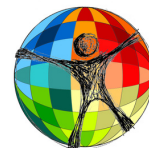


VOL. 10 | NO. 1 | SUMMER 2021

Environmental Refugees: The Right to Have Rights

Ashley Clark

McGill Centre for
Human Rights
and Legal Pluralism



Centre sur les droits de la
personne et le pluralisme
juridique de McGill



McGill FACULTY OF
Law

ABOUT CHRLP

Established in September 2005, the Centre for Human Rights and Legal Pluralism (CHRLP) was formed to provide students, professors and the larger community with a locus of intellectual and physical resources for engaging critically with the ways in which law affects some of the most compelling social problems of our modern era, most notably human rights issues. Since then, the Centre has distinguished itself by its innovative legal and interdisciplinary approach, and its diverse and vibrant community of scholars, students and practitioners working at the intersection of human rights and legal pluralism.

CHRLP is a focal point for innovative legal and interdisciplinary research, dialogue and outreach on issues of human rights and legal pluralism. The Centre's mission is to provide students, professors and the wider community with a locus of intellectual and physical resources for engaging critically with how law impacts upon some of the compelling social problems of our modern era.

A key objective of the Centre is to deepen transdisciplinary collaboration on the complex social, ethical, political and philosophical dimensions of human rights. The current Centre initiative builds upon the human rights legacy and enormous scholarly engagement found in the Universal Declaration of Human Rights.

ABOUT THE SERIES

The Centre for Human Rights and Legal Pluralism (CHRLP) Working Paper Series enables the dissemination of papers by students who have participated in the Centre's International Human Rights Internship Program (IHRIP). Through the program, students complete placements with NGOs, government institutions, and tribunals where they gain practical work experience in human rights investigation, monitoring, and reporting. Students then write a research paper, supported by a peer review process, while participating in a seminar that critically engages with human rights discourses. In accordance with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded. Therefore, papers in this series may be published in either language.

The papers in this series are distributed free of charge and are available in PDF format on the CHRLP's website. Papers may be downloaded for personal use only. The opinions expressed in these papers remain solely those of the author(s). They should not be attributed to the CHRLP or McGill University. The papers in this series are intended to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s).

The WPS aims to meaningfully contribute to human rights discourses and encourage debate on important public policy challenges. To connect with the authors or to provide feedback, please contact human.rights@mcgill.ca.

ABSTRACT

Canada is among the world's leading refugee resettlement countries and is a signatory to international agreements that affirm its commitment to the protection of refugee rights; however, even as climate change affects growing regions of the world, Canada has not yet begun to address the issue of climate change migration and/or environmental refugees.

Given Canada's lack of any decisive stance, in policy or in law, on environmental refugees, this paper analyses whether any international (e.g. led by the United Nations High Commissioner on Refugees (UNHCR)) or domestic factors have the potential to change Canada's refugee policy to recognize a special status for people whose migration and permanent displacement is linked to climate change.

This paper argues that Canada's past refugee policy record shows that it rarely acts independently, but draws lessons from states with similar profiles and from international bodies, in particular the UNHCR. If Canada wants to enhance its place among developed nations and fully participate in the international regime of refugee protection, it must be seen to subscribe to new ideologies that are grounded in human rights.

CONTENTS

SECTION ONE: INTRODUCTION	6
SECTION TWO: CLIMATE CHANGE AND MIGRATION	9
SECTION THREE: THE UNHCR AND ITS INFLUENCE ON CANADIAN REFUGEE POLICIES	17
SECTION FOUR: THE RECOGNITION OF EDPs: THE LITIGATION APPROACH	23
SECTION FIVE: CONCLUSION	33
BIBLIOGRAPHY	35

LIST OF ACRONYMS

CERD	Committee on the Elimination of Racism
CIDA	Canadian International Development Agency
ECHR	European Convention on Human Rights
EDP	Environmentally Displaced Person/Peoples
GCR	UN Global Compact on Refugees
IDP	Internally Displaced Person(s)
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
TFEU	Treaty on the Functioning of the European Union
TPS	Temporary Protection Status
TSR	Temporary Suspension of Removal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNEP	United Nations Environment Programme
UNHCR	United Nations High Commissioner on Refugees

Section One: Introduction

Climate change is one of the largest threats to human security. The increasing severity of droughts, floods, and storms—and the resulting loss of life, damage to infrastructure and property, and diminished access to sustainable livelihoods—is shocking, with reports of severe environmental hardship around the world emerging almost every day. On average, more than 20 million people are displaced by environmental factors every year.¹ This number does not include displacements where the environment is merely a secondary factor driving the choice to migrate.² If these secondary-factor displacements are included, the estimated number of environmentally displaced peoples (EDPs) soars to over 50 million people annually.³ In a world in constant flux, one thing is clear and constant: the climate is changing, and humans are struggling to adjust.

The world is scrambling to find new methods to adapt to the shifting environmental realities that are threatening vulnerable populations and spurring human migrations. By the year 2050, the world may have as many as 200 million environmental migrants whose forced displacement is linked to climate change.⁴ If these projections are accurate, Canada will become a desirable relocation destination due to our history of accepting and resettling refugees and our commitment to international agreements that affirm refugee rights. Although most climate migration will be within state borders or across borders with neighbouring states,⁵ those with financial and social capacity will

¹ See UNHCR, “Climate change and disaster displacement” (last visited 21 November 2021), online: UNHCR: The UN Refugee Agency <www.unhcr.org/climate-change-and-disasters.html>.

² See Richard Black, “Environmental Refugees: Myth or Reality?” (2001) UNHCR Working Paper No 34 at 3.

³ See Norman Myers, “Environmental refugees: a growing phenomenon of the 21st century” (2001) 357:1420 *Philosophical Transactions: Biological Sciences* 609 at 611.

⁴ See *ibid* at 609; Oli Brown, *Migration and Climate Change* (Geneva: International Organization for Migration, 2008) at 11.

⁵ See Khalid Koser, “Climate Change and Internal Displacement: Challenges to the Normative Framework” in Étienne Piguet, Antoine Pécoud & Paul de

likely follow established migration routes to traditional refugee receiving countries—some will forge new routes to new resettlement areas.

There is a profound lack of capacity in the developing world to deal with the social, economic, and political problems associated with climate change and forced migrations. Given Canada's lack of any decisive stance, in policy or in law, on the issue of climate change migration and/or environmental refugees, this paper asks: Will national and international debate on environmental migrants result in changes to Canadian refugee policy?

Thesis Statement

The link between climate change and migration is no longer under studied. Yet, largely absent from the literature is a politically framed analysis of the ethics and assumptions underpinning the debate: specifically, a study that carefully explores the ethical, legal, and political considerations that frame the issue of environmental refugees, and how these issues might play out pragmatically in Canada. This paper analyses whether any factors, either international (e.g. led by the United Nations High Commissioner on Refugees (UNHCR)) or domestic have the potential to change Canada's refugee policy to recognize a special status for people whose migration and permanent displacement is linked to climate change. This paper argues that Canada's refugee policy record shows that it rarely acts independently, but draws lessons from states with similar approaches to managing refugees and from international bodies, in particular the UNHCR. This paper studies human displacement arising from climate change, the ethics of forced environmental migration, and the central legal challenges presented by EDPs. It also considers domestic and international policies that affect the ability of EDPs to actualize their rights. If Canada wants to enhance its place among developed nations and fully participate in the international regime of refugee protection, it must be seen to subscribe to ideologies that are grounded in human rights. This paper speaks to those attempting to understand and address this

Guchteneire, eds, *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) 289 at 289.

global challenge by questioning the normative foundations of the current international refugee system in the face of increasing environmental migration.

Purpose of the Paper

The topic of this paper evolved from my Master's research on the disproportionate impacts on Metro Manila's poor as a consequence of flooding caused by Typhoon Ondoy in 2009. My graduate experience working alongside international development organizations and non-governmental organizations such as the Asian Development Bank, UN-Habitat, and the Philippine Red Cross helped foster my evolving interest in the relationship between forced migration and environmental change. The purpose of this paper is to address some of the questions remaining after my Master's research experience. Specifically, displacement will continue to increase across both developed and developing countries, as a result of climate change, which poses the questions: Where will people go? Who will take them? What rights should environmentally displaced people (EDPs) expect (if any), and how might these be met by the international community?

