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ENVIRONMENTAL MIGRATIONS: RETHINKING THE NEED TO TAKE INTO ACCOUNT LOCAL CONTEXTS IN LEGAL AND POLICY RESPONSES

ADELE DE MESNARD*

In recent years, the frequency and intensity of environmental degradations has raised awareness among the international community that their impact on the displacement of populations could be acutely exacerbated in the future. There have been many international calls to take steps for an international regime of protection. However, current works on environmental migrations demonstrate that it is still a very controversial and highly political issue. As follows, this article criticises the analogy made between traditional refugees and environmental migrants. From a legal and practical perspective, the Convention relating to the Status of Refugees and the Protocol Relating to the Status of Refugees are not sufficient to address the plight of environmentally induced migrants. Besides, a universal status specifically dedicated to environmentally induced migrants cannot adequately capture the diversity of migrations induced by environmental degradations. We must think of environmental migrations according to the different and local contexts in which environmental degradations may occur and affect population displacements. Being concerned with closely interrelated environmental, socio-economic, and cultural factors has led us to consider alternative approaches for perceiving migration. It appears necessary to take into account the vulnerability of the most-affected and, above all, of Indigenous peoples. In view of their unique characteristics and their claims on the international scene, we must question how the protection of their rights can be connected to the issue of protecting environmental migrants. Studying the particular case of Tuvalu and how the terms “environmental refugee” and “migration” are perceived by Tuvaluans also illustrates how flexible regional and bilateral agreements could more effectively lead to respect and protection of ties to the land and community.

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I INTRODUCTION

The effects of climate change exacerbate the frequency and intensity of extreme weather events such as the rise of sea levels, increased heat waves, shrinking of sea ice, droughts, and floods. The 2013 report of the Intergovernmental Panel on Climate Change asserts that the worsening impact of global climate change is directly — with a probability greater than 95 per cent — linked to the build-up of greenhouse gases in the atmosphere.¹ Over the past few decades, major environmental catastrophes have been widely reported by the media and have alarmed the public with the escalating severity of environmental issues and increased vulnerability of affected people. This worldwide attention has caused researchers, policy makers, public and non-governmental organisations, and more generally, the international community, to recognise the link between environmental degradations and human migration.

Today, these issues are a source of controversy. Like the non-uniform impacts of climate change on the environment, it seems necessary to clearly stress the complexity and the diversity of these migration flows. Four major dimensions can be addressed: the mixed nature of environmental degradations; the choice of destination and length of displacement;² the degree of constraint in the decision to leave;³ and how far

¹ Intergovernmental Panel on Climate Change, Working Group 1, ‘Climate Change 2013: The Physical Science Basis’ (Contribution to the Fifth Assessment Report, Intergovernmental Panel on Climate Change, 27 September 2013) <<http://www.ipcc.ch/report/ar5/wg1>>.

² Indeed, the nature of the environmental change is an important factor to consider as the nature and temporality of potential migration is likely to differ depending on whether the degradation phenomenon resulted from on-slow or cumulative changes, or from abrupt and sudden disasters. The latter will *a priori* mainly lead to temporary population displacement, with those affected able to return to their homes once their environment is secured again. On the contrary, severe slow environmental degradation may leave no

environmental factors may influence departure in relation to other economic, political, social, and interrelated factors.⁴ Indeed, 'environmental migration is generally taken as an economic decision in situations where people are directly dependent on their environment for their livelihoods',⁵ as Indigenous peoples often are.

In response to this recognition of the complex relationship between environmental degradations and migration, many definitions and policy responses now compete on the international scene. In 1985, the term "environmental refugee" appeared officially for the first time in a report of the United Nations Environment Programme ('UNEP').⁶ Such a term was soon taken for granted which is problematic insofar as it still has no legal value in international law. This new category of "environmental refugee" should also be interpreted with caution since it refers to the concept of refugee as defined by the *Convention relating to the Status of Refugees* ('*Refugee Convention*') and the *Protocol Relating to the Status of Refugees* ('*Refugee Protocol*').⁷

Recent years have seen important new policy initiatives and draft projects concerning the protection of environmental migrants. At the European level, there is the resolution and recommendation jointly adopted by two Committees of the Council of Europe Parliamentary Assembly.⁸ Furthermore, in May 2012, the Council of the European Union ('EU') adopted conclusions on the EU Global Approach to Migration and Mobility in which 'the need to further explore the linkages between climate change, migration and

possibility of return. Where this occurs, the migration will not be prepared in the same manner, and may also affect the choice of destination. This choice of destination is very important, as a destination within the affected population's borders will invoke a different consequence in law than one that involves crossing an international border.

