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FOREWORD BY EDITOR-IN-CHIEF  
*Prof. (Dr.) Yubaraj Sangroula*

## FEATURE ARTICLE

China South Asia Connectivity:  
Reflections on Benefits of OBOR in  
Nepal from International Law  
Perspective  
*Prof. (Dr.) Yubaraj Sangroula*

## ARTICLES

Tax Implications of Brexit –The Road  
Ahead  
*Dr. Kanwal DP Singh*

Maritime Threats to the South and  
Southeast Asia: Scope for a Regional  
Agreement  
*Mr. Utpal Kumar Raha & Dr. Raju, K. D.*

An Overview on Climate Change  
Displacement: Exploring New Principles  
and Frameworks for Funding  
*Ashna Singh K*

“Corruption” in Development Grants  
and Aids: An Impediment to Sustainable  
Development Initiatives  
*Upma Gautam & Deeksha Bajpai Tewari*

Arrest on Reasonable Suspicion and  
Credible Information: Policy and  
Practice in Bangladesh  
*Hussain Mohammad Fazlul Bari*

Assessing on Female Criminality: A Case  
Study of Varanasi District Jail  
*Dr. Bibha Tripathi*

Post-Earthquake Resurrection:  
Jurisprudential Diagnosis from the  
Standpoint of the Earthquake Victims  
*Anil Kumar Shrestha*

Using the Unprecedented Nuclear Weapons  
Advisory Opinion as Precedent in the  
Marshall Islands Cases  
*Pallavi Kisbore*

The UN System and the Non-Governmental  
Organisations  
*Pradeep Pathak*

The Implementation of the International  
Covenant on Civil and Political Rights in  
China’s Judicial System: Perspectives on  
Adoption of Exclusionary Rule in China  
*SUN Xu*

Private Property Rights versus Eminent  
Domain in Nepal  
A reference to road widening drive in the  
Kathmandu valley  
*Dev Sunar*

Understanding the quintessence of Clinical  
Legal Education: Nepalese Experience  
*Gyanu Gautam*



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# An Overview on Climate Change Displacement: Exploring New Principles and Frameworks for Funding

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## **Abstract**

*Climate change displacement is probably going to be one of the biggest global challenges for the future in the wake of the worrying state of the global environment and the never - ending North-South politics manifested by blame-games and weak wordings in the Paris Climate Change Agreement. This challenge thus comes with several securities, funding and human rights implications. For these reasons, it has become important to address these issues beforehand and be prepared for the future. Several studies have been carried out in this regard, mostly dealing with the human rights implications involved. This article seeks to go a step further and analyses how a practical framework could be drafted. In particular, this article would arrive at this framework based on two main themes. Firstly, what could be the principles in underlying the future course of action which could accommodate such human rights and secondly, how the funding for this cause could be assimilated based on the very principles. Based on these two themes, the Southern countries should build arguments to bank on as and when questions regarding this issue arise at the global fora.*

## **Introduction**

Climate change displacement, sometimes also understood as climate change ‘migration’, is popularly known to represent the ‘human face’ of these days’ climate change but this was not always recognized as such. During the 1980s and 1990s, climate change was predominantly conceived as a scientific and environmental issue; however, in 1990, the potential impacts of climate change on human migration were identified by the Intergovernmental Panel on Climate Change.<sup>1</sup> This article however focuses on the issues of climate change

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<sup>1</sup> Jane McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards,’ UNHCR Legal and Protection Policy Research Series No. PPLA/2011/03, UNHCR, 2011, p. 5.

‘displacement’ as opposed to migration as the former term carries it with the meaning of ‘involuntariness’ and ‘forced’ displacement as opposed to the term ‘migration’ which connotes a sense of ‘voluntariness.’

To understand the connection between climate change and displacement, it is important to understand the meaning of climate change first. The UNFCCC has defined climate change as ‘*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.*’<sup>2</sup> However, recently, the IPCC has also come up with a new definition of climate change as being ‘*a change in the state of the climate that can be identified [e.g., by using statistical tests] by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer.*’<sup>3</sup> Therefore, according to the new definition, climate change refers to any change in climate over the time, whether due to natural variability or as a result of human activity as opposed to the UNFCCC definition wherein climate change refers to a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is- in addition to natural climate variability- observed over comparable time periods.<sup>4</sup> In 2014, the IPCC reaffirmed in its assessment report and made it as ‘*warming in the climate system is unequivocal...and human influence is extremely likely to have been the dominant cause of the observed warming since the mid-twentieth century.*’

Coming to the issue of displacement, cross-border displacement as a result of natural disasters and the effects of climate change have been identified as a normative gap in the international protection regime.<sup>5</sup> This is not to say that no efforts at all are being made in this direction. The UN General Assembly in 2009 adopted a resolution on *Climate Change and Its Possible Security Implications*, requesting the Security Council to provide a comprehensive report. In 2008, the Council of Europe Parliamentary Assembly’s Committee on Migration, Refugees and Population compiled a report on *Environmentally-Induced Migration and Displacement*.