Outline of Paper

The current section is an introduction to the paper wherein the research problem is stated and the central argument is formulated. The sections of this paper unfold in a logical arc in their attempt to persuade the reader of the importance of understanding climate change displacement as an ethical-political problem. Given the emerging nature of the study of climate change migration, this paper provides a critical analysis of one of the ongoing central debates in the field—the question of definition—before developing its argument. Section Two offers a comprehensive review of the various understandings of EDPs in the academic and policy literature. Through this analysis, it becomes apparent that the field is rife with disagreement to the extent that it may be affecting the treatment experienced by EDPs around the world. This discussion is important as it serves as a reminder that a key challenge to addressing forced environmental migration is its multifaceted nature. In nearly every case of environmental displacement framed by this paper, it is impossible to clearly distinguish the environment or climate change as the

sole motivator for migration. McAdam⁶ and Black⁷ each give clear and detailed discussions of this conceptual challenge, explaining that climate change is but one of many factors instigating migration. Yet, where authors like Kibreab⁸ have argued that this somehow reduces the validity of the study of climate change as a determinant of forced migration, I must strongly disagree. While climate change is clearly one of many factors causing EDP migration, we must take special note of it for its unique ethical quality: climate change factors involved in forcing migration for environmental refugees have been caused by humanity as a whole. In this, unlike the other factors driving forced environmental migration, humanity has a responsibility to monitor and ameliorate its outcomes.

Sections Three and Four guide the reader through the current state of the UNHCR international refugee policy (Section Three) and Canadian domestic law (Section Four) to examine their capacities to meet the immediate needs of environmental refugees and potential future EDPs. Section Four highlights small areas of success that could be built upon or modified to better suit the diverse practical and ethical needs of EDPs. Tying together the conclusions from Section Two with the legal and political realities explored in Sections Three and Four, Section Five provides the closing arguments of this paper as well as its main implications for scholarship and policymakers.

Section Two: Climate Change and Migration

Climate change now firmly encourages or demands relocation of large numbers of people. Yet, perhaps because of its new patterns, forced environmental migration is still a relatively new term, lacking a clear and comprehensive definition. The lack of consensus in recent scholarship has delayed effective responses

⁶ See Jane McAdam, "Conceptualizing Climate Change-Related Movement" (2012) 106:1 *American Society Intl L* 433 at 434.

⁷ See Black, *supra* note 2 at 2.

⁸ See Gaim Kibreab, "Migration, Environment and Refugeehood" in Basia Zaba & John Clarke, 1st ed, *Environment and Population Change* (Liege, Belgium: Derouaux Ordina Editions, 1994) 115 at 115.

in law and policy. Section Two clarifies the social and political considerations surrounding environmental migration and displacement.

Exploring the Definition Question: EDPs and “Environmental Refugees”

The term “environmental refugees” was first coined in 1985 by the United Nations Environment Programme (UNEP).⁹ While the term “environmental refugee” now appears frequently in intellectual work,¹⁰ Warner et al. offer the following definition, which is also used by the International Organization for Migration (IOM):

Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.¹¹

While the displacing event is different than that involved in traditional refugee claims (political persecution verses environmental disruption), the idea that the quality and/or safety of the lives affected are in jeopardy is prominent in both conceptions of “refugee”, as is the central theme that some sort of disruption has resulted in a need to migrate away from a negative situation.

The term “climate refugees” has been seductive in the developing body of literature around environmental

⁹ See Karen Elizabeth McNamara, “Conceptualizing discourses on environmental refugees at the United Nations” (2007) 29:1 Population & Environment 12 at 17.

¹⁰ See e.g. Diane C Bates, “Environmental Refugees? Classifying Human Migrations Caused by Environmental Change” (2002) 23:5 Population & Environment 465 at 467; Brown, *supra* note 4 at 15; Matthew Lister, “Climate Change Refugees” (2014) 17:5 Critical Rev of Intl Soc Political Philosophy 618 at 619.

¹¹ Koko Warner et al, “In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement” (May 2009) at 2, online (pdf): Climate Migration Report <www.ciesin.columbia.edu/documents/clim-migr-report-june09_final.pdf>.

displacement.¹² This trend is striking, particularly because environmentally displaced persons (EDPs) are not considered “refugees” under the preeminent instrument in international law that houses refugee rights, the United Nations’ 1951 *Convention Relating to the Status of Refugees* (the 1951 Refugee Convention).¹³ Those who meet the terms of the definition of “refugee” trigger an international agreement on the part of signatory states to guarantee their protection.¹⁴ It also obliges those states not to return Convention refugees to their country of origin—the principle of *non-refoulement*.¹⁵ A Convention refugee is:

[A]ny person who, 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 origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or ... owing to such fear, is unwilling to return to it.¹⁶

While some scholars argue that the 1951 Refugee Convention could be interpreted to include environmental refugees as a “social group,” or that “government-induced environmental degradation” is a form of persecution,¹⁷ there appears to be growing consensus that an expansion of the 1951 Refugee Convention’s definition might overwhelm the mandate of the United Nations High Commissioner on Refugees (UNHCR) and may also undermine the protections currently offered to

¹² See Giovanni Bettini, Sarah Louise Nash & Giovanna Gioli, “One step forward, two steps back? The fading contours of (in)justice in competing discourses on climate migration” (2017) 183:4 *Geographical J* 348 at 349.

¹³ See Maya Goodfellow, “How helpful is the term ‘climate refugee’?” *The Guardian* (31 August 2020), online: <www.theguardian.com/world/2020/aug/31/how-helpful-is-the-term-climate-refugee>; Lister, *supra* note 10 at 620.

¹⁴ See GA Res 429, UNHCR, 5th Sess, UN Doc A/RES/429 art 24(3) (1951) [1951 Refugee Convention].

¹⁵ See *ibid*, art 33.

¹⁶ *Ibid*, art 2.

¹⁷ See Angela Williams, “Turning the Tide: Recognizing Climate Change Refugees in International Law” (2008) 30:4 *Law & Pol’y* 502 at 508.

“traditional” Convention refugees.¹⁸ A 2009 United Nations report advises that the UNHCR and the IOM not expand the 1951 *Refugee Convention* and that the term “refugee” should be avoided in relation to environmental migrants.¹⁹

The disconnection here between discourse and reality begs further consideration. There are a few possibilities as to why the term “environmental refugees” persists: First, Kibreab alludes to the possibility that the popularity of the term can be connected to the agenda of policymakers in the Global North, who are largely seeking to further restrict asylum laws and procedures.²⁰ Specifically, Kibreab claims that the designation of “environmental refugee” was “invented at least in part to depoliticise the causes of displacement, so enabling states to derogate their obligation to provide asylum,”²¹ moving the experience from one that may trigger rights-claims under international law (a Convention refugee) to one that triggers nothing, legally (an environmental refugee).

Indeed, Kibreab’s claim is plausible, particularly as it is exceedingly difficult to distinguish a definitive line between an *environmental* migrant and an *economic* migrant. Yet, Kibreab’s reasoning does not entirely fit with the thrust of the literature on environmental migration. Black argues that the notion that northern governments promulgate EDPs as environmental refugees as a means to restrict asylum is inconsistent with the fact that much of the literature on environmental refugees argues for an extension of asylum law and/or humanitarian assistance to those who are forcibly displaced by environmental degradation.²² Even if the practical impact of the literature on environmental refugees provides governments of the Global North with an argument to further restrict the terms associated with asylum and/or refugee claims, this was not the direct intention of many authors writing on the topic of environmental refugees.

¹⁸ See *ibid.*

¹⁹ See *Report of the Office of the UNHCR on the relationship between climate change and human rights*, UNHCR, 2009, UN Doc A/HRC/10/61 1 at 17.

²⁰ See Gaim Kibreab, “Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate” (1997) 21:1 *Disasters* 20 at 21.

²¹ *Ibid.*

²² See *supra* note 2 at 11–12.