³ This dimension is difficult to evidence, as the distinction between voluntary and forced migration can be blurred. Nevertheless, it is a fundamental distinction underlying the different types of protection afforded by the law.

⁴ The complex nature of this issue is increased by various political, social, and economical factors in most migration scenarios. As environmental factors may only be one of the reasons that migration is triggered, a consensus will depend strongly on the context in which the environmental degradations occurred, taking into account any political tensions, poverty, unemployment, health issues, food security, etc.

⁵ Olivia Dun and François Gemenne, 'Defining environmental migrations: Why it matters so much, why it is controversial and some practical processes which may help move forward' (2008) 6 *Revue Asylon(s), Exodes Ecologiques* <<http://barthes.ens.fr/TERRA/article847.html>>.

⁶ Essam El-Hinnawi, 'Environmental Refugees' (Report, United Nations Environment Program, 31 December 1985) 41.

⁷ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, UNTS, 31 January 1967 (entered into force 4 October 1967).

⁸ See Council of Europe Parliamentary Assembly, *Environmentally induced migration and displacement: a 21st-century challenge*, Resolution 1655 and Recommendation 1862, Adopted by the Assembly on 30 January 2009 (9th Sitting).

development, including the potential impact of climate change on migration and displacement' was recognised.⁹ However, the scope of these initiatives remains relatively limited and isolated, as is also the case with petitions conducted by Indigenous peoples to influence the course of international negotiations on climate change. These petitions and political actions raise the question of environmental migrants' protection and their treatment in law, whose contours are yet to be defined.

The first section of this article will demonstrate that such an analogy between conventional refugees and "environmental refugees" is legally inaccurate and practically inadequate to embrace the diversity of migrations induced by environmental degradations. The second section will discuss why flexible regional and bilateral agreements are more relevant than a universal status specifically dedicated to environmentally induced displacements in order to take into account the vulnerability of affected people, particularly of Indigenous peoples, and the different local contexts in which environmental degradations may occur. Indeed, preserving the identity and culture of Indigenous peoples is a question of overriding importance facing the very nature of displacement and migration.

II THE MISLEADING AND LEGALLY INACCURATE NOTION OF "ENVIRONMENTAL REFUGEE"

According to Article 1 A (2) of the *Refugee Convention*, in order to claim refugee status, four conditions must be met: (i) to have left his or her country of origin or residence; (ii) a well-founded fear of being persecuted; (iii) for reasons of race, religion, nationality, membership of particular social group or political opinion; and (iv), to be unable, or owing to such fear, to be unwilling to avail him or herself of the protection of that country.¹⁰ Each state determines the appropriate procedures for implementing such a refugee status, in accordance with the *Refugee Convention* and *Refugee Protocol*.¹¹

There is no direct reference to victims of environmental degradations or to a well-founded fear of environmental persecution. More fundamentally, the very nature of legal

⁹ 'Climate change, environmental degradation, and migration: An EU Strategy on adaptation to climate change' (Commission Staff Working Document, European Commission, 16 April 2013) 7.

¹⁰ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1(2).

¹¹ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, UNTS, 31 January 1967 (entered into force 4 October 1967).

protection for political refugees is different from the protection needs of populations affected by environmental degradations. The *Refugee Convention* enshrines the utterly individual frame of the refugee definition. The refugee status claimant must give reasons of personal persecution and cannot rely solely on the general situation of their country of origin or their racial, religious, or linguistic membership.¹² Such individuality is reflected at every stage of the determination procedure: the claim is made by the applicant himself who must demonstrate that his subjective and personal fear of persecution is well-founded.¹³ After an individual hearing, the applicant alone is eligible for refugee status. By contrast, individually identifying people affected by environmental degradations may be acutely complex. Environmental disasters are said to be blind to the identity of persons, in the sense that the entire population at the place of the disaster is likely to suffer its negative impacts.¹⁴

However, could a new category of environmental persecution be designed and incorporated into the *Refugee Convention*? Let us first analyse the concept of 'persecution' as understood by the *Refugee Convention*. According to the UN Handbook on Refugee Status, 'the phrase "well-founded fear of being persecuted" is the key phrase of the definition'.¹⁵ The applicant must provide evidence of the fear of being persecuted on return to their country of origin. This criterion is subjective, as the claimant's allegations will prevail during the examination of their application. However, the UN

¹² See:

One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure ... the relevant facts of the individual case will have to be furnished in the first place by the applicant himself.

United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992) [37], [40], [195].