Next, it is argued that the funds and funding mechanisms exercised at present for the purpose of climate change adaptation/mitigation are not properly

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<sup>2</sup> United Nations Framework Convention on Climate Change, 1771 UNTS 107, adopted on 9 May 1992, art 1(2).

<sup>3</sup> Intergovernmental Panel on Climate Change, ‘IPCC Fourth Assessment Report: Climate Change 2007 - Climate Change Synthesis Report,’ 2007, *Intergovernmental Panel on Climate Change*, available at [https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf), accessed on 1 March 2017.

<sup>4</sup> Ibid.

<sup>5</sup> United Nations High Commission for Refugees, ‘High Commissioner’s Dialogue on Protection Challenges (8–9 December 2010) Breakout Session 1: Gaps in the International Protection Framework and in Its Implementation, ‘Protection Gaps and Responses’, 2010, *United Nations High Commission for Refugees* available at <http://www.unhcr.org/4d09e47a9.pdf>, accessed on 10 March 2017.

institutionalised especially with reference to climate change displacement. The potential usefulness of the Warsaw Loss & Damage Mechanism has also been diluted by the recent COP-21 at Paris. The mechanism basically aims *'to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change.'*<sup>6</sup> This mechanism was due for consideration at the later COPs and unfortunately, at the recent COP-21 at Paris, the Northern states were successful in dominating the rest of the nations which resulted in the inclusion of the Loss & Damage mechanism in the final agreement, although, without any basis for liability or compensation.<sup>7</sup> The channel of International Refugee Law also does not seem to be very welcoming enough as climate change migrants would not fall into the ambit of article 1A of the Refugee Convention, 1951 as per which there must be:

*A well-founded fear of being persecuted in the country of one's nationality or residence and the reasons for persecution are limited to race, religion, nationality, membership of a particular social group or political opinion' due to which one is unable, or owing to such fear, is unwilling to avail oneself of the protection of that country.*

The channel of statelessness also seems to be an inadequate one as the legal definition of 'statelessness' is premised on the denial of nationality through the operation of the law of a particular state than through the disappearance of a state altogether. Hence climate change creates the differently unique possibility of people becoming stateless because their state has physically disappeared or become physically uninhabitable but not because of legal change. It is also argued that this issue is not exclusively that of environmental law and hence the institutions developed by the evolution of international environmental law alone are not sufficient to deal it. Looking into the avenue of temporary/complementary measures, these are bilateral arrangements usually between neighbouring countries, it is criticised that these are evolved and utilised on an ad-hoc basis and lack a rights based approach. Going into the litigation avenue, there are several roadblocks including lack of precedents, jurisdictional issues, and problems regarding attribution of state responsibility. Therefore, there arises the need to address these glaring gaps in international law, in particular, the gap regarding funding, rights and most importantly pre-planning. Basically, there is a lack of a comprehensive framework to deal effectively with this issue and other incidental issues that may arise.

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<sup>6</sup> UNFCCC Decision 2/CP.19, Warsaw international mechanism for loss and damage associated with climate change impacts, UN Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014).

<sup>7</sup> Saleemul Huq & Roger-Mark De Souza, 'Climate Compensation: How Loss and Damage Fared in the Paris Agreement,' 12 January 2016, *New Security Beat* available at <https://www.newsecuritybeat.org/2016/01/loss-damage-fared-paris-agreement/>, accessed on 13 March 2017.

## The Reality of Displacement

Today, there is a consensus regarding the fact that forced displacements due to climate change are here to stay. Not only this, such migration is not a new or recent phenomenon. For example, during the Dust Bowl years of the 1930s, thousands of people had migrated out of North America's Great Plains, and several thousands were internally displaced within this region. In Ethiopia, since the 1970s, millions of people have been displaced by a combination of drought and political instability with the difficulty of identifying the cause and the effect between these two factors. As per Norman Myers' research, it is estimated that there will be 200 million climate change migrants by 2050, i.e., one person out of every forty-five persons in this world will be displaced.<sup>8</sup> As per the Stern Review on the Economics of Climate Change (2006) it is estimated that around 200 million people will be permanently displaced by climate change by 2050.<sup>9</sup> Bangladesh is one of the most densely populated nations in the world and also is one of the poorest nations to keep on bearing the brunt of climate change in the form of climate change displacement, nationally and internationally, most often illegally in the latter case. Bangladesh has been facing gradual rise on climate stresses and sudden shocks, including water shortage, cyclone, floods and coastal/delta erosion. During 1991-2010, Bangladesh was one of the three countries along with Myanmar and Honduras most affected by extreme weather events.<sup>10</sup>

There are also a few instances of cross-border relocations of whole communities for example, the Gilbertese movement to the Solomon Islands between 1955 and 1964 (via the Phoenix Islands from 1937); the relocation of the Banabans from present-day Kiribati to Rabi in Fiji in 1945; and the relocation of a group of Vaitupuanans from present-day Tuvalu to Kioa in Fiji from 1947 and in 1856, the whole population of Pitcairn Island (around 200 people) was resettled on Norfolk Island, some 6,000 kilometers away.<sup>11</sup>

## Arriving at a Definition

Currently there is no accepted definition in legal terms as to a person displaced by climate change. Yet definitions of several scholars and organizations may be

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<sup>8</sup> Intergovernmental Panel on Climate Change, 'Climate Change 2001: Third Assessment Report', 2001, *IPCC* available at [http://www.grida.no/climate/ipcc\\_tar/wg1/pdf/wg1\\_tar-front.pdf](http://www.grida.no/climate/ipcc_tar/wg1/pdf/wg1_tar-front.pdf), accessed on 27 April 2017.