Yet, if academic and policy interest in the notion of environmental refugees is not overtly motivated by a desire in the Global North to restrict asylum, the question remains as to why so much of the literature seeks to separate environmental causes of migration from political, economic and/or social causes. This paper argues that the terminology “refugee” is attractive because of the weight it holds in international law and policy. Indeed, a refugee is granted fairly comprehensive special rights that align with the central goal of much of the literature on environmental displacement. While the literature on the refugee label is quite vast, this paper focuses on the human rights/international law approach in the debate.

Human Rights and the Law

Much of the literature focuses on the advancement of a regime similar to that protecting migrants currently designated as “refugees” by the 1951 Refugee Convention.²³ This approach focuses on the commonalities between convention refugees and EDPs and emphasizes that the issue of environmental displacement is a question of human rights rather than one of climate models or other scientific projections.²⁴ For example, Bates draws a link between the various motivations of migration, stating the “term ‘refugee’ may be ... applied to migrants simply compelled by external constraints ... [that] may vary from moderate to intense, with the difference partially contingent on subjective assessments.”²⁵ As the motivation to migrate for both refugees and environmental migrants is driven by a level of compulsion rather than a mere personal desire, for Bates, an ethical requirement to protect this vulnerable population rests on the international community, much as it does in the case of traditionally-defined refugees.²⁶ Bates uses this rationale to

²³ See e.g. Bates, *supra* note 10 at 467; Roberta Cohen, “Developing an International System for Internally Displaced Persons” (2006) 7:2 Intl Studies Perspectives 87 at 88–89; David Keane, “The Environmental Causes and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’ ” (2004) 16:2 Geo Intl Env'tl L Rev 209 at 210–11; or Lister, *supra* note 10 at 618.

²⁴ See Lister, *supra* note 10 at 623.

²⁵ *Supra* note 10 at 467–68.

²⁶ See *ibid* at 468.

classify environmental migrants into three categories based on the level of compulsion associated with their “choice” to migrate: a “migrant” makes a “voluntary” choice, an “environmental emigrant” is “compelled” to migrate, and an “environmental refugee’s” choice to migrate is “involuntary.”²⁷ While logically clear and largely convincing, this approach is simultaneously hindered by the reality of the international human rights regime, which often finds itself without sufficient financial support or political will to enforce its principles.²⁸ In this vein, environmental migration cannot currently be considered as an actualisable human right. A clearer definition and a more practically minded approach (offering reasonable and politically acceptable solutions) may be of great benefit to the literature, which tends to argue for an extension of rights,²⁹ but leaves policy-oriented solutions to others. This tendency is particularly evident in arguments rooted in normative principles; however, many legally-driven analyses also suffer from a disconnection caused by the lack of political will in the international community to expand protection regimes to existing—let alone emerging—vulnerable populations.³⁰

Overall, the question of whether to designate someone as a refugee does not effectively capture the full challenge forced environmental migration brings to the international community; yet, this question has dominated much of the debate in the field thus far. It is also clear that much of the literature is often paralysed in its inability to bring together normative and political policy concerns in a meaningful way; a task that is taken up by this paper. It is, therefore, worth exploring the literature emerging directly from the policy world, to see if an understanding of this challenge has developed along a different trajectory.

²⁷ See *ibid.*

²⁸ Bob Clifford, “Merchants of Morality,” *Foreign Press* (13 November 2009), online: <foreignpolicy.com/2009/11/13/merchants-of-morality/>.

²⁹ See especially Lister, *supra* note 10 at 628–29.

³⁰ Maxine Burkett, “The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era” (2011) 2:3 *Climate L* 345 at 372, 374

Policy Positions: International Organizations and Policy Groups

Following a similar trajectory to the discussions in academic literature, a central point of contention in the major international and domestic policy debates is the validity of distinguishing between traditional conceptualizations of displaced persons (mainly refugees, asylum seekers, and internally displaced persons) and EDPs.³¹ Much of the work that asserts a distinction draws upon research conducted by the UNHCR, employing their specific and purposefully limited understanding of the circumstances that create a refugee. The recent 2018 UN *Global Compact on Refugees* (GCR) recognizes that “[w]hile not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.”³² Despite hopes that the GCR would result in more practical support for climate migrants, Stapleton et al. have cautioned that the GCR “is not binding and does not as yet include a framework for implementation. It remains to be seen what impact it will have on individual state policies.”³³ In contrast, the authors note that the GCR:

is pointedly not tasked with opening up debate on the scope of the 1951 Convention or the mandate of UNHCR. Moreover, the decision to establish two separate compacts on refugees and migrants risks perpetuating a conceptual and organizational distinction between ‘forced’ and ‘voluntary’ flight that fails to reflect the fluid and complex reality of contemporary population movements, both within countries and across borders, incorporating ‘voluntary’ migrants, putative refugees, former IDPs [internally displaced persons], other forcibly displaced people and

³¹ See Roger Zetter, “Protecting environmentally displaced people: Developing the capacity of legal and normative frameworks” (2011) at 13, online (pdf): www.refworld.org/pdfid/4da579792.pdf.

³² GA, 73rd Sess, Supp No 12, UN Doc A/73/12 (Part 2) (2018) at para 8 [Global Compact].

³³ Sarah Opitz Stapleton et al, “Climate change, migration and displacement: The need for a risk-informed and coherent approach” (13 November 2017) at 27, online (pdf): Overseas Development Institute cdn.odi.org/media/documents/11874.pdf.

trafficked and smuggled persons', often using the same routes and heading for the same destinations.³⁴

Ironically, while the principles of the UNHCR provide the foundation for much of the literature on distinguishing between EDPs and traditionally-defined displaced persons, it does not support the creation of a new protection regime, but rather insists that the definitional and institutional structures already exist to manage the needs of all displaced persons, no matter the motivation for their displacement.³⁵ For the UNHCR, meeting the challenges of environmental displacement is not a question of definition, but rather one of institutional capacity and international political will. Clearly, understanding the nature of this new form of displacement is crucial to effectively meeting its challenges.

Where international organizations have been unable or unwilling to accept responsibility for EDPs, these migrants are not absent from their research. Ultimately, the fact that international institutions like the UNHCR have chosen to invest time and resources into assessing the rise of "external forced displacement" resulting from "natural disasters and environmental degradation" worldwide indicates that environmental displacement is a problem that is gaining traction in international political discourse.³⁶ It can be reasonably understood that these organizations are conducting studies to monitor the projected number of EDPs due to their possible threat to international or domestic state security.³⁷ Problematically, approaches that frame EDPs as a threat to protect against, rather than as a humanitarian challenge to be met, fundamentally stagnate and deter progress towards developing an effective response to this issue. For example, where nations and international organizations could, and should, be implementing adaptation schemes and working towards developing a plan for responsible, guided migration (both internally and across borders), many of these analyses focus on the negative consequences that may result if heightened border

³⁴ *Ibid.*

³⁵ See Zetter, *supra* note 31 at 58.

³⁶ See *Global Compact*, *supra* note 32 at para 12.

³⁷ See Laura Story Johnson, "Environment, Security and Environmental Refugee" (2010) 1:2 J Animal & Environmental L 222 at 224, 237, 239, 245.

security is not established.³⁸ As will be discussed in Section Four, Canada may choose to prioritize security rather than develop rights-based policy on environmental migrants.

Where Do We Go From Here?

This Section has explored the extensive environmental refugee debate from both an academic and a policy perspective, as well as how EDPs might best be understood vis-à-vis the international protection regime. Ultimately, it has been suggested that this friction may be at least partially resolved by greater attention to the details, experiences, and demands of environmentally-induced migration.³⁹ A new discourse and new approaches are needed to effectively address the ethical, policy, and legal aspects of environmental displacement. Sections Three and Four respectively will address these facets as they pertain to UNHCR international refugee policy and Canadian domestic law.

Forced environmental migration occurs on no recognizable ethical grounds, which holds significant implications for the future of (non-)citizens' rights in the context of global justice, international law, and domestic (im)migration policy worldwide. Developing an ethics of environmental migration is necessary if Canada is to avoid significant human rights and global justice failings in the face of climate change and increasingly frequent and severe environmental events. Yet, beyond developing a strictly normative argument, the following Sections also seek to address the opportunities and limitations of current international and domestic legal policies, ultimately developing a way in which Canada can meet the diverse ethical demands of EDPs and balance these with the many international political constraints.

