming, too many countries have the capacity to simply retreat from handling those problems. In the United Kingdom, fears of being submerged by migrants played heavily in the referendum to withdraw from the European Union; the issue was never framed as straying from the Refugee Convention, but rather limiting the United Kingdom's exposure to its obligations by making it more difficult for possible asylum-seekers to arrive in the first place.⁷⁸ Likewise, in the United States, nominal claims of commitment to the Convention co-exist with strenuous deterrent measures to limit the United States'

Convention has spent much of its adult life under attack in both developed and developing countries.").

⁷⁴ See generally Elaina Marie Taylor, *The Effects of Political Rhetoric on Refugee Policy and Communities in the United States and Germany*, EL RIO: A STUDENT RES. J. 50–51 (2018) (analyzing the United States and Germany's changes in refugee policy and refugee political rhetoric over the last decade).

⁷⁵ See *id.* at 51–53.

⁷⁶ *Id.* at 53–54.

⁷⁷ See Daniel McLaughlin, *Poles and Czechs Follow Austria and Hungary in Rejecting UN Migration Pact*, THE IRISH TIMES (Nov. 2, 2018), <https://www.irishtimes.com/news/world/europe/poles-and-czechs-follow-austria-and-hungary-in-rejecting-un-migration-pact-1.3684210> [<https://perma.cc/MN4T-RX56>].

⁷⁸ See Alan Travis, *On Asylum and Refugees, Britain Left Europe Years Ago*, GUARDIAN (Mar. 1, 2017), <https://www.theguardian.com/uk-news/2017/mar/01/how-britain-hard-stance-refugees-reshaping-european-policy> [<https://perma.cc/F4VA-Q38K>].

obligations.⁷⁹ The United States has made entry extremely difficult, adding tremendous costs (from criminal prosecution to family separation) during the screening process and making the interior less welcoming as well.⁸⁰ The United States can thus limit the Convention while conceding its continued existence.

There is much to critique in deterrent strategies—from their questionable legality to their misreading of the enduring power of the reasons people flee their countries for safety elsewhere. And yet, when we contemplate the subset of climate-change migrants fleeing because of the literal unavailability of land, it should be clear, even to those who favor deterrence currently, that such a strategy has no bearing on these future migrants.⁸¹ People may be deterred from seeking entry into the United States specifically, but deterring them from leaving their home countries is clearly impossible as those countries degrade and, in extreme cases, disappear.⁸² If deterrence is impossible, but migrants and advocates believe they may seek Convention protections, states' willingness to abide by the Convention—even in its current weakened state—may disappear entirely.⁸³

⁷⁹ See *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL (Sept. 17, 2018), <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy> [<https://perma.cc/QE3Y-HZ9N>] (“The prospects for refugees hoping to resettle in the United States changed abruptly in 2017 [T]he Trump administration suspended indefinitely the entry of Syrian refugees into the country and lowered the FY 2017 refugee admissions ceiling from 110,000 (set under the Obama administration) to 50,000.”).

⁸⁰ See generally SARAH PIERCE, JESSICA BOLTER, & ANDREW SELEE, *TRUMP’S FIRST YEAR ON IMMIGRATION POLICY: RHETORIC VS. REALITY I* (Migration Policy Inst. ed., 2018) (“The most significant changes to date are the increase and broadening of immigration enforcement priorities, the elimination of temporary protections for noncitizens implemented by prior administrations, and the reduction in refugee admissions.”).

⁸¹ See EMILY WILKINSON, AMY KIRBYSHIRE, LEIGH MAYHEW, PANDORA BATRA & ANDREA MILAN, *CLIMATE-INDUCED MIGRATION AND DISPLACEMENT: CLOSING THE POLICY GAP 3* (Overseas Dev. Inst. ed., 2016) (explaining that forced migrants are those who need to leave their homes to avoid severe deterioration in habitat and resources . . . [t]hese people may be unable to return due to the physical loss of land, or may need to alter livelihood practices or other aspects of living in order to return.”).