¹³ But see:

[t]hese considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.

United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992) [43].

¹⁴ Veronique Magnigny, 'Des victimes de l'environnement aux réfugiés de l'environnement [From victims of the environment to environmental refugees]' (2008) 6 *Revue Asylon(s), Exodes écologiques*.

¹⁵ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992) [37].

Handbook on Refugee Status states that ‘the term “well-founded” implies ... that this frame of mind must be supported by an objective situation’,¹⁶ that is to say, with regard to a detailed factual analysis of the socio-political context of the country of origin or residence from which the person is fleeing.

The UN Handbook on Refugee Status recognises that ‘[t]here is no universally accepted definition of the term “persecution”, and various attempts to formulate such a definition have been met with little success.’¹⁷ However, within the *Refugee Convention*, it must refer to a threat to life or physical and moral integrity based on race, religion, nationality, membership of a particular social group, or political opinion.¹⁸ The Handbook expressly states that famine or environmental disasters cannot fall within the scope of the *Refugee Convention*, and these reasons will only be considered to portray an accurate picture of the situation of the applicant.¹⁹

Much research has been conducted on the applicability of the *Refugee Convention* to the case of environmental migrations.²⁰ Of the grounds for persecution, it seems “membership of a particular social group” is most likely to be of interest in determining whether environmental migrants are eligible for refugee status. The *Refugee Convention* and *Refugee Protocol* provides no definition of this ground, proving vague and open to interpretation. It is increasingly being invoked in claims for refugee status, with the Guidelines on International Protection: ‘Membership of a particular social group’²¹

¹⁶ Ibid [38].

¹⁷ Ibid [51].

¹⁸ See:

From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.

United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992) [51].

¹⁹ Ibid [39].

²⁰ See, eg, Jessica Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’ (1998) 6(2) *New York University Environmental Law Journal* 480, 519–28; Dana Falstrom, ‘Stemming the flow of environmental displacement: creating a Convention to protect persons and protect the environment’ [2001] (6) *Colorado Journal of International Environmental Law and Policy* 1; Christel Counil, ‘The question of the Protection of “Environmental refugees” from the standpoint of International Law’ (2009) *Migration and Climate Change* (UNESCO Publishing/Cambridge University Press) 359; Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 319.

²¹ United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 2: ‘Membership of a particular social group’ within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/02/02 (7 May 2002).

providing evidence that the concept is inclined to respond to changes in society.²² As there is no closed list, states have gradually recognised women, families, tribes, homosexuals, and other groups. In this way, Cooper argues that it would be possible to interpret the *Refugee Convention* to consider ‘membership of a particular social group’ as a ground for persecution for victims of environmental degradations,²³ with the category acting ‘as a “catch-all” for individuals not falling into the remaining categories’.²⁴ Cooper bases her reasoning on the identification of environmentally displaced persons’ socio-economic profiles as a particular social group, who share the characteristic of lacking the sufficient political power to protect their environment.²⁵ Indeed, environmental degradations occur mainly in developing countries, striking primarily the poorest people. In addition, when it affects developed countries, it remains that the most underprivileged segments of the population suffer the most from impacts of environmental changes. These victims of environmental degradations could therefore be characterised by their membership of the social group, “the poor”. They would be distinguished by the fact that they belong to this social group of states that are politically unable to compel developed states to reduce their greenhouse gas emissions,²⁶ all the more since the negative impacts of environmental degradations are linked and exacerbated by the difficulties associated with poverty, social inequity, and government indifference.

However, this interpretation is controversial and problematic since, first of all, the Guidelines on International Protection in fact state that such a notion as ‘member of a particular social group’ should not be interpreted as a “catch-all” that applies to all persons fearing prosecution ... to preserve the structure and integrity of the *Refugee Convention’s* definition of a refugee’.²⁷ In addition, we may wonder whether the immutable characteristic required to fall within the category of ‘membership of a particular social group’ could legitimately be applied to environmental migrants. Indeed,

²² Ibid 2[3].

²³ Jessica Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’ (1998) 6(2) *New York University Environmental Law Journal* 480, 519–28.

²⁴ Ibid 521.

²⁵ Ibid 524.

²⁶ See, eg, Cooper, above n 23; Christopher M Kozoll, ‘Poisoning the well: Persecution and the environment, and Refugee Status’ [2004] (15) *Colorado Journal of International Environmental Law and Policy* 271; Molly Conisbee and Andrew Simms, *Environmental Refugees: The case for Recognition* (New Economics Foundation, 2003) 44.