Section Three: The UNHCR and its Influence on Canadian Refugee Policies

³⁸ See *ibid* at 237.

³⁹ See Bates, *supra* note 10 at 468–69.

This Section delves further into the roots and reasons for the continued gap between the normative rights of environmentally displaced persons (EDPs) and their political realization. Section Three is divided into three parts: Part One provides a brief conceptual and historical framing of the United Nations High Commissioner on Refugees (UNHCR). Next, Part Two conceptualizes how traditional human rights are conceived under the current international regime. Specifically, this part of the paper takes a closer look at how the framing of the human rights regime under the *Universal Declaration of Human Rights* (UDHR)⁴⁰ is likely to impact the realization of EDP rights. Here, the areas in which the international community is falling short are highlighted; particularly, the central role it has carved out for the state in recognizing and administering universal rights.⁴¹ Part Three then looks at Canada's engagement with the UNHCR. I argue that, for EDPs, the dominance of the state in the human rights regime poses significant ethical and political problems for the recognition of environmental refugees in Canada. Finally, Section Three concludes that for the full realization of EDP rights, the international community must actively consider an evolution of the sovereign state system into one which can accommodate the geographical and temporal fluidity of modern challenges like climate change.

UNHCR: Historical Perspective

The UNHCR is the most influential international agency on refugee matters. The UNHCR is most notably recognized for its creation of the *1951 Convention Relating to the Status of Refugees* (the *1951 Refugee Convention*).⁴² During this time period, Western European nations recognized the value of a non-partisan agency that could represent their interests and expedite the settlement of masses of displaced persons.⁴³ In this way, the

⁴⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [UDHR].

⁴¹ See Brooke Ackerly, "Human Rights Enjoyment in Theory and Activism" (2010) 12:1 Human Rights Rev 221 at 226.

⁴² See Section Two for a more in-depth discussion of the *1951 Refugee Convention*.

⁴³ See Gil Loescher, "The UNHCR and World Politics: State Interests vs Institutional Autonomy" (2001) 35:1 Intl Migration Rev 33 at 35.

UNCHR began a process by which it would become an expert and moral authority on refugees and refugee rights anywhere in the world.

The Human Rights Regime

The UDHR works to balance the tension between universal norms and sovereign authority. It enables the continuation of sovereignty by allowing states the option to sign and participate in the project of universal, legal, human rights.⁴⁴ In many ways, the UDHR was a response to the global void created by the atrocities of World War II, highlighting that how a government treats its own citizens is a matter of legitimate international concern, and not simply a sovereign domestic issue.⁴⁵ Yet, while many countries have chosen to support the UDHR, the very process by which universal human rights are given recognition in the international community—through the state—raises a serious question: what happens to our rights outside of the state? This question is particularly concerning for EDPs. As Arendt notes, outside of the law and belonging to no particular political community, refugees are reduced to beings in a “condition of complete rightlessness.”⁴⁶ Said differently, the guarantee of realizable rights does not exist for EDPs under the modern international regime. This poses a severe ethical dilemma to the international community.

The reality of the human rights regime is that it has largely operated within the ideological and political constraints of the principle of state sovereignty. The principle of sovereignty dictates that not only do states have unlimited power within their own borders, but that other states have no right to interfere with what other governments do inside of their own borders.⁴⁷ The framing of human rights vis-à-vis the state poses a significant challenge for EDPs. Specifically, environmental events and climate/weather patterns are not controllable by human forces and do not respect

⁴⁴ See Ackerly, *supra* note 41.

⁴⁵ See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd ed (Ithaca: Cornell University Press, 2013) at 25, 28, 32.

⁴⁶ Hannah Arendt, *The Origins of Totalitarianism*, revised ed (New York: Harcourt Brace Jovanovich, 1973) at 296.

⁴⁷ See Donnelly, *supra* note 45 at 211.

state borders. For the most part we cannot determine when, where, and the severity with which environmental events will take place. This point, coupled with the fact that while a state may have a responsibility to protect the welfare of its own citizens,⁴⁸ it has a very limited set of duties towards individuals from other states under the current international regime. This creates a challenge: when environmental events displace people across borders, the situation becomes more complicated without an effective, entrenched international legal framework or treaty and/or an enforcement body to guide state responses. The UNHCR has explicitly stated that it cannot take responsibility for EDPs because its resources are already overextended with the growing number of political refugees.⁴⁹ The UNHCR's reasoning for separating EDP rights from those of refugees is not a principled one; it is strictly practical. This paper argues that this reveals more about the flaws in the system and its current structuring than it does to any lack of substance in EDP ethical protection claims.

EDPs find themselves caught between human rights theory and practice. Despite an ethics of human rights which is almost intuitive,⁵⁰ the discursive and paradigmatic frame of the international regime, influenced by state sovereignty, challenges the legitimate formulation of EDP rights in meaningful (i.e. legal) ways.

Conceptualizing "Legitimate" Displacement: EDPs, Canadian Refugee Policies and the Right to have Rights

The reality of the current international regime is that states are free to reject outsiders. For example, even if EDPs have a common right to free migration, if a group of EDPs were to arrive at Canada's borders with nothing but an argument for why they should stay, and Canada remains unconvinced, these EDPs essentially have nothing. In other words, the reality of the current sovereign state system is that a right is not a right unless it has been recognized by the state from which you are claiming it.

⁴⁸ See Piet Hein van Kempen, "Four Concepts of Security – A Human Rights Perspective" (2013) 13:1 Human Rights LR 1 at 7, 20.

⁴⁹ See Brown, *supra* note 4 at 14.

⁵⁰ See Ackerly, *supra* note 41 at 221.

Ethically, this is problematic; yet, this is the reality of the international human rights regime under current international structures. Even more problematic, is the reality that even if a state voluntarily chooses to participate in normatively rooted international law agreements, this does not guarantee that it will always choose to act in accordance with them.⁵¹ For example, Canada's ability to shift policy positions on immigration and refugees represents an example of the ultimate power of the state in terms of recognizing and giving effect to the right to seek refuge. Prior to 1967, Canada's immigration policy formally discriminated against non-white migrants.⁵² Although Canada signed the *1951 Refugee Convention and Protocol* in 1969,⁵³ and committed to the principle of *non-refoulement* of Convention refugees,⁵⁴ Canada continues to privilege specific displaced persons who closely meet its immigration criteria.⁵⁵ At the same time, however, public sentiment and international pressure worked to encourage the Canadian government to accept refugees from non-European countries; most notably, the acceptance of the Vietnamese "boat people" in 1978.⁵⁶ Canada has established a precedent that would allow it to respond to international calls for help. As the UNHCR moved to expand its mandate in its endeavour to protect all refugees, so too did Canada affirm its commitment to refugees in the 1976 *Immigration Act*, recognizing their needs to distinct, humanitarian consideration, and moving beyond the *1951 Refugee Convention* definition to include "displaced and persecuted" people who

⁵¹ See *ibid* at 226.

⁵² See Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 2nd ed (Toronto: University of Toronto Press, 2000) at 351.

⁵³ *Ibid* at 373 (the 1967 Protocol expanded the 1951 Refugee Convention to include refugee events that occurred outside of Europe).

⁵⁴ See *1951 Refugee Convention*, *supra* note 14, art 33.

⁵⁵ See Irving Abella, "Canadian Refugee Policy to 1980: Historical Overview" in Vaughan Robinson, ed, *The International Refugee Crisis: British and Canadian Responses* (London, England: Palgrave Macmillan UK, 1993) 77 ("Canada took 'the cream of the crop,' precisely 'the people ... Canada's immigration policy sought to attract'" at 92).

⁵⁶ See Harold Troper, "Canada's immigration policy since 1945" (1993) 48:2 *Intl J* 255 at 274.

could be processed as part of a “designated class.”⁵⁷ This policy decision meant that Canada could act outside the constraints of the 1951 *Refugee Convention* to bring in additional people whose fundamental rights were compromised, perhaps even allowing, I would argue, Canada to accept environmental migrants today.