<sup>9</sup> N. Stern, 'Stern Review: The Economics of Climate Change', 2006, available at [http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview\\_report\\_complete.pdf](http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf), accessed on 27 April 2017.

<sup>10</sup> Maxmillan Martin et al, 'Policy analysis: Climate change and migration Bangladesh', Working Paper no. 4, Refugee and Migratory Movements Research Unit, University of Dhaka and Sussex Centre for Migration Research, 2013.

<sup>11</sup> Jane Mc Adam & Elizabeth Ferris, 'Planned relocations in the context of climate change: unpacking the legal and conceptual issues', vol. 4, *Cambridge Journal of International and Comparative Law* p. 137, 2015, p. 162.

looked at. For example, the International Organization for Migration has a working definition for such persons and defines them as “environmental migrants” who are:

*Persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.*<sup>12</sup>

The *African Union Convention on Internally Displaced Persons* is the only international instrument aimed at a regional response that is the closest to recognizing people displaced by climate change wherein it defines “internally displaced persons” as:

*Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.*<sup>13</sup>

While going into a definitional discourse, two schools of thoughts come to light – that of maximalists and that of minimalists. The maximalist school of thought anticipates that a large number of people will be displaced primarily due to climate change and on the other hand, the minimalists believe that people will migrate but the sole cause for that cannot be environment/climate change alone and hence it is actually difficult to say exactly how many persons have been displaced due to environmental reasons primarily. The worry of the minimalists is worth considering and therefore a definition with a causation factor, which will hopefully satisfy the worries of the minimalists, will be arrived at. Thus, a balance between the maximalist and the minimalist approach needs to be struck. It is true that climate change cannot and will not be the sole cause for displacement and both are bound to be mixed up and a definition of a climate change displaced person needs to be skirted around these factors. In other words, climate change will have an ‘incremental impact’, ‘adding to existing problems’ and ‘compounding existing threats.’<sup>14</sup> The European Commission’s *Thematic Issue on Migration in Response to Environmental Change* also identifies five main factors which determine whether people stay or go and those are: economic, social, political, demographic and environmental – and none of these occur in isolation from each other; and environmental change will affect these drivers.<sup>15</sup> Further, the UNU-EHS also points out competition over potentially diminishing or changing water and land

<sup>12</sup> International Organization for Migration, ‘Migration, Climate Change and the Environment,’ *International Organization for Migration* available at <http://www.iom.int/definitional-issues>, accessed on 5 March 2017.

<sup>13</sup> *Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, adopted on 23 October 2009.

<sup>14</sup> McAdam (n 1), p. 9.

<sup>15</sup> European Commission, ‘Thematic Issue: Migration in Response to Environmental Change,’ vol. 51, *Science for Environment Policy* p. 3, 2015, p. 5.

resources that may exacerbate pressures which contribute to conflict, which in turn precipitates movements of people.<sup>16</sup>

Docherty and Giannini propose a ‘very likely’ standard, i.e., a greater than 90% probabilities to identify climate change events is possible. They also propose the concept of slow-onset and gradual displacement, which are more likely to be established as induced by anthropogenic climate change than a sudden disaster. This standard is good enough as slow-onset changes are something that are peculiar to climate change whereas such anthropogenic climate change may also cause sudden-onset disasters hence such a water-tight compartment cannot really be drawn. Rather it must be seen, in case of a sudden disaster, whether there had been gradual sea-level rise, increase in cyclone activity and as such. Jane McAdam had rightly suggested that what matters is in fact is the nature of harm, rather than its source<sup>17</sup> but this does not mean that all sorts of environmental harm will be included within the scope of this article, it only cares of those changes in climate that can reasonably be said to have had an anthropogenic link. Next, in order to separate ‘economic’ migrants or any other kind of migrants from persons displaced due to climate change, it needs to be seen how the 90% standard can be actually used. It is thus suggested that to ascertain this: an *en masse* designation of migrants should be given as that would be a good way of ascertaining if climate change was the primary cause of mass efflux into other territories.

### Broad Principles for a Framework

In this section, the main question that will be addressed is: what are the principles upon which the framework should be based and what are the principles that should inform the international negotiations upon which the acceptance of such a proposal is dependent?

To begin with, one such principle is that of equity, i.e., it is to be broadly understood to mean as equitable allocation of resources across the globe to reduce the gap between the rich and the poor countries. This may be understood in the context of distributive justice which is a moral basis and invoked to require developed nations to assist developing countries. Mayer has pointed out that equity, on its own, is unlikely to trigger such a systematic framework of protection that could qualify as “legal” and if equity has some influence in international negotiations, at least as an argumentative tool, if not as a sincere but secondary consideration of some state representatives, then other considerations that are more closely linked to national interests are likely to come first.<sup>18</sup> Thus, nations

<sup>16</sup> Koko Warner et al., ‘Changing Climate, Moving People: Framing Migration, Displacement and Planned Relocation,’ UNU-EHS Policy Brief no. 8, United Nations University, 2013.