⁸² See *id.*

⁸³ See Jane McAdam, *Seven Reasons the UN Refugee Convention Should Not Include ‘Climate Refugees,’* PLATFORM ON DISASTER DISPLACEMENT (June 7, 2017), <https://disasterdisplacement.org/staff-member/seven-reasons-the-un-refugee-convention-should-not-include-climate-refugees> [<https://perma.cc/TK6T-GWGP>] (“Fifth, there is little political appetite at the moment to expand the Refugee Convention. Opening it up for renegotiation would most likely result in a far weaker protection framework, with less

The Convention matters. Its protections are critical. But we should not ask it to encompass migrants whose profiles do not fit within its parameters. Doing so may result in weakening protections for even those who fit under its protections as currently defined, an outcome that must be avoided. As UNHCR Consultant Weerasinghe writes, “[r]efugee law frameworks may form part of a ‘toolbox’ of options, when multiple frameworks are available to provide international protection. When only one framework (refugee, migration, other) is operational, the potential to tailor appropriate and differentiated international protection responses is constrained.”⁸⁴ The Convention has a vital place in international law, but we need other legal frameworks that fit climate change migration specifically, so that we can ensure the long-term survival of the Convention. The next section turns to these ideas.

V. Unconventional Refugees: When Precision Is Not Enough

*“We can park our chair on the beach as often as we please, and cry at the oncoming waves, but the tide will not listen, nor the sea retreat.”*⁸⁵

This Article has so far issued a call to not overly rely on a refugee convention whose contours are only *sometimes* applicable to climate-change migration, and to find those moments where people do fit within its protections. I have recognized that calling climate-change migrants “refugees” has dangerous unintended consequences and usurps tremendous energy in trying to shoehorn populations of migrants into a legal regime not designed for that purpose. As Professor Ramji Nogales has written, “[l]awyers and the broader public engage in arguments about whether these migrants fit within the murky legal definition of a particular social group rather than engaging in discussion concerning far more important questions about who should be able to migrate globally and why.”⁸⁶ As the quote from Robert Winder above suggests, we do indeed face an unavoidable new series of forced migrations caused by climate change, and as the seas literally will not retreat,

protection for all – including those it currently protects.”).

⁸⁴ Weerasinghe, *supra* note 4, at 8.

⁸⁵ ZYGMUNT BAUMUN, STRANGERS AT OUR DOOR 5 (2016) (quoting ROBERT WINDER, BLOODY FOREIGNERS: THE STORY OF IMMIGRATION TO BRITAIN xiii (2013)).

⁸⁶ Ramji-Nogales, *supra* note 12, at 614–15.

we must craft responses appropriate to the challenge.

A. Why: The Idea of Duty

In other work, I have discussed philosophical justifications for responding to the challenge, largely grounded in a “weak cosmopolitanism,” which forms a middle ground between the state-primacy approach of Michael Walzer and the open borders position of Joseph Carens.⁸⁷ Weak cosmopolitanism concedes that there are special duties we owe to our fellow citizens, but recognizes that we may *also* have duties to non-citizens, including to forced migrants.⁸⁸

One source of duty particularly relevant to the climate-change context is the role of the receiving state in creating the harm that individuals are fleeing. The countries with the most significant or dramatic migrations forced by climate change (e.g. Pacific Island or Sahelian nations) are not the countries responsible for global warming,⁸⁹ which is largely driven by the production of greenhouse gases.⁹⁰ Where industrialized countries like China and the United States bear a far greater share of the underlying causes of climate-change migration, political philosophers articulate a justification for them to likewise bear a far greater share of providing redress to the affected populations.⁹¹

⁸⁷ See generally Keyes, *supra* note 13, at 30–45 (“There is a range between immigration control that denies all rights and completely open borders with strong incentives for migration. This Article adopts such a position: a pragmatic understanding of the significance of borders, with limitations on the power of immigration control to deny fundamental rights. The middle ground between bounded justice and open borders is sometimes labeled moderate or weak cosmopolitanism.”).

⁸⁸ *Id.* at 34 (“Acknowledging that we are citizens of both our nations and the world, this philosophy privileges duties owed to co-nationals, but recognizes a lesser set of duties that may yet be owed to non-nationals, such as these forced migrants.”).

⁸⁹ See Johannes Friedrich, Mengpin Ge & Andrew Pickens, *This Interactive Chart Explains World’s Top 10 Emitters, and How They’ve Changed*, WORLD RES. INST. (Apr. 11, 2017), <https://www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed> [<https://perma.cc/9VQP-5KUR>] (naming the Top Ten Emitters of Greenhouse Gases: China, United States, European Union, India, Russia, Japan, Brazil, Indonesia, Canada, and Mexico).