²⁷ United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 2: ‘Membership of a particular social group’ within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/02/02 (7 May 2002) [3].

political powerlessness cannot be regarded as an immutable characteristic. In *A v Minister for Immigration & Multicultural Affairs*,²⁸ it was held ‘a social group must exist independently of the persecution imposed on members of the group’.²⁹ Following, ‘the New Zealand Refugee Status Appeals Authority (‘RSAA’) affirmed very poor refugee claimants from Tuvalu could not be refugees if they had not been treated differently from anyone else.’³⁰

In the same spirit, Cooper also considers that it would be possible to amend the *Refugee Convention* to include a Protocol that would explicitly assert that future environmental degradations, whether sudden or gradual, may be considered as grounds for persecution.³¹ However, in the spirit and purpose of the *Refugee Convention*, a clear causal link is required between the specific acts that lead to escape from the country of origin and any of the *Refugee Convention’s* grounds for fear of persecution. In theory at least, “political” refugees are easy to distinguish from the rest of the population. Conversely, it seems highly difficult to establish such a clear causal link between environmental degradations and the reasons a person escapes their environment. Indeed, environmental incentives to leave are mostly indirect and, above all, reflect exactly on the economic and social rights of affected populations. In situations where people are directly dependent on the environment for their livelihoods, any degradation

²⁸ (1997) 190 CLR 225.

²⁹ T Alexander Aleinikoff, ‘Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 263, 287.

³⁰ Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 44; see also:

All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide ... It cannot be said to be forms of harm directed at the appellants for reasons of their civil and political status.

Refugee Appeal No 702189/2000 (2000) RSAA [13], quoted in Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 445.

³¹ See expanded definition:

Any person who owing (1) to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, or (2) to degraded environmental conditions threatening his life, health, means of subsistence or use of natural resources, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country [may qualify for refugee status].

Cooper, above n 23, 494 (emphasis in original).

may create — to a greater or lesser degree — a depletion of resources, eventually leading to migration.

This interpretation also faces another fundamental distinction between “environmental refugees” and “political refugees”. The latter are protected against their country of origin or residence. Hence, granting refugee status can be seen both as an international and political act of condemnation and as an act of defence for the fundamental rights of asylum seekers. Instead, the international protection of environmental migrants may be provided in collaboration with their countries of origin or residence. The legal relationship between the state and the affected citizens still exists, although the state in question cannot necessarily assume the necessary financial and material support to ensure effective protection of its citizens.³²

Furthermore, adding a new Protocol to the *Refugee Convention* or applying a broad interpretation would face a major obstacle: the current migration policies of many states, most of which are designed to close their external borders. As the first policy of many governments is to reduce their immigration, their regulations on asylum tend towards stringent and restrictive. Therefore, it may create some fear that encouraging the adoption of such a protocol could lead to a devaluation of the current protections offered to refugees under the *Refugee Convention*. It could ‘encourage receiving states to treat [refugees] in the same way as “economic migrants” to reduce their responsibility to protect and assist.’³³ This is even more truthful when considering the fact that states are still very reluctant to make concessions that could affect national sovereignty. The case study of the European Union is particularly revealing of such fear of massive and uncontrolled immigration surrounding and influencing the current States’ migration policies.³⁴

³² Maigny, above n 14.

³³ JoAnn McGregor, ‘Refugees and the Environment’ in Richard Black and Vaughan Robinson (eds), *Geography and Refugees: Patterns and Process of Change* (London: Belhaven Press, 1993) 157, 162.

³⁴

Systematization of concepts such as those of ‘internal asylum’, ‘country of first asylum’, ‘safe third country’, and ‘safe country of origin’ are obstacles to the recognition of the status on the grounds that the applicant could seek asylum elsewhere than Europe or the risks they invoke are *a priori* suspected of not being real. The procedure for granting the refugee status offers even less guarantees. As for the new Reception Conditions directive (**Directive 2013/33/EU**), it authorizes the detention of asylum seekers during the time of the examination of their applications in such a high number of assumptions that it may become the norm.

Refugee status is given only sparingly and states are using more and more disincentives such as the detention of asylum seekers and restrictions on access to employment. Subsequently, under the current state practice, it would not be appropriate and even politically unfeasible to extend the scope of the *Refugee Convention* to include environmental migrants. Finally, doing so would fail to provide effective protection for people affected by environmental changes, in any event, since most of the environmental displacements occur within the borders of the affected states. By contrast, the definition of a refugee in the *Refugee Convention* explicitly requires the crossing of international borders to enjoy such a status, since political refugees are fleeing persecution from their governments. Thus, a majority of environmentally displaced persons would remain outside the scope of the *Refugee Convention*.