<sup>17</sup> McAdam (n 1), p. 10.

<sup>18</sup> Benoit Mayer, ‘The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads: Fraternity, Responsibility and Sustainability,’ vol. 56, *Supreme Court Law Review [Canada]* p. 723, 2012, p. 726.

today don't really make it their primary consideration to strive for equitable allocation of resources. But the need of the hour is to do exactly this. Although the UNFCCC ties equity to common but differentiated responsibilities and respective capabilities,<sup>19</sup> giving it some sort of legal basis, yet, the understanding is still very narrow.

Another principle as highlighted by Mayer is that of 'fraternity' which is similar to the 'duty to cooperate' that Justice Charles D. Gonthier has pointed out as that the first value of fraternity recognizes that there are certain people within this community who require special protection and to whom we have a commitment.<sup>20</sup> This is actually a moral principle based on the natural human feeling of empathy for each other. Fraternity, as a moral principle, calls on the community to provide "special protection" for anyone whose rights are affected. It translates into a form of *modus vivendi* or social contract,<sup>21</sup> which reflects the readiness of the members of a community to allocate a certain amount of their resources to help those in need, with a clear *quid pro quo*: the insurance of being helped in case they are themselves in need.<sup>22</sup> Mayer thus analyses that environmental migrants are forced to migrate because of an environmental change which makes it impossible for them to live with dignity in their place of origin (this is similar to human rights and hence other states may feel obliged (voluntarily) to help them, there being no legal obligation to do so.

Wyman has suggested another moral basis for protection based on collective ownership of environment- initially being Grotius's idea that God originally granted the earth to mankind in common. On the basis of this theory, Wyman suggests that the rationale of collective ownership of the earth justifies a right of relocation for citizens of threatened island nations (and potentially other climate victims) on the basis that they face dire necessity. In these circumstances, the right to self-preservation of these citizens should trump the right of nations to exclude them; thus, the national right to exclude resembles the individual property owner's right to exclude, which is overridden by the private right of necessity.<sup>23</sup> David Miller suggests that special ties between people, who lead them to form a community, also impose responsibilities on members of that community.

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<sup>19</sup> Edward Cameron, 'What Is Equity in the Context of Climate Negotiations?' 14 December, 2012, *World Resources Institute* available at <http://www.wri.org/blog/2012/12/what-equity-context-climate-negotiations>, accessed on 14 March 2017.

<sup>20</sup> Charles D. Gonthier, 'Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy,' vol. 45, *McGill Law Journal* p. 567, 2000, p. 574.

<sup>21</sup> John Rawls, *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, p. 197.

<sup>22</sup> Mayer (n 18), p. 728.

<sup>23</sup> Katrina Miriam Wyman, 'Responses to Climate Migration,' vol. 37, *Harvard Environmental Law Review* p. 167, 2013, p. 196.



However, these principles again lack legal quality and are based on voluntariness, charity, or empathy. There is a need to look further than this.

The next ingenious perspective that Mayer provides is that of state responsibility. The problem regarding this is that the law on state responsibility is understood to mean to be applicable and enforceable only through the avenue of litigation/arbitration at courts. However, in a very articulate way Mayer proves this notion wrong as he analyses:

*...Given the declarative nature of the law of state responsibility, practical obstacles precluding its implementation through litigation do not affect its applicability as a question of principle: responsible states are responsible despite the unlikelihood of being declared so; they hold secondary obligations that arise from their wrongful acts even though it is improbable that any international courts or tribunals could ever have the opportunity to enforce such obligations.*

In other words, procedural shortcomings should not affect the substance of the law. Together with including through international negotiations with the climate regime, other forms of partial or complete implementation can be conceived.”<sup>24</sup> Another study has pointed out that “present-day international law recognises a right of all States, irrespective of individual injury, to take counter-measures in response to large-scale or systematic breaches of obligations *erga omnes*.”<sup>25</sup> Mayer has also pointed out that the UNFCCC ambiguously refers to States “common but differentiated responsibilities” and to their “respective capabilities and their social and economic conditions” without making it clear whether the latter elements are included in the former principle or, on the contrary, should be distinguished from them.<sup>26</sup> Now in order to establish a sense of responsibility, it may be pointed out that UNFCCC has noted that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and developmental needs.” Even though CBDR exists and it incorporates equity into it, in practice, there is no real sense of ‘responsibility’ attached to it and it has further been diluted in the Paris Agreement of 2015. At the same time, the fact that the full meaning of CBDR is ambiguous, there is no reason not to read responsibility into it but it also needs to be kept in mind that developed states have many a times denied a ‘purely ‘responsibility’ based approach’ and thus the framework suggested herein is based on several other principles as well over than just ‘responsibility’ or ‘culpability.’ It is also suggested that based on David Miller's principle of capacity, which assigns responsibilities according to the agent's capacity to perform them, besides the

<sup>24</sup> Benoit Mayer, ‘State Responsibility and Climate Change Governance: A Light through the Storm,’ vol. 13, *Chinese Journal of International Law* p. 539, 2014, p. 562.