⁹⁰ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT SUMMARY FOR POLICYMAKERS 2 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf [<https://perma.cc/7X8D-JMLN>] (“Human influence on the climate system is clear, and recent anthropogenic emissions of green-house gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems.”).

⁹¹ See Bayes Ahmed, *Who Takes Responsibility for the Climate Refugees?*, 10 INT’L

A “global harm principle,” laid out by philosopher Shelley Wilcox, identifies a duty to compensate those individuals or groups harmed by the state’s actions⁹² and makes such people a priority for admissions under the state’s immigration mechanisms.⁹³ Writing about refugees specifically, Joseph Carens, the most famous proponent of open borders,⁹⁴ urges that those who disagree with his conclusions recognize this duty: “Sometimes we have an obligation to admit refugees because the actions of our own state have contributed in some way to the fact that the refugees are no longer safe in their home country.”⁹⁵

The United States has historically recognized such duties in limited circumstances. The United States welcome of Vietnamese refugees sprang from a recognition of the vulnerability these refugees faced as the United States decided to withdraw militarily from Vietnam.⁹⁶ In the Marshall Islands and the Federated States of Micronesia, United States testing of nuclear weapons brought environmental destruction to the Islands.⁹⁷ As a result,⁹⁸ the United

J. OF CLIMATE CHANGE STRATEGIES AND MGMT. 5, 19–20 (2018) (“When only 62 billionaires have more combined wealth than the bottom half of the world population, only 10 countries are producing 69 per cent of the world’s total of carbon dioxide, and these countries are consuming most of the world’s resources and consequently generating more wastes, then the least developed and world’s poorest countries carry the burden of the polluters in the form of climate-change impacts [T]he liable or climate polluting countries should pay for the victim country’s recovery to bring climate justice.”).

⁹² Jared Keyel, *Responsibility to Redress: Global Harm, Obligation and the Afghan and Iraqi Refugee Crises*, 5 SPECTRA 2 (2016) (clarifying that the state conduct must have been a “critically necessary causal factor” in the harm).

⁹³ *Id.*

⁹⁴ Joseph H. Carens, *The Case for Open Borders*, OPEN DEMOCRACY (2015), <https://www.opendemocracy.net/beyondslavery/joseph-h-carens/case-for-open-borders> [<https://perma.cc/LE9T-VV6P>].

⁹⁵ JOSEPH H. CARENS, *THE ETHICS OF IMMIGRATION* 195 (2013).

⁹⁶ Max Boot, *Trump’s Plan to Deport Vietnamese Refugees Betrays a Sacred American Principle*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/opinions/global-opinions/trumps-plan-to-deport-vietnamese-refugees-betrays-a-sacred-american-principle/2019/01/02/6cd00c84-0eac-11e9-831f-3aa2c2be4cbd_story.html?utm_term=.7696667ea936 [<https://perma.cc/4EN2-6DT7>] (“The United States establishes a sacred bond with allied states when U.S. troops shed blood alongside their own. Deporting Vietnamese refugees would be another betrayal of South Vietnam and of America’s own Vietnam veterans.”).

⁹⁷ Robert Alvarez, *The Legacy of U.S. nuclear Testing in the Marshall Islands*, HUFFINGTON POST (2011), https://www.huffingtonpost.com/robert-alvarez/the-legacy-of-us-nuclear_b_586524.html [<https://perma.cc/4LYK-NAJ4>].

⁹⁸ Compact of Free Association, U.S.-Marsh. Is., Art. VII §177, Apr. 30, 2003,

States signed a Compact of Free Association⁹⁹ with the Republic of the Marshall Islands (and a separate one with the Federated States of Micronesia).¹⁰⁰ Under the Compact's terms, Marshall Islanders who are otherwise admissible¹⁰¹ to the United States can travel freely to the United States, but only in "nonimmigrant" status, i.e. not on a path to lawful permanent residence or citizenship.¹⁰² The status permits them to work lawfully, and if other routes to lawful permanent residence open up (for example, through marriage to a U.S. citizen), they are able to adjust their status accordingly.¹⁰³