The Canadian refugee example raises important questions about the quality of human rights in the face of principles like state sovereignty: if a right is supposed to be universal (i.e. applied to everyone) how can a state choose not to uphold it? Again, without a clear theoretical foundation, the UDHR remains in a position of constant tension with the principle of state sovereignty. The reality is that, from an ethical standpoint, a state cannot choose to ignore human rights; but, from a political standpoint, many human rights violations are often ignored in the absence of a recognized international authority capable of effective enforcement.⁵⁸ One could argue that in the most extreme case of environmental displacement—e.g. island countries at risk of disappearing due to rising tides⁵⁹—EDPs would likely receive recognition of their right to life under the modified logic of the 1951 *Refugee Convention*.⁶⁰ While one may be tempted to see this issue as resolved, claiming, for example, that international law holds many of the necessary protection regimes to satisfy the challenge of environmental displacement, this logic would likely not apply to EDPs with no special rights (e.g. where migration is imperative, but not to maintain life).⁶¹ The conclusion is clear: in order to guarantee universal environmental rights to migration, the discursive power of the sovereign state system must shift away from a focus on negative rights and the power of the state. It seems that the failure of the current system, coupled with a global shift towards a common understanding of humanity may prove to be a successful catalyst to change, both in terms of enabling a

⁵⁷ *Ibid*; *Immigration Act*, 1976, SC 1976–77, c 52, s 6(3).

⁵⁸ See Donnelly, *supra* note 45 at 33.

⁵⁹ See Lister, *supra* note 10 at 622.

⁶⁰ See *supra* note 14, art 33.

⁶¹ See Terence Epule Epule, Changhui Peng & Laurent Lepage, “Environmental refugees in sub-Saharan Africa: a review of perspectives on the trends, causes, challenges and way forward” (2015) 80:1 *Geo J* 79 (for example, “roughly 80 million people are facing threats of starvation due to environmental conditions while some 100 million are at the mercy of desertification” at 82).

better understanding of the global nature of climate change and producing effective adaptation results for EDPs.

Moving Forward: Global Citizenship

As the principle of state sovereignty is incapable of effectively supporting EDP rights to migrate and adapt, the obvious question is: what do we do? This paper proposes that a potential answer to the question is reframing of the notion of citizenship. The driving logic here is that, with a shift in our accepted understanding of citizenship from a liberal conception focused on the rule of law, towards one rooted more firmly in the idea of a global political society, this more robust form of citizenship may be able to compensate for the ill-conceived isolating qualities of the principle of sovereignty. This vision of global citizenship, grounded in the idea of an international community challenged by the global climate change risk, combined with a declaration of global rights offers the most direct way to actualize full EDP rights. While this Section has argued that the ethics to support EDP rights and the discontinuation of the principle of state sovereignty are clear, the political rationale is not. As such, this paper moves to assess whether there is a viable way forward using domestic courts to achieve recognition for EDPs.

Section Four: The Recognition of EDPs: The Litigation Approach

The human rights tradition is fundamentally rooted in international and domestic legal state traditions.⁶² Logically, it is understandable that much of the debate surrounding global climate change and its impacts (which seeks to provide rights to environmentally displaced persons (EDPs)) turns to international and domestic law as the primary mechanism to transform

⁶² See Jack Donnelly, "State Sovereignty and International Human Rights" (2014) 28:2 Ethics & Intl Affairs 225 at 226.

normative theory into empirical practice.⁶³ Yet, as discussed in Section Three, the human rights regime is still largely rooted in the principle of state sovereignty.

Despite this challenge, it is still worth examining the role of international and domestic law for the following reasons: First, international law is often cited in the literature as the solution to extending migration and adaptation rights to EDPs.⁶⁴ Second, international law houses the body of comprehensive and internationally-recognized universal human rights: specifically the *Universal Declaration of Human Rights* (UDHR)⁶⁵ and the *1951 Convention Relating to the Status of Refugees* (the *1951 Refugee Convention*).⁶⁶ This body of treaties, laws, and conventions serves as the legal foundation most EDPs access to build their rights claims. Third, individuals in multiple foreign jurisdictions have had recent successes in prompting domestic courts to direct governments to act on climate change. The successes abroad have lessons for future litigation in Canada to secure the right of EDP protection, and to promote a legal system vindicating those rights. Through an analysis of these guiding instruments in conjunction with recent case law, Section Four will explore and offer an assessment on the ability of Canadian courts to support EDP rights to migration and adaptation.

Drawing inspiration from Bates's classification of environmental migrants (as outlined in Section Two),⁶⁷ this Section looks at two future scenarios that could produce EDPs—e.g. island countries at risk of disappearing due to rising ocean levels⁶⁸ and increased desertification in sub-Saharan Africa, where migration is imperative, but not to maintain life⁶⁹ (as discussed briefly in Section Three). The main body of this Section is divided in order to account for the different circumstances affecting EDPs. Here, the paper moves towards a more specific analysis of the particular characteristics of the various experiences of

⁶³ See Bates, *supra* note 10 at 467; Lister, *supra* note 10 at 619.

⁶⁴ Lister, *supra* note 10 at 629.

⁶⁵ UDHR, *supra* note 40.

⁶⁶ *Supra* note 14.

⁶⁷ See *supra* note 10 at 468.

⁶⁸ See Lister, *supra* note 10 at 622.

⁶⁹ See Epule, *supra* note 61 at 82.

environmental displacement, and the kinds of rights different EDPs might need in order to meet the challenges associated with their particular form of displacement. Overall, Section Four argues that while EDPs in the first example may find themselves in a position to make successful rights claims under current international law and under the *Canadian Charter of Rights and Freedoms* (the *Charter*),⁷⁰ EDPs fleeing a situation similar to the second example will have a harder time achieving recognition of their rights, in large part due to the nature of state sovereignty.

Environmental Displacement and the Law

Canada's international reputation for accepting and resettling refugees and our commitment to international agreements that affirm refugee rights stems from the influence of the 1982 *Charter*.⁷¹ It established a measure of justice that was extended to refugees in *Singh v. Minister of Employment and Immigration*⁷² and won Canada international recognition.⁷³ The Supreme Court of Canada decided in the *Singh* case that the *Charter* applied to non-citizens even if they are still officially outside Canada and are seeking entry.⁷⁴ This is significant for EDPs, as this case would give environmental migrants the right to a refugee hearing in Canada. But, without any defined status, they would likely be removed.

This challenge is most evident in the decision of Justice Priestly of the New Zealand High Court to deny "environmental refugee" status to Teitiota and his family from Kiribati.⁷⁵ This is one of the first cases to hear arguments for granting refugee status to

⁷⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁷¹ *Ibid.*

⁷² [1985] 1 SCR 177 at para 74, 17 DLR (4th) 422 [*Singh* cited to SCR].

⁷³ See Rebecca Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (Oxford: Oxford University Press, 2014) at 100.

⁷⁴ See *Singh*, *supra* note 72 at paras 53–56.

⁷⁵ *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment*, [2013] NZHC 3125.

inhabitants of Pacific islands threatened by climate change.⁷⁶ Justice Priestly cites Hathaway's definition of persecution (a factor fundamentally required for legal refugee status) as "the sustained or systemic violation of basic human rights demonstrative of a failure of state protection."⁷⁷ He notes that this definition has also been applied in Canada and the United Kingdom, thereby legitimizing its international value.⁷⁸ Of note, Justice Priestly acknowledges that the definition of refugee is not confined to 1951 *Refugee Convention* understanding, but merely describes "a person driven from his or her home to seek refuge, esp. in a foreign country, from war, religious persecution, political troubles, natural disaster etc.; a displaced person."⁷⁹ For Justice Priestly, the legal trouble in extending refugee status protection is not in accurately applying refugee to EDPs, but in the politicized, state-centred understanding of persecution: an act which relates to *state* (in)action and *not* to *non-state* entities like the environment. The strict definition of refugee poses a significant obstacle for people who have been displaced by environmental disasters and who are seeking protected migratory status, as it does not afford them the possibility of being officially recognized as legitimate subjects of forced (cross-border) migration.⁸⁰ As a result, EDPs are left to piece together a protection regime from laws and principles that were not originally intended to protect them as EDPs.