<sup>25</sup> Christian Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2005, p. 250.

<sup>26</sup> Mayer (n 18), p. 747.

developed nations, even developing countries will have ‘responsibility’ under this proposed framework.

Thus, after analysing all these approaches, it is suggested that a truly equitable and just framework can be achieved legally through addition of other principles to the existing principle of CBDR in international environmental law – basically a stronger sense of state responsibility and human rights. The need is in particular on the right to development, which is ‘...an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.’<sup>27</sup> Thus, the right to development encompasses the essence of all other rights. Hence, at the international fora, the Southern states must argue for their right to development, specifically arguing against the developed industrialized nations to reduce their carbon space so that the Southern states may get more space to develop. This argument is further supported by these words enshrined in the UDHR – that recognizes the equal and inalienable rights of all members of the human family.

### Internal Displacement

In the legal framework proposed herein, the first and foremost step to resort is that of internal migration, i.e., within the country itself as opposed to taking international migration as a first step. As this framework emphasizes on state responsibility, at the same time, it also emphasizes that the primary responsibility of persons displaced/likely to be displaced by climate change is that of the home state. It is founded on the recognition in international and human rights law as that: although different States have different capacities, states are responsible for caring for their own people.<sup>28</sup> Guiding principle 3 on Internally Displaced Persons also recognizes that states bear the primary duty and responsibility to provide assistance and protection in all phases of internal displacement. Similarly, in Refugee law as well, internal migration is resorted to first otherwise as a matter of practice, the receiving states reject such refugees or do not accord them refugee status at the borders in the first place. In Refugee law, this is known as the ‘internal flight mechanism.’ When such internal displacement does take place, it is proposed that the state must take care of such displacement in accordance with the International Guiding Principles on Internally Displaced Persons. Also, before any plans are made, it would be a good idea to map the vulnerable and resilient populations at first. For example, this may be done by looking at any past incidents of displacement, history of natural availability and constraint of resources, economic conditions and so on.

<sup>27</sup> Declaration on the Right to Development, A/RES/41/128, adopted on 4 December, 1986, art. 1.1.

<sup>28</sup> Bonnie Docherty & Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’, vol. 33, *Harvard Environmental Law Review* p. 349, 2009, p. 358.

## Cross Boarder Displacement

On and only in case that the exercise of internal flight mechanism fails and international movement becomes inevitable, the following mechanism suggested herein for international displacement may be used. At this juncture, it is pointed out that the *Draft Convention on the International Status of Environmentally-Displaced Persons*<sup>29</sup> in article 9 states that ‘*all persons confronted by a sudden or gradual environmental degradation have the right to move within or outside of their home state.*’ The Article places an obligation on states not to hinder such displacement and further it is interesting to compare this right with the right to choose one’s residence and the right not to be displaced.<sup>30</sup> Next, it is suggested that by applying the concept of state responsibility, every state be given quotas as per their global emissions after 1992 (because it is after 1992 that climate change was deciphered to be a phenomenon that was actively taking place) with the same being revised at an interval of every few years to host a certain number of migrants. However, at the same time this must be done keeping the principle of ‘proximity’ in mind, i.e., regional migration should be resorted to first because it is preferably a better option due to similar cultural sensitivities and geographical conditions<sup>31</sup> as it puts migrant populations in ease at preserving their culture and assert their right to self-determination.<sup>32</sup> This should be done in consultation with the people likely to be affected as they must be ensured for their meaningful participation and free and informed consent in each action.

Next, in the case of “sudden” international displacement, there must be displacement *masse*<sup>33</sup> as explained previously for the host country to accept migrants. Another principle that needs to be imported into this framework from Refugee law is that of non-refoulement, i.e., no person should be allowed to return to territories where they will be again subjected to persecution as the Refugee Convention. This principle has obtained the status of customary international law and has been extended to be applicable to ‘torture’ as well. Thus, similar treatment must be accorded to persons displaced due to climate change, especially having regard to the fact that if they are forced to return, they may be subjected to various human rights violations (such as due to conflicts caused due to lack of natural resources).

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<sup>29</sup> “Environmentally-displaced persons” are defined as ‘*individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions, resulting in their forced displacement, at the outset or throughout from their habitual residence.*’

<sup>30</sup> Sumudu Atapattu, ‘Climate Change: Disappearing States, Migration, and Challenges for International Law’, vol. 4, *Washington Journal of International Law and Policy* p. 1, 2014, p. 8.

<sup>31</sup> Even under the Refugee Convention, migrants are to be accorded protection that is suitable for them, considering the geographical areas and climatic conditions that they are suited to.

<sup>32</sup> The Refugee Convention also includes aspects related to cultural preservation. Also see article 1 of *International Covenant on Economic Social and Cultural Right* (right to self-determination), article 1 of *Convention for the Safeguarding of the Intangible Cultural Heritage*.