B. What: Durable Immigration Status

Unlike contexts where temporary regimes might be adequate to address the arrival of "unconventional" refugees, such as civil strife and civil wars that create population exoduses, climate-change migration demands durable long-lasting solutions.¹⁰⁴ When repatriation is not possible, temporary regimes result in serious inequities. Here, the experience of Marshall Islanders and Micronesians in the United States is instructive. As noted above, the United States made special provisions for their passage to the United States, but once here, they have only "nonimmigrant" status, which leaves the Islanders in a perpetual limbo.¹⁰⁵ As one commenter notes in an assessment of the Compact's immigration provisions, "if international relocation of a significant number of [Marshall Islands and Micronesia] citizens becomes necessary, the

T.I.A.S. 04-501 ("The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia, (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.").

⁹⁹ U.S. CITIZENSHIP AND IMMIGR. SERVS., STATUS OF CITIZENS OF THE FREELY ASSOCIATED STATES OF THE FEDERATED STATES OF MICRONESIA AND THE REPUBLIC OF THE MARSHALL ISLANDS (2015), available at <https://www.fsmgov.org/status.pdf> [<https://perma.cc/WR9P-RA8>].

¹⁰⁰ *Id.*

¹⁰¹ INA 212 provides a host of reasons to deny admission, including a broad range of criminal offenses and likelihood of becoming a "public charge." 8 U.S.C. §1182(a)(4) (2018).

¹⁰² Compact of Free Association, *supra* note 98, at art. IV §141(a).

¹⁰³ *Id.* at art. IV §141(d), (h).

¹⁰⁴ Keyes, *supra* note 13, at 77.

¹⁰⁵ U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 99, at 4.

current immigration provisions in the Compacts would be wholly inadequate on their own to respond to such a critical situation.”¹⁰⁶

Other temporary responses to forced migration have been regimes aimed at ultimately repatriating the migrants. In the United States, Temporary Protected Status (TPS) exists for those already in the country who are unable to return home due to civil conflict or natural disasters.¹⁰⁷ TPS comes with work authorization, but lacks other features of immigration mechanisms with goals of integration—the goal of TPS is intentionally the opposite, even though people may stay many years, even decades, with TPS when conditions in the countries of origin do not improve.¹⁰⁸ Likewise, despite the ability to offer broader forms of refugee protection under its domestic law incorporation of the Cartagena Declaration, Mexico processed many Haitian migrants post-earthquake as temporary one-year visitors authorized to work, but admitted for humanitarian reasons and *not* as refugees.¹⁰⁹

Temporary frameworks may be of use in certain kinds of climate-driven migration. As Professor Martin notes, “[i]n both slow onset and acute cases, movement may be temporary, cyclical or permanent. The decision as to whether return is possible involves a range of variables, including the extent to which the environmental causes – either direct or through other channels—is likely to persist or frequently reoccur.”¹¹⁰ In cases where the displacement is temporary or cyclical, TPS-style mechanisms may be appropriate.¹¹¹ However, we also know from the outset that in many instances, repatriation cannot be the goal or orientation of the program, which argues strongly against a TPS-style mechanism for those migrants for whom the migration will be permanent.¹¹²

As noted above, African and Latin American nations have

¹⁰⁶ Briana Dema, *Sea Level Rise and the Freely Associated States: Addressing Environmental Migration under the Compacts of Free Association*, 37 COLUM. J. ENVTL. L. 177, 201 (2012).

¹⁰⁷ See Keyes, *supra* note 13, at 19–21 (describing framework of Temporary Protected Status program).

¹⁰⁸ See *generally id.* at 19–25 (providing background information on Temporary Protected Status such as eligibility requirements, critiques, and proposed changes).

¹⁰⁹ Weerasinghe, *supra* note 4, at 77–78.

¹¹⁰ See Martin, *supra* note 6, at 192.