With increasingly diverse reasons, types, and forms of migration related to the environment, how can we categorise these different realities into one universal document? As discussed earlier, given the unfavourable political context of closing states' borders, a sui generis instrument will raise many difficulties as a new form of protection. Such an instrument will inevitably require many compromises in order to overcome the resistance of states, and should be circumvented to avoid creating a status "on the cheap" in the same vein as the precarious right of political refugees. A universal and individualistic approach faces the major impediments of the complexity and multiplicity of contexts faced by people affected by environmental degradations. Thus, a protection scheme should be considered in the context of a little-studied theme: the beneficiaries. This second section will focus mainly on Indigenous peoples and the need to strengthen their legal protection in both legal and policy responses to environmental degradation.

III THE NEED TO PROVIDE ENHANCED LEGAL PROTECTION FOR INDIGENOUS PEOPLE AND THE RELEVANCE OF BILATERAL AGREEMENTS

According to the economic, social, political, and cultural contexts in which they occur, environmental changes may have completely different impacts on the displacement of populations affected by these degradations. Some population groups' livelihoods are

Daniele Lochak, 'L'Europe, terre d'asile? [Europe, a land of asylum?]' (2013) 4 *La Revue des Droits de l'Homme* <<http://revdh.revues.org/40>>; See, eg, *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application no 30696/09, 21 January 2011).

certainly more vulnerable to the impacts of environmental changes than others. We can focus on two main research priorities: (i) assessing how the protection of rights of Indigenous peoples can and must be connected to the issue of protection of environmental migrants; and (ii) considering the relevance of regional and bilateral agreements.

Before anything else, it seems necessary to clarify the very nature of the term Indigenous peoples, which covers very diverse realities and historical dynamics. At present, there is no universal definition. Besides the criterion of 'self-identification as indigenous or tribal,'³⁵ and being the descendants of the native population of a territory before any colonisation process,³⁶ other distinctive features include their cultural specificity within the dominant society, and particularly, their special relationship with Mother Earth. Indeed, Indigenous peoples retain a very spiritual relationship with their traditional lands; as such, Indigenous values, identities, and social, political, and economic institutions are based on this reverence for nature — 'the Earth is the specific social space in transmitting traditional culture and heritage.'³⁷ As evidenced by their traditional laws and customs, land is not only seen as a means of livelihood but an essential part of their faith and community life.

In many territories, this intimate relationship is often challenged by expropriation or forced removal from their traditional lands and sacred sites. There is also the issue of environmental degradations, partly because of climate change. For Indigenous peoples who are entirely dependent on their lands to survive (especially for hunting, fishing, and seasonal crops), any harm to the integrity of their environment threatens their traditional means of subsistence, fosters food insecurity, and may lead to serious health consequences. These disastrous consequences may force communities to migrate and seek refuge elsewhere, above all, because this vulnerability is exacerbated by discrimination and marginalisation within their dominant society.³⁸

³⁵ See *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, C169 ILO (entered into force 5 September 1991) art 1(2).

³⁶ See *Ibid* art 1(b). Most African States reject such historical features since they believe that the entire population of the State is Indigenous. This criterion is also controversial since it may be difficult to implement it. Indeed, for some native people who have been driven from their land and who are now living in urban centres, it may be burdensome to provide such proof of continuity.

³⁷ Frederic Deroche, Jean-Claude Fritz and Raphael Porteilla, *La nouvelle question indigène: Peuples autochtones et ordre mondial* (Editions L'Harmattan, 2006) 275.

³⁸ See, eg, Elisabeth Harball, 'Alaska natives try to flee climate change but find little help', *E&E Publishing* (online), 31 January 2013 <<http://www.eenews.net/stories/1059975576>>.

However, in recent years, many reports of international bodies and organisations have been published on the repercussions of environmental degradations on Indigenous peoples, with special attention paid to the effects of climate change.³⁹ These reports commonly describe, in great detail, the loss of resources and social consequences related to environmental degradation. Interestingly, these reports also reveal that even measures of mitigation of climate change on a global scale may increase the forced displacements of Indigenous peoples in violation of their fundamental rights.⁴⁰

Nonetheless, human rights implications or violations in respect to environmental degradations can be addressed. An international jurisprudence based on the interpretation of major human rights principles to recognise and protect Indigenous peoples' rights to their lands and reduce their vulnerability to climate change has emerged.⁴¹ Along with the progress made by the *United Nations Declaration on the Rights of Indigenous Peoples*,⁴² some national courts and constitutions have tended to recognise this intimate and specific link between the economic and cultural survival of Indigenous peoples and the protection of the environment. Further visible progress has been made in some local authorities' reactions to Indigenous movements in light of environmental degradations. Undeniably, Indigenous peoples should be supported by governments in