<sup>33</sup> This was the system that was followed initially under the Refugee Convention but now the system of individual determination of refugees is used.

Apart from the right of non-refoulement, the receiving state must also respect, protect and fulfill a certain level of basic or minimum rights such as: right to food, right to life, access to justice and so on to those displaced people. The receiving state must at least accord the same human rights that it would accord to other aliens in its territory. The Refugee Convention is a great source of inspiration in this regard and many rights from the same may be or rather must be incorporated into the framework being suggested currently – for ex. right against non-discrimination (article 3), freedom of religion (article 4), right to claim intellectual property (article 14), right of association (article 15), right to access courts (article 16), and same treatment as nationals in terms of rationing, housing, public education, public relief, social security (Articles 20 – 24). In article 34 of the Refugee Convention, it is provided that the Contracting States shall facilitate the assimilation and naturalization of refugees as far as possible and this provision should also be included within this proposed framework. Apart from these individual rights, collective rights also need to be granted, for example, if new territory is given to an existing state or to a migrating population from a sunken-island state then the population must be accorded as a ‘sovereign’ one, similar to governments-in-exile, for example the Tibetan establishment in India that is a true ‘government-in-exile.’

As is the case in Refugee law, in spite of the being parties to the Convention, it is a practice that states make a determination of refugee status at the borders before actually granting refuge. This is a reasonable thing to do for all states and similar determination will tend to be followed in case of persons displaced by climate change. Hence, while making a determination, it is an idea effort to note, as per Kolmannskog’s and Trebbi’s argument, whether the persons displaced by climate change need to be accorded protection or not. The focus should not be on why someone left the home initially but rather whether the gradual degradation has reached a critical point where they cannot be expected to return now,<sup>34</sup> i.e., a ‘returnability test’ approach must be taken wherein the focus should be on the potential harm that the person might face in return to the home state and not to the cause of the harm. As per this test, if the answer to any one of these questions – is return permissible? Is it feasible? Can it reasonably be required? – is ‘no,’ then individuals concerned should be regarded as forcibly displaced persons having the dire need of protection and assistance as displaced person.<sup>35</sup>

Once such migrants are accepted, even though the obligation of non-refoulement will apply, the receiving state and the sending state should enter into an understanding for voluntary repatriation efforts. There should be an obligation placed upon the sending state as well to start making efforts to make the situation better in its own country so that the displaced persons may be able to return to

<sup>34</sup> V. Kolmannskog & L. Trebbi, ‘Climate Change, Displacement and Protection: A Multi-Track Approach,’ vol. 92, *International Review of the Red Cross*, 2010, p. 713.

<sup>35</sup> Koko Warner et al., ‘Changing Climate, Moving People: Framing Migration, Displacement and Planned Relocation’, Policy Brief no. 8, UNU-EHS, 2013, p. 9.

their homes as soon as possible. Since most of the persons who are likely to be displaced will be indigenous groups and populations with unique cultural sensitivities, they will be more inclined towards returning to their homelands.

Next, while discussing international displacement, attention also needs to be drawn to National Adaptation Plans. The national adaptation plan process was established under the Cancun Adaptation Framework- it enables Parties to formulate and implement national adaptation plans as a means of identifying medium and long-term adaptation needs and developing and implementing strategies and programmes to address those needs; it is a continuous, progressive and iterative process which follows a country-driven, gender-sensitive, participatory and fully transparent approach.<sup>36</sup> Thus, here it is suggested that as part of NAPs, the home state must begin planning to bring up its citizens' educational qualifications or other skill development activities, which may be helpful for them when they migrate to other countries. For example, the Government of Kiribati aims to raise the qualifications of its inhabitants in order to meet the requirements of the Australian and New Zealand labour markets with the aim of making the its citizens more attractive as migrants.<sup>37</sup> Thus, these are measures suggested in terms of 'sustainability' as worded by Mayer. This is basically the argument based on 'sustainable development,' i.e., meeting the needs of the present generation without compromising the needs of the future generations. Thus, this framework does take a rights based approach; rather it is built on mainly upon the well-developed area of international human rights law infused with the general public international law principle of 'state responsibility.' Such basing in international human rights law also strengthens the basis due to its already existing credibility.

## Funding

Funding is one of the most, if not, the most important part of this proposed framework as this will be the main backup source for all the efforts that will be made in relocating/rehabilitating persons affected by climate change. Coming to the issue of allocation of funds and the issue of how much one has to donate, many researchers have suggested that the funds for the same may be drawn from the existing adaptation funds such as the Green Climate Fund created at Cancun (keeping in mind that migration is now increasingly characterized as adaptation).

Under the UNFCCC, The Adaptation Fund was established in 2001 to finance concrete adaptation projects and programmes in developing country Parties to the

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<sup>36</sup> UNFCCC, 'National Adaptation Plans', *UNFCCC* available at [http://unfccc.int/adaptation/workstreams/national\\_adaptation\\_plans/items/6057.php](http://unfccc.int/adaptation/workstreams/national_adaptation_plans/items/6057.php), accessed on 28 April 2017.