Just as the particular circumstances of refugees, internally displaced persons, and asylum seekers determine the rights and privileges assigned to each forced migrant, this paper turns to explore two examples of how the particular experiences of environmental displacement can play a significant role in determining which legal apparatus could, or does, hold the potential to support a set of rights which are adequately suited to meet their needs as displaced persons.

⁷⁶ See *ibid.*

⁷⁷ *Ibid* at para 8.

⁷⁸ See *ibid.*

⁷⁹ *Ibid* at para 9.

⁸⁰ See McAdam, *supra* note 6 at 434.

Example 1: EDPs from Island Countries

EDPs from island countries at risk of disappearing due to rising ocean levels are arguably the most likely group to be displaced across borders and/or experience statelessness due to the immediacy of their anticipated migration needs.⁸¹ These people will be permanently and irrefutably displaced from their homes and/or livelihoods as a result of environmental factors. The Intergovernmental Panel on Climate Change (IPCC) has indicated that for many island nations the unavoidable “rapid sea level rise that inundates islands and coastal settlements is likely to limit adaptation possibilities, with potential options being limited to migration.”⁸² It is clear that individuals falling into this category of EDPs have the most immediate need for a special migration protection regime, which may be similar to that of currently-defined refugees, as statelessness resides in their future.

From 2002–2004, the government of Canada, through the Canadian International Development Agency (CIDA), funded a relocation project on the island of Vanuatu.⁸³ In response to persistent flooding, residents of the village of Lateu on Tegua island were moved inland to the village of Lirak.⁸⁴ While initially successful, in that the residents were extricated from the chaos of constant flooding, the assistance of the Canadian government appears to have been a one-time event. As sea levels continue to rise, it is only a matter of time before life on Vanuatu will once again be unsustainable. The charitable nature of Canada’s aid points to a common theme discussed in this paper: responsibility for citizens is demarcated through borders and states. Under this regime, states offer one-off packages of humanitarian aid when and where necessary.⁸⁵ This is a troubling indication of the future

⁸¹ See Lister, *supra* note 10 at 622.

⁸² Intergovernmental Panel on Climate Change, “17.4.2.1 Physical and ecological limits” (2007), online: *IPCC Fourth Assessment Report: Climate Change 2007* <archive.ipcc.ch/publications_and_data/ar4/wg2/en/ch17s17-4-2-1.html>.

⁸³ See Patricia Siméoni & Valérie Ballu, “Le mythe des premiers réfugiés climatiques: mouvements de populations et changements environnementaux aux îles Torrès (Vanouatou, Mélanésie)” (2012) 685:3 *Annales de géographie* 219 at 225.

⁸⁴ See *ibid.*

⁸⁵ See Clifford, *supra* note 28.

of EDP rights under the current international regime. An ongoing, durable program is necessary to meet the anticipated needs of future EDPs.

The idea that refugee applicants must overcome the presumption that their state will not or cannot protect them is entrenched.⁸⁶ As a result, if a state were to be considered extinct, EDPs may be able to be recognized as “stateless” persons under international law.⁸⁷ In February 2007, the Committee on the Elimination of Racism (CERD) released its 17th Canada Report.⁸⁸ Paragraph 18 of the report indicates Canada’s current position with respect to stateless asylum seekers:

The 1954 Convention relating to the Status of Stateless Persons to a large extent duplicated the 1951 Convention relating to the Status of Refugees; in the Canadian context, therefore, there was no need for both. Furthermore, Canada believed that it had the necessary safeguards in both its citizenship and immigration legislation to adequately cover the situation of stateless persons. Stateless persons were eligible to make refugee protection claims with respect to their country or countries of former habitual residence. Individuals whose claims for refugee protection had been rejected could apply for ‘pre-removal risk assessment’, or apply to remain in Canada for humanitarian and compassionate reasons. Successful refugee claimants, as well as those whose applications were accepted on humanitarian grounds, could apply for permanent residence within Canada.⁸⁹

Canada appears to be saying that our refugee regime responds fairly and effectively to the unique situation of stateless persons. Said differently, because the procedures outlined in the quote above are equally available to stateless persons, this group is in fact being adequately protected. EDPs fleeing to Canada from small island states may qualify as stateless and, because of

⁸⁶ See 1951 Refugee Convention, *supra* note 14, art 1(2).

⁸⁷ Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) [*The 1954 Convention on Stateless Persons*].

⁸⁸ Committee on the Elimination of Racial Discrimination, 70th Sess, 1790th Mtg, CERD/C/SR.1790 (2007).

⁸⁹ *Ibid* at para 18.

their new, legally recognized status as a refugee, be entitled to *Charter* protections per the *Singh* case.⁹⁰ However, as noted in the 1951 *Refugee Convention*, statelessness means “not having a nationality,” not without state.⁹¹ Small island nations may continue to exist as legal entities even after being submerged if other countries do not officially withdraw recognition of their statehood.⁹² This would leave the former inhabitants of completely inundated countries *de facto* stateless, as they would be unable to exercise their rights as citizens.⁹³ However, accessing the modest protections Canadian law affords to stateless persons will depend on their being able to demonstrate *de jure* statelessness.⁹⁴ Whether or not those displaced from submerged island states will be considered *de jure* stateless remains uncertain given that there is no jurisprudence on the matter—in international or Canadian law.

Example 2: Imperative but not Immediate Migration

Migrants that fall within this category of EDPs are affected by slow-moving but devastating processes of climate change and are no longer able to sustain their current lifestyle.⁹⁵ This is particularly the case for millions of impoverished families in sub-Saharan Africa who are forced to migrate due to desertification, which makes subsistence agriculture increasingly difficult.⁹⁶ As such, it is likely that they will be strongly pressured to migrate away from their homeland to more hospitable countries in order

⁹⁰ See *supra* note 57.

⁹¹ *Supra* note 14, art 1(2).

⁹² See Walter Kälin, “Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What are the Gaps in the Normative Framework for Their Protection?” (10 October 2008), online: *Brookings* <www.brookings.edu/research/displacement-caused-by-the-effects-of-climate-change-who-will-be-affected-and-what-are-the-gaps-in-the-normative-framework-for-their-protection/>.

⁹³ See Indira Goris, Julia Harrington & Sebastian Köhn, “Statelessness: what it is and why it matters” (2009) 32 *Forced Migration Rev* 4 at 4.

⁹⁴ See CA Batchelor, “Statelessness and the problem of resolving nationality” (1998) 10:1 *Intl J Refugee L* 156 at 172.

⁹⁵ See Epule, *supra* note 61 at 82.

⁹⁶ See *ibid* at 83–85.

to sustain their basic living requirements. Under current international law, it can be argued that states are required to prevent and protect against environmental degradation and disaster, whenever possible. For example, the decision in *Stichting Urgenda v. State of the Netherlands (Ministry of Economic Affairs and Climate Policy)*,⁹⁷ was a global first in holding a government accountable for climate change impacts. Notably, *Urgenda* was informed by multiple human rights principles and obligations with varying national and super-national implications. Specifically, the right to a healthy environment in Article 21 of the Dutch Constitution⁹⁸ and Articles 2 (right to life) and 8 (private and family life) of the European Convention on Human Rights (ECHR),⁹⁹ clearly informed the scope and interpretation of the duty of care.

However, the judicial reasoning above only applies to recognized citizens *within* state borders. It thus becomes more complicated when individuals cross borders as (environmentally) displaced persons, as there is currently no framework designed to recognize a set of international environmental migration rights. Unlike the EDPs from disappearing small island nations, these migrants have a state to return to. It is more likely that cross-border migrants in this category will find themselves classified by the state as economic migrants, with little or no recourse in the international community to make a claim of necessary migration to another state. Since the impacts of climate change are predicted to worsen in the next 20–30 years,¹⁰⁰ EDPs in this category may be able to take advantage of Canada’s Temporary Suspension of Removal (TSR) program.¹⁰¹ Canada’s Immigration and Refugee Protection Regulations grant authority to the Minister of Public Safety to

⁹⁷ (2019), ECLI:NL:HR 2019:2007 (Supreme Court of the Netherlands, The Hague) [*Urgenda*].