³⁹ See especially Raymond de Chaves and Victoria Tauli-Corpuz (eds), *Guide on Climate Change and Indigenous People* (Tebtebba Foundation, 2009) <<http://www.ddrn.dk/filer/forum/File/Guide-on-CC-and-IPs%5B1%5D.pdf>>; Mirjam Macchi, 'Indigenous and Traditional Peoples and Climate Change' (Issues Paper, International Union for Conservation of Nature, March 2008) <http://cmsdata.iucn.org/downloads/indigenous_peoples_climate_change.pdf>.

⁴⁰ Raymond de Chaves and Victoria Tauli-Corpuz (eds), *Guide on Climate Change and Indigenous People* (Tebtebba Foundation, 2009) 27 <<http://www.ddrn.dk/filer/forum/File/Guide-on-CC-and-IPs%5B1%5D.pdf>>.

⁴¹ See, eg, Article 27 of the International Covenant on Civil and Political Rights, which provides general protection of the right to cultural integrity. As such, Article 27 was often invoked for the protection of land rights of Indigenous peoples. The United Nations Human Rights Committee, who monitors the implementation of the Covenant, accepted complaints by Indigenous peoples and recognised their particularly close ties to their lands; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27; See, eg, *Lubicon Lake Band v Canada* where the Human Rights Committee found that Canada had violated Article 27 by granting concessions to private companies to prospect oil, gas, and wood within the territory of the Lubicon Cree and thereby expropriating its historical territory: Human Rights Committee, *Views: Communication No 167/1984*, Supp no 40, UN Doc A/45/40 (26 March 1990) [33].

⁴² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); See especially articles affording rights to Indigenous peoples who may be affected by environmental degradations: Article 8 'Right to not be subjected to forced assimilation or destruction of culture'; Article 19 'on the free, prior and informed consent'; Article 20 'Right to be secure in subsistence and development'; Article 24 'Right to the highest attainable standard of health and the conservation of vital plants and animals'.

rebuilding their own institutions and in protecting the transmission of their knowledge, particularly with regard to methods of traditional medicine and health education.⁴³

Indigenous peoples themselves have been fighting for many years to make their voice heard on the international stage. In 2002, in response to the United States and Australia's refusal to ratify the *Kyoto Protocol*, Tuvalu threatened to take both countries to the International Court of Justice for breach of the 'no harm' rule.⁴⁴ Similarly, in December 2005, 60 Indian Inuit living in the Arctic regions of the United States submitted a petition to the Inter-American Commission on Human Rights for violation of their human rights resulting from the impact of climate change caused by acts and omissions of the United States.⁴⁵ In view of the very intimate relationship between the environment and their identity as an Aboriginal community, these fundamental rights include respect for their cultural integrity, their security, the subsistence of their livelihoods, and the preservation of their health and physical integrity. While the Commission refused to consider such a petition, these two actions helped to increase public awareness of the link between adverse effects of climate change and human rights, and to alert governments and companies of their potential responsibility for these effects. Most recently in October 2013, a resident of Kiribati — another Pacific archipelago — requested refugee status from New Zealand due to the effects of global warming. However, 'a New Zealand judge dismissed Ioane Teitiota's case as "novel" but "unconvincing" ... He said the UN *Refugee Convention* stated that a refugee must fear persecution if they returned home, a criteria Mr Teitiota did not meet.'⁴⁶

Quite often on the international scene, Indigenous peoples demand that their 'free, prior and informed consent' and their participation in decision-making,⁴⁷ both at the national

⁴³ See especially Carlos Yescas Angeles Trujano, *Indigenous Routes: A framework for understanding Indigenous Migration* (International Organization for Migration, 2008) 48–9.

⁴⁴ See Rebecca Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' [2005] (14) *Pacific Rim Law & Policy Journal* 103, 104; Piers Moore Ede, 'Come Hell or High Water: Rising Sea Levels and Extreme Flooding Threaten to Make the South Pacific's Tuvalu the First Victim of Global Warming' [2003] (29) *Alternatives Journal* 1, 1–2.

⁴⁵ Sheila Watt-Cloutier, Submission to the Inter-American Commission on Human Rights, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005.