<sup>37</sup> Office of the President, 'Relocation', *Office of the President, the Republic of Kiribati Official Website* available at <http://www.climate.gov.ki/category/action/relocation/>, accessed on 28 April 2017.

Kyoto Protocol which are particularly vulnerable to the adverse effects of climate change and the Adaptation Fund is financed with a share of proceeds from the clean development mechanism project activities and other sources of funding.<sup>38</sup> The share of proceeds amounts to 2% of certified emission reductions issued for a Clean Development Mechanism project activity.<sup>39</sup> While there is a funding mechanism under UNFCCC, there are no specific guidelines or rules to direct them to be used for climate change displacement in particular. There exist other funds as well such as the Global Environment Facility and the Green Climate Fund, which were adopted at Cancun. However, these also are in their nascent stages and not directed properly at particular adaptation activities.

The main question is that how these funds are to be utilised and channelized since unlike the commitment to emissions reductions, the commitment to helping developing country parties to meet the costs of adaptation is not accompanied by a protocol that spells out specific commitments.<sup>40</sup> Instead, a piecemeal collection of committees, technical strategies, action plans, accords and programs have been floated over the years at the COPs to UNFCCC...in the absence of a protocol with binding targets for adaptation assistance, the amount, nature and mechanism of contributions being made under this commitment are done at the discretion of each individual party.<sup>41</sup> Therefore, in order to solve this problem, herein a structure for directing the funds is proposed on the basis of state responsibility supported by other reasons existing in the climate change regime. For instance, sub-section 4 of article 4 of the UNFCCC states – *'The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.'* The Cancun Agreements adopted by COP-16 to the UNFCCC in 2010, in one of the places stated that – *'...owing to their historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof.'* Thus, the word responsibility has been used herein and migration also has been recognized as a form of adaptation. Docherty and Giannini have suggested that there must be a funding mechanism in place on the basis of CBDR. CBDR is a principle that recognizes historical differences in the contributions of developed and developing States to global environmental problems and differences in their respective economic and technical capacity to tackle these problems.<sup>42</sup> They have

<sup>38</sup> 'Adaptation Fund', UNFCCC available at [http://unfccc.int/cooperation\\_and\\_support/financial\\_mechanism/adaptation\\_fund/items/3659.php](http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php), accessed on 25 April 2017.

<sup>39</sup> Ibid.

<sup>40</sup> Robert McLeman, 'Climate Change Migration, Refugee Protection, and Adaptive Capacity-Building,' vol. 4, *McGill International Journal of Sustainable Development Law and Policy* p. 1, 2012, p. 9.

<sup>41</sup> Ibid.

<sup>42</sup> Centre for International Sustainable Development Law, 'The Principle of Common but Differentiated Responsibilities: Origins and Scope,' *Centre for International Sustainable Development Law* available at [http://cisdl.org/public/docs/news/brief\\_common.pdf](http://cisdl.org/public/docs/news/brief_common.pdf), accessed on 15 March 2017.

also suggested that such development assistance on part of the developed states must be compulsory. They also suggest that because climate change is a global problem, the international community has an obligation to provide assistance to climate change displaced persons regardless of whether their movement has a trans-border dimension – i.e., they rightly suggest that such funding should be obtained and utilised towards persons internally displaced due to climate change as well. However, this must be taken a step further and must be viewed from the perspective of state responsibility. Contribution to the funds must be based as per global emissions of all the states except the least developed countries, which may again be subject to revision every few years. An estimate must be adopted for calculating how much should the countries contribute? The top four greenhouse gas emitting countries on a tonnes per capita basis are the developed countries of Australia (at 30.9), the United States (25.0), Canada (23.1) and New Zealand (23.0). Another overall estimate suggests that between 1850 and 2005, the developed world contributed approximately 75% of the cumulative global emissions of CO<sub>2</sub> and the 27 countries (now 28) comprising the EU has contributed 26.91% of the world total while the US alone is responsible for 29.25%.<sup>43</sup> McAdam and Saul have suggested that people living in areas, which are likely to be rendered uninhabitable due to climate change, should have the early option of migrating to other countries. In numbers, it is roughly proportionate to the host countries' cumulative greenhouse gas emissions and this would mean that, per year, the US (as the highest emitter) would take in 866,000 people, while Italy (as the 10th highest emitter) would take 8,600.<sup>44</sup> The point here is that it is not impossible to make such estimates or gather such statistics. At the same time, there is a need to include and give responsibility to the developing countries as well in this mechanism because developing countries are also increasing their emissions now but to a lesser degree and hence the responsibilities attached should also be in accordance with the degree/amount of emissions. The need to take a further step is because even though CDDR incorporates the word 'responsibility' in it, in practice it has come to mean something else, i.e., there is no real sense of responsibility; and efforts have been reduced to mere charity in the international climate change regime. Therefore, the funding mechanism proposed herein takes into account the historical emissions of the developed nations as well as the current emissions of the developing countries. All in all, this funding mechanism is based on responsibility as well as the sustainability argument, i.e., the funds given by the countries towards this cause would help in building capacity in the vulnerable countries so that adaptation efforts are effectively made at the national level so that the need for international movement doesn't arise in the first place and thus this is ultimately in the self-

<sup>43</sup> Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, 'Consideration of the Scale of Emission Reductions to Be Achieved by Annex I Parties in Aggregate – Addendum,' paper no. 2, Submission by Tuvalu, United Nations Framework Convention on Climate Change, 2009.