⁹⁸ *Ibid* at para 2.3.1.

⁹⁹ *Ibid* at para 2.2.2.

¹⁰⁰ See Brad Plumer & Henry Fountain, “A Hotter Future Is Certain, Climate Panel Warns. But How Hot Is Up to Us”, *The New York Times* (last modified 11 November 2021), online: <www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html>.

¹⁰¹ See Canada Border Services Agency, News Release, “Temporary Suspensions of Removals Lifted for Burundi, Liberia and Rwanda” (24 July 2009), online: Canadian Society of Customs Brokers <cscb.ca/article/temporary-suspensions-removals-lifted>.

impose a TSR to eligible nationals of countries where there is an ongoing “environmental disaster resulting in substantial temporary disruption of living conditions.”¹⁰² TSR is a statutory embodiment of the concept of safe haven that provides protection to those who do not meet the legal definition of refugee but are “nonetheless fleeing—or reluctant to return to—potentially dangerous situations.”¹⁰³ In essence, TSR legislation works to protect specific groups of foreigners who are in Canada but cannot return to their country of origin because of armed conflict or environmental disasters.¹⁰⁴

For EDPs in this category, the limits of TSR privileges are obvious: First, TSR is issued on an ad hoc and temporary basis.¹⁰⁵ Second, the granting of this status is subject to the political whims and priorities of Canada (i.e., the political sovereignty of the state). Third, TSR is limited only to those who have been continually present in Canada since event that caused the unsafe conditions in their home country.¹⁰⁶ If TSR did not include a presence requirement, it would likely encourage a mass influx of displaced persons, overwhelming and potentially incapacitating the TSR system. Finally, TSR remedies come with the expectation that foreign nationals will return home after the resolution of the associated environmental disasters.¹⁰⁷ In other words, the statute is ill-equipped to deal with environmental deteriorations of a long-term or permanent nature. Illustrative of this fact is that in 2005, Temporary Protection Status (TPS)¹⁰⁸ of citizens of Montserrat

¹⁰² *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 230(1)(b).

¹⁰³ Lisa Seghetti, Karma Ester & Ruth Ellen Wasem, “Temporary Protected Status: Current Immigration Policy and Issues” (2015) 17:3 *Current Politics & Economics US, Can & Mexico* 429 at 431.

¹⁰⁴ See *ibid* at 431–32.

¹⁰⁵ See *Immigration and Refugee Protection Regulations*, *supra* note 103 (TSR grants are discretionally on the part of the Canadian Minister of Public Safety).

¹⁰⁶ See *ibid*; Chelsea Krombel, “The Prospective Role of Temporary Protected Status: How Discretionary Designation Has Hindered the United States’ Ability to Protect Those Displaced by Environmental Disaster” (2012) 28:1 *Conn J Intl L* 153 at 157.

¹⁰⁷ See *Immigration and Refugee Protection Regulations*, *supra* note 103, s 230(2).

¹⁰⁸ Temporary Protection Status (TPS) is the United States’ equivalent of Canada’s Temporary Suspension of Removal (TSR).

living in the United States was discontinued as it was deemed “likely that [volcanic] eruptions will continue for decades, [and] the situation that led to Montserrat’s designation can no longer be considered temporary as required by Congress when it enacted the TPS designation.”¹⁰⁹ Canada recognized this reality in the days following Haiti’s January 2010 earthquake by announcing that it would “speed up” Haitian family reunification visas for primary relatives, while Quebec instituted its own “humanitarian sponsorship” program to allow humanitarian entry of both primary and secondary relatives.¹¹⁰ Here, again, Canada seeks to impose specific immigration criteria for environmental migrants. One could argue that Canada could grant permanent residency to climate migrants through “public policy considerations,” a path the government has used in the past for survivors of the 2010 earthquake in Haiti.¹¹¹ Further, the government of Canada could mandate removal officers to consider the consequences of deportation and whether it would risk the “life, liberty or security” of a person due to climate fallout.¹¹² However, compared to Example 1, EDPs in this category all suffer from the same shortcoming: despite a functional set of theoretical rights, they lack a legitimately recognized mechanism which would be able to make these rights available to be claimed in a reality where state domestic political priorities often trump international commitments.

A Silver Lining?

Where laws and agreements do exist in a sufficiently comprehensive manner to provide a protection regime for EDPs, enforcement mechanisms are noticeably lacking, and thus the

¹⁰⁹ Susan Martin, “Climate Change, Migration, and Governance” (2010) 16:3 Global Governance 397 at 406 [emphasis added].

¹¹⁰ See Royce Bernstein Murray & Sarah Petrin Williamson, “Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti” (2011) at 10 Center for Global Development Working Paper No 255, online: www.files.ethz.ch/isn/130262/file_Murray_Williamson_disaster_recovery_FINAL.pdf.

¹¹¹ See Sarah D’Aoust, *Immigration: An Expedient Complement to Disaster Response? An Examination of Canada’s Post-Earthquake Immigration Measures for Haiti and the Influence of the Haitian Diaspora in Canada* (MA, University of Ottawa, 2012) at 43 [unpublished].

¹¹² See *Charter*, *supra* note 70, s 7.

level of international attention and support received may influence whether the rights of EDPs are met. The examples presented in this Section highlight that assistance for EDPs is unpredictable. However, there may be a potential silver lining: domestic laws and public policy seem to hold some potential in affording rights to EDPs, but they require further honing to acknowledge the different circumstances affecting environmental migrants. There is no indicator that domestic political will cannot work with the principles of international law to provide a future set of internationally recognized environmental migration and adaptation rights.

Section Five: Conclusion

This paper has highlighted that environmentally displaced persons (EDPs) receive no special recognition, little international policy and legal consideration, and minimal assistance in their flight from the adverse encroaching conditions of climate change. The Sections of this paper have built upon one another to bring attention to some of the deeper tensions between the granting and actualization of human rights for EDPs under the current international regime. It particularly focused on the role of state sovereignty as an obstacle to the advancement of EDP rights. However, it is clear from the analysis presented in this paper that specialized immigration categories and/or exemptions for EDPs that take into consideration the different circumstances of environmental migrants may offer the best resolution moving forward (as outlined in Section Four). This approach would not alter the current sovereign state system, and thus is among the more straightforward options available for immediate implementation. Moreover, these categories of EDPs could be tested through pilot programs, so they can be trialled before being legislated. While this approach could lead to the same definitional constraints associated with the traditional refugee definition, whereby the granting of status is based on a specific understanding of what an EDP looks like, it is important that legislators craft categories of EDPs that capture EDPs who require immediate aid (see Example 1 in Section Four). Temporary protected status could be offered to EDPs facing similar

circumstances to those described in Example 2 to ease the integration and employment challenges of immigration.

The people most affected by disasters never choose to be victims, but the policy mechanisms adopted by the international community are critically important to their well-being. Beyond academic considerations, the findings in this paper point to an urgency for policymakers and lawmakers to engage with critical questions of environmental displacement. Rooting itself in the idea of global citizenship, Canada can, and should, draw on lessons from states with similar profiles and from international bodies, in particular the UNHCR. Times are changing. As more countries start to look towards the very real possibility of EDPs, it is likely that Canada, too, will be pushed to adapt its refugee policies to include environmental migrants. Overall, this paper argues that Canada must be proactive rather than reactive to the threat of climate displacement and the promotion of EDP rights.

Bibliography

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Immigration Act, 1976, SC 1976-77, c 52.

Immigration and Refugee Protection Regulations, SOR/2002-227.

JURISPRUDENCE: CANADA

Singh v Minister of Employment and Immigration, [1985] 1 SCR 177, 17 DLR (4th) 422.

JURISPRUDENCE: FOREIGN

Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment, [2013] NZHC 3125.

Stichting Urgenda v State of the Netherlands (Ministry of Economic Affairs and Climate Policy), (2019), ECLI:NL:HR 2019:2007 (Supreme Court of the Netherlands, The Hague).

TREATIES & UNITED NATIONS DOCUMENTS

Committee on the Elimination of Racial Discrimination, 70th Sess, 1790th Mtg, CERD/C/SR.1790 (2007).