⁴⁶ Chris Irvine (ed), 'Kiribati Climate Change refugee rejected by New Zealand', *TheTelegraph.co.uk* (online), 26 November 2013

<<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/kiribati/10474602/Kiribati-climate-change-refugee-rejected-by-New-Zealand.html>>.

⁴⁷ *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, C169 ILO (entered into force 5 September 1991) art 16(2).

and international level, are effectively respected and enforced. This is especially the case when such decisions may directly affect their fundamental rights and survival.⁴⁸ These principles are particularly important in the case of measures to mitigate the impacts of climate change. For instance, as reported by the Australian Human Rights Commission, 'bio-fuel initiatives aimed at reducing greenhouse gas emissions may lead to an increase in monoculture crops and plantations, resulting in a decline in biodiversity and food security' for Aboriginal and Torres Strait Islander Peoples.⁴⁹

Finally, Indigenous peoples call for the international community's recognition of the value of their knowledge and practices to better adapt and mitigate adverse effects of climate change and to ensure the sustainability of their communities (especially with their traditional conservation forest management practices, sustainable agriculture production, farming, water collection, and irrigation, etc).⁵⁰ These sustainable models are not yet sufficiently taken into account by governments and the international community. To be effective long-term strategies, these adaptation measures must receive real financial and technical assistance from the international community and must not be isolated only to Indigenous communities, but integrated with other strategies of environmental conservation at the national level.

This first section highlighted the need to pay particular attention to the protection of Indigenous peoples in the case of sudden or progressive deterioration of their environment. The following case study of Tuvalu will illustrate many of the challenges

⁴⁸ See Andrea Carmen, 'Climate Change, Human Rights and Indigenous People' (Submission to the United Nations High Commissioner on Human Rights by the International Indian Treaty Council, NGO in Special Consultative Status to the UN Economic and Social Council, 2008) 27; Directorate-General For External Policies, 'Indigenous Peoples and Climate Change' (Study, Human Rights Study Policy Department, European Parliament, May 2009).

⁴⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' (Report No 2/2009, Australian Human Rights Commission, 2009) 146
<http://www.humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport08/pdf/ntreport08.pdf>.

⁵⁰ See, eg, the Indigenous communities in Rio Yaqui, Sonora Mexico that use:

'the Cultural Indicators for Food Security, Food Sovereignty and Sustainable Development' as an effective tool for assessing the impacts of decreasing rainfalls on traditional farming activities in their areas, as well as their own traditional knowledge about using seeds and methods which are resilient in drought conditions.

Andrea Carmen, above n 48; See also Celeste McKay and Andrea Carmen, 'Report of the North America Region Preparatory Meeting for the United Nations Permanent Forum on Indigenous Issues Seventh Session' (Meeting Report, United Nations Permanent Forum on Indigenous Issues, 7 May 2007), which provides concrete examples of successful Indigenous policies and methods to protect their lands and adapt them to the disastrous effects of climate change.

and legal issues that must be overcome regarding environmental migrations and Indigenous peoples, with a focus on the relevance of increased regional cooperation.

A Case Study: Tuvalu

In the central Pacific Ocean, the archipelago of Tuvalu is a low-lying atoll nation that can certainly be categorised within those most susceptible to climate change, as recognised by the Intergovernmental Panel on Climate Change.⁵¹ In addition to soil and coastal erosion, the vulnerability of Tuvalu is exacerbated by other environmental and socio-economic factors: limited natural resources, unreliable supply of drinking water, loss of biodiversity, unsuitable construction roads or a very limited economy, and intense demographic pressure.⁵²

Paradoxically, it is this terrible threat posed by global climate change that propelled the nation to the foreground of world news. Symbolic images of “climate refugees” or “environmental refugees” are used to highlight this vulnerability.⁵³ Through the media, Tuvalu has become a powerful symbol of the future effects of global warming.⁵⁴ The Tuvalu Government is also actively involved in promoting this media coverage, using the exposure as an excellent opportunity to carry more weight in the negotiation process around climate change, and to solicit greater international assistance.⁵⁵ In 2009 at the Copenhagen Conference on Climate Change, Ian Fry, representative of Tuvalu, attracted media attention with a strong speech in which he symbolically denied the agreements

⁵¹ See Intergovernmental Panel on Climate Change, Working Group II, ‘Climate Change 2001: Impacts, Adaptation, and Vulnerability’ (Contribution to the Third Assessment Report, Intergovernmental Panel on Climate Change, 2001) 855 [17.2.2.1] <<http://www.ipcc.ch/ipccreports/tar/wg2/>>.