<sup>44</sup> Jane McAdam & Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law,' Working Paper No. 4, Sydney Centre for International Law, 2008.

interest of the developed nations. In order to support this argument further, the principle of subsidiarity is useful. The principle of subsidiarity stems from the Treaty on European Union, where it is used as a principle of competence sharing between the Union and its member states. It provides that *'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'* Today, such subsidiarity at a global level is the need of the hour. As Mayer has rightly pointed out, this would include a set of commonly accepted minimal standards recognized by the international community, including the principles of an early and sustainable response; consideration for individual and collective rights; a global approach; and common but differentiated responsibility.<sup>45</sup> One other problem is that nations are already making necessitated or voluntary contributions so why should they contribute separately in this manner exclusively for persons displaced due to climate change? In Wentz's and Burger's proposal for a Climate Change Displacement Coordination Facility, they've also asked the same question – i.e., if the facility is used to distribute funds, it will be important to define its relationship with other existing funds, including the Global Environment Facility, the Green Climate Fund, the Special Climate Change Fund, the Least Developed Countries Fund, and the Adaptation Fund.<sup>46</sup>

## Conclusion

Firstly, summarizing the entire issue, it was shown that climate change and displacement do have an established link and this link has gone further to be characterized as 'adaptation' to climate change. Responsibility pleads for recognition of the rights of states, which are affected by climate change, while fraternity pleads for universal human rights, and sustainability rejects any right-based argument, favouring voluntary international or regional cooperation. And further, a future international legal protection of climate or environmental migrants will be influenced by a combination of several different arguments, as no single argument would be able to gather sufficient political resources.<sup>47</sup> Hence, the proposals suggested in this article are a mix of all these approaches, incorporating all kinds of interests, particularly in terms of funding.

Today, the state of environment has reached such a stage that there is a need to go beyond words. International peer pressure and good faith go for a truly 'responsible' approach informed by the rich content of international law,

<sup>45</sup> Benoit Mayer, 'The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework,' vol. 22, *Colorado Journal of International Environmental Law and Policy* p.357, 2011, p.397.

<sup>46</sup> Jessica Wentz & Michael Burger, 'Designing a Climate Change Coordination Displacement Facility: Key Issues for COP 21,' September 2015, *Columbia Law School* available at [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/unfccc\\_climate\\_change\\_displacement\\_coordination\\_facility.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/unfccc_climate_change_displacement_coordination_facility.pdf), accessed on 27 February 2017.

<sup>47</sup> Mayer (n 18), p. 762.



especially human rights law. Words, peer pressure and good faith have not helped in properly controlling climate change hence there is a need to explore new avenues. Moreover, the measures suggested herein place more demands on the developed countries, and the developed countries too ought to realise that these measures are in their own self-interest (i.e., it is in their interest that such planning regarding this issue be done beforehand instead of disproportionate burden being placed on them at a later stage) as climate change displacement is going to be a big problem in the future. It is no more a question of if it's going to happen; rather it's a question of when it's going to happen. Climate change and all its related problems such as that of climate change displacement are global problems that require global solutions and it is possible only with the collaboration and compromises of all members of the international global community.

Even though the focus of this article has been the issue of displacement due to climate change, it is also stressed that ultimately, this problem will be fully addressed when all other issues of climate change (for example, the already existing climate change obligations of controlling emissions, technology sharing, funding, scaling up of innovations etc. need to be seriously taken first as those will help in addressing general climate change challenges of mitigation and adaptation which will ultimately have an impact on other issues such displacement due to climate change) and poverty/socio-economic inequality as a whole are addressed at the national and international level. Keeping the problem of finding an overall solution in mind, still, in this study, a 'sustainable' plan for climate change displacement has been suggested as opposed to a mere short-term emergency plan. As Ammer and Stadlmayr note, fragmented approaches focus on a specific area within efforts to prevent and cope with 'environmental flight' (e.g. focusing only on the reception of 'international environmental refugees') whereas comprehensive approaches try to address all aspects of prevention of 'environmental flight' as well as coping with 'environmental flight'.<sup>48</sup> Thus, it is finally concluded that for climate 'justice' to not remain mere in words, the proposal suggested herein is one of the ways to begin to move towards a 'just' solution which is based on a mix of approaches, both with help of law and generation of socio-morality.

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<sup>48</sup> Margit Ammer et al., 'Legal Status and Legal Treatment of Environmental Refugees,' November 2010, *Environmental Research of the Federal Ministry of the Environment, Nature Conservation and Nuclear Safety* available at [https://www.umweltbundesamt.de/sites/default/files/medien/461/publikationen/texte\\_54\\_2010\\_kurzfassung\\_e1\\_0.pdf](https://www.umweltbundesamt.de/sites/default/files/medien/461/publikationen/texte_54_2010_kurzfassung_e1_0.pdf), accessed on 8 March 2017.