Convention Relating to the Status of Refugees, GA Res 429, UNHCR, 5th Sess, UN Doc A/RES/429 (1951).

Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

Report of the Office of the UNHCR on the relationship between climate change and human rights, UNHCR, 2009, UN Doc A/HRC/10/61 1.

Global Compact on Refugees, GA, 73rd Sess, Supp No 12, UN Doc A/73/12 (Part 2) (2018).

Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

SECONDARY MATERIALS: MONOGRAPHS

- Arendt, Hannah, *The Origins of Totalitarianism*, revised ed (New York: Harcourt Brace Jovanovich, 1973).
- Brown, Oli, *Migration and Climate Change* (Geneva: International Organization for Migration, 2008).
- D'Aoust, Sarah, *Immigration: An Expedient Complement to Disaster Response? An Examination of Canada's Post-Earthquake Immigration Measures for Haiti and the Influence of the Haitian Diaspora in Canada* (MA, University of Ottawa, 2012) [unpublished].
- Donnelly, Jack, *Universal Human Rights in Theory and Practice*, 3rd ed (Ithaca: Cornell University Press, 2013).
- Hamlin, Rebecca, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (Oxford: Oxford University Press, 2014).
- Kelley, Ninette & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 2nd ed (Toronto: University of Toronto Press, 2000).

SECONDARY MATERIALS: ARTICLES

- Abella, Irving, "Canadian Refugee Policy to 1980: Historical Overview" in Vaughan Robinson, ed, *The International Refugee Crisis: British and Canadian Responses* (London, England: Palgrave Macmillan UK, 1993) 77.
- Ackerly, Brooke, "Human Rights Enjoyment in Theory and Activism" (2010) 12:1 Human Rights Rev 221.
- Batchelor, CA, "Statelessness and the problem of resolving nationality" (1998) 10:1 Intl J Refugee L 156.
- Bates, Diane C, "Environmental Refugees? Classifying Human Migrations Caused by Environmental Change" (2002) 23:5 Population & Environment 465.
- Bettini, Giovanni, Sarah Louise Nash & Giovanna Gioli, "One step forward, two steps back? The fading contours of (in)justice in competing discourses on climate migration" (2017) 183:4 Geographical J 348.

- Black, Richard, "Environmental Refugees: Myth or Reality?" (2001) UNHCR Working Paper No 34.
- Burkett, Maxine, "The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era" (2011) 2:3 Climate L 345.
- Cohen, Roberta, "Developing an International System for Internally Displaced Persons" (2006) 7:2 Intl Studies Perspectives 87.
- Donnelly, Jack, "State Sovereignty and International Human Rights" (2014) 28:2 Ethics & Intl Affairs 225.
- Epule, Terence Epule, Changhui Peng & Laurent Lepage, "Environmental refugees in sub-Saharan Africa: a review of perspectives on the trends, causes, challenges and way forward" (2015) 80:1 Geo J 79.
- Goris, Indira, Julia Harrington & Sebastian Köhn, "Statelessness: what it is and why it matters" (2009) 32 Forced Migration Rev 4.
- Hein van Kempen, Piet, "Four Concepts of Security – A Human Rights Perspective" (2013) 13:1 Human Rights LR 1
- Johnson, Laura, Story, "Environment, Security and Environmental Refugee" (2010) 1:2 J Animal & Environmental L 222.
- Keane, David, "The Environmental Causes and Consequences of Migration: A Search for the Meaning of 'Environmental Refugees' " (2004) 16:2 Geo Intl Env'tl L Rev 209.
- Kibreab, Gaim, "Migration, Environment and Refugeehood" in Basia Zaba & John Clarke, 1st ed, *Environment and Population Change* (Liege, Belgium: Derouaux Ordina Editions, 1994) 115.
- , "Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate" (1997) 21:1 Disasters 20.
- Koser, Khalid, "Climate Change and Internal Displacement: Challenges to the Normative Framework" in Étienne Piguet, Antoine Pécoud & Paul de Guchteneire, eds, *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) 289.
- Krombel, Chelsea, "The Prospective Role of Temporary Protected Status: How Discretionary Designation Has Hindered the United States' Ability to Protect Those Displaced by Environmental Disaster" (2012) 28:1 Conn J Intl L 153.
- Lister, Matthew, "Climate Change Refugees" (2014) 17:5 Critical Rev of Intl Soc Political Philosophy 618.

- Loescher, Gil, "The UNHCR and World Politics: State Interests vs Institutional Autonomy" (2001) 35:1 Intl Migration Rev 33.
- Martin, Susan, "Climate Change, Migration, and Governance" (2010) 16:3 Global Governance 397.
- McAdam, Jane, "Conceptualizing Climate Change-Related Movement" (2012) 106:1 American Society Intl L 433.
- McNamara, Karen Elizabeth, "Conceptualizing discourses on environmental refugees at the United Nations" (2007) 29:1 Population & Environment 12.
- Myers, Norman, "Environmental refugees: a growing phenomenon of the 21st century" (2001) 357:1420 Philosophical Transactions: Biological Sciences 609.
- Seghetti, Lisa, Karma Ester & Ruth Ellen Wasem, "Temporary Protected Status: Current Immigration Policy and Issues" (2015) 17:3 Current Politics & Economics US, Can & Mexico 429.
- Siméoni, Patricia & Valérie Ballu, "Le mythe des premiers réfugiés climatiques: mouvements de populations et changements environnementaux aux îles Torrès (Vanouatou, Mélanésie)" (2012) 685:3 Annales de géographie 219.
- Troper, Harold, "Canada's immigration policy since 1945" (1993) 48:2 Intl J 255.
- Williams, Angela, "Turning the Tide: Recognizing Climate Change Refugees in International Law" (2008) 30:4 Law & Pol'y 502.

OTHER MATERIALS: ONLINE MATERIALS

- Canada Border Services Agency, News Release, "Temporary Suspensions of Removals Lifted for Burundi, Liberia and Rwanda" (24 July 2009), online: cscb.ca/article/temporary-suspensions-removals-lifted.
- Clifford, Bob, "Merchants of Morality," *Foreign Press* (13 November 2009), online: foreignpolicy.com/2009/11/13/merchants-of-morality/.
- Goodfellow, Maya, "How helpful is the term 'climate refugee'?" *The Guardian* (31 August 2020), online: www.theguardian.com/world/2020/aug/31/how-helpful-is-the-term-climate-refugee.

Intergovernmental Panel on Climate Change, "17.4.2.1 Physical and ecological limits" (2007), online: *IPCC Fourth Assessment Report: Climate Change* 2007 <archive.ipcc.ch/publications_and_data/ar4/wg2/en/ch17s17-4-2-1.html>.

Kälin, Walter, "Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What are the Gaps in the Normative Framework for Their Protection?" (10 October 2008), online: *Brookings* <www.brookings.edu/research/displacement-caused-by-the-effects-of-climate-change-who-will-be-affected-and-what-are-the-gaps-in-the-normative-framework-for-their-protection/>.

Murray, Royce Bernstein & Sarah Petrin Williamson, "Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti" (2011), Center for Global Development Working Paper No 255, online: <www.files.ethz.ch/isn/130262/file_Murray_Williamson_disaster_recovery_FINAL.pdf>.

Plumer, Brad & Henry Fountain, "A Hotter Future Is Certain, Climate Panel Warns. But How Hot Is Up to Us", *The New York Times* (last modified 11 November 2021), online: <www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html>.

Stapleton, Sarah Opitz et al, "Climate change, migration and displacement: The need for a risk-informed and coherent approach" (13 November 2017), online (pdf): *Overseas Development Institute* <cdn.odi.org/media/documents/11874.pdf>.

UNHCR, "Climate change and disaster displacement" (last visited 21 November 2021), online: *UNHCR: The UN Refugee Agency* <www.unhcr.org/climate-change-and-disasters.html>.

Warner, Koko et al, "In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement" (May 2009), online (pdf): *Climate Migration Report* <www.ciesin.columbia.edu/documents/clim-migr-report-june09_final.pdf>.

Zetter, Roger, "Protecting environmentally displaced people: Developing the capacity of legal and normative frameworks" (2011), online (pdf): <www.refworld.org/pdfid/4da579792.pdf>.