¹¹¹ See *id.*

¹¹² See Keyes, *supra* note 13, at 24–25.

committed to more expansive refugee frameworks that could afford durable protection to climate-change migrants.¹¹³ Within Europe, both Sweden and Finland offer protections specifically linked to environmental issues.¹¹⁴ Sweden's asylum system permits individualized protection to applicants who cannot return to their countries of origin "because of an environmental disaster."¹¹⁵ Finland offers something similar, for those whose "need for protection" is "because of an . . . environmental disaster."¹¹⁶ While New Zealand—which has been denying climate-related claims under its refugee framework—contemplated an environmental refugee visa, it ultimately rejected that plan.¹¹⁷

The international community is grappling with such alternatives in various ways, many largely focused on sharing and encouraging state-level approaches, as opposed to generating a new Convention or Protocol. Professor Martin provides a comprehensive view of these approaches in her writing, including the Cancun Adaptation Framework which considers the three kinds of climate-change migration, and the complex responses required for each,¹¹⁸ and the Nansen Initiative.¹¹⁹ The Nansen Initiative has encouraged states to consider complementary protection regimes in light of climate change, in part by uncovering practices from around the world "that complement refugee and other humanitarian protection regimes in use by countries in protecting those who are displaced by natural disasters and other forms of environmental change."¹²⁰ The third framework Professor Martin assesses is the Migrants in Countries

¹¹³ See UNHCR, Expert roundtable interpretation, *supra* note 72, at ¶¶ 6–7.

¹¹⁴ Martin, *supra* note 6, at 199.

¹¹⁵ *Id.* at 199–200 (quoting Aliens Act 2005:716, ch. 4 § 2 (Swed.) (2006)).

¹¹⁶ *Id.* (quoting Aliens Act, Act No. 301/2004, amendments up to 1152/2010 included, 39 (Fin)).

¹¹⁷ AFP, *New Zealand Cools on Climate Refugee Plan*, NEWS24 (Mar. 16, 2018), <https://www.news24.com/Green/News/new-zealand-cools-on-climate-refugee-plan-20180316> [<https://perma.cc/JFW5-MNGC>].

¹¹⁸ Martin, *supra* note 6, at 192–93. Responses include: (1) voluntary migration (migration seeking to avoid the risks associated with anticipated climate change), (2) displacement (following acute events like hurricanes or typhoons), and (3) planned relocation. *Id.* at 193. Planned relocation may help those in areas likely to experience major environmental problems to leave before those problems become dire: "individuals and households who are unable or unwilling to leave even in the face of life-threatening situations." *Id.* at 192.

¹¹⁹ See *id.* at 204–09 (describing the history and workings of Nansen Initiative).

¹²⁰ *Id.* at 206.

in Crisis (MCIC) framework, which created guidelines and catalogued practices in a similar way to the Nansen Initiative, but led by the most affected countries themselves.¹²¹

Climate-change migration has the possibility of opening up new ways of thinking about forced migrations. Unusual in humanitarian frameworks, there is a solidarity among countries, as many are grappling with internal climate-change migration and adaptation. As we consider how to absorb migrants from regions and nations whose inhabitability is in sharp and rapid decline, we can think about the post-Katrina experience in the United States, where migrants who could not return to New Orleans integrated into communities like Houston without creating massive localized distress (beyond short-term emergency responses).¹²² After decades of seeing the refugee framework as divided between countries “creating” or sending the refugees, and countries receiving the refugees, this shared experience marks a profound change.

That change has not yet resulted in widespread popular discourse about the duties owed to climate-change migrants. Tuvalu, Kiribati, and the Maldives, being the most immediately impacted, have been vocal, demanding, and creative about urging that discourse.¹²³ Countries like New Zealand, Sweden, and Finland are responding.¹²⁴ It is beyond time for the countries most responsible for climate change to join these conversations and create immigration mechanisms that respond to the coming migrations.

¹²¹ *See id.* at 209–11.

¹²² AUDREY SINGER & WILLIAM H. FREY, *KATRINA AND RITA IMPACTS ON GULF COAST POPULATIONS: FIRST CENSUS FINDINGS 1* (Brookings ed., 2006) (“This analysis provides a “baseline” portrait of the impact of Hurricanes Katrina and Rita on population shifts and changing characteristics in the Gulf Region in the immediate months after the storms hit”); *see “New Orleans West”: Houston is Home for Many Evacuees 10 Years After Katrina*, *GUARDIAN*, <https://www.theguardian.com/us-news/2015/aug/25/new-orleans-west-houston-hurricane-katrina> [<https://perma.cc/4VJB-6UMQ>].

¹²³ *See* Martin, *supra* note 6, at 200.

¹²⁴ *See id.* at 199–200.