⁵² See François Gemenne, ‘Tuvalu, un laboratoire du changement climatique? Une critique empirique de la rhétorique des « canaris dans la mine » [Tuvalu, a laboratory for climate change? An empirical critique of the ‘canaries in the coalmine’ rhetoric]’ (2010) 4 *Revue Tiers Monde* 89 <<http://www.geographie.ens.fr/IMG/Tuvalu-Gemenne.pdf>>.

⁵³ ‘The insular environment ... is seen as the earthly incarnation of climate change, which was before considered as an abstract and distant reality ... To embody this reality, the small and friendly State of Tuvalu, free of negative powerful mental models, is both welcome and timely.’ Ibid.

⁵⁴ Ibid.

⁵⁵ See, eg, Prime Minister and Minister of Foreign Affairs of Tuvalu, Apisai Ielemia, ‘Tuvalu Statement’ (Speech delivered at the 63rd Session of the United Nations General Assembly, New York, 26 September 2008) <http://www.un.org/ga/63/generaldebate/pdf/tuvalu_en.pdf>.

proposed by industrialised countries in terms of limiting global temperature rise to 2°C.⁵⁶ However,

the introduction by the delegation of Tuvalu of a motion for the establishment of a contact group to discuss the creation of a new protocol binding under the Framework UN Convention on Climate Change (UNFCCC), has created an outcry in the [Assembly] ... Negotiations had to be suspended for several hours and a solidarity demonstration took place in the main hall.⁵⁷

Mr Fry refused to support the final agreement reached by the Conference.⁵⁸ What may, at first, seem surprising is that the Government of Tuvalu does not request international recognition under a protective “environmental refugees” status. Instead, their priority is to mitigate the adverse effects of climate change by placing political pressure on industrialised states, rather than the considered alternative of ‘being addressed as refugees who need to be saved by Western charity.’⁵⁹

However, despite these political and strategic demands of the Tuvalu Government, this issue of “environmental refugees” cannot be sidestepped. Indeed, when Tuvalu will no longer be able to cope with adaptation measures, fleeing the country may become a last resort solution. In this perspective, regional cooperation — which has already been underway to varying degrees for some years — appears to be essential.

A field survey was conducted in July – September 2007, as part of the EACH-FOR Program to ‘compare social representations on migration with those of Tuvaluans themselves’ with a primary aim to ‘identify the key determinants of the migration behaviour of Tuvaluans and the related perceptions and representations’.⁶⁰ Both residents of Tuvalu and migrants living in New Zealand were interviewed. New Zealand

⁵⁶ Tuvalu is indeed doomed to disappear beyond an increase of 1.5°C; See Brad Johnson, “Tuvalu to Obama and the Senate: “The fate of my country rests in your hands””, *Climate progress* (online), 13 December 2009 <<http://thinkprogress.org/green/2009/12/13/174518/tuvalu-fate-senate/>>.

⁵⁷ Courrierinternational.fr ‘Copenhagen 2009, Tuvalu secoue la conférence’ [Copenhagen 2009, Tuvalu shakes the conference] *Courrier international.fr* (online), 14 December 2009 <<http://www.courrierinternational.com/article/2009/12/14/tuvalu-secoue-la-conference>>.

⁵⁸ He described the agreement as ‘30 pieces of silver to betray our future and our people’. Adam Morton, ‘Copenhagen chaos as talks fail’, *TheAge.com* (online), 20 December 2009 <<http://www.theage.com.au/environment/copenhagen-chaos-as-talks-fail-20091219-l6r5.html>>.

⁵⁹ Angela Oels, ‘Asylum rights for climate refugees? From Agamben’s bare life to the autonomy of migration’ (Conference Paper presented at the Annual Convention of the International Studies Association, 26 March 2008) 16 <http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/5/1/0/8/p251088_index.html?hpssid=acb11206933221a0014d9be8909d20a4>.

⁶⁰ François Gemenne, above n 52, 10.

is a popular destination amongst migrants, which can be explained both by its strong presence of Polynesian culture and the assistance New Zealand provides to promote such migration.

The outcomes of this survey can be considered quite surprising at first, since they misalign completely with the views accepted and reinforced by media of powerless and passive people facing the increasing pressures of climate change. The majority of people interviewed clearly said that they do not intend to migrate in the near future, regardless of the threat posed by climate change.⁶¹ The deep-rooted attachment to their land is certainly one of the main reasons for their decision to stay. Indeed, these peoples are highly dependent on their own lands and natural resources, both for their survival and for the preservation of their cultural and spiritual values. As follows, traditional knowledge and practices are interpreted and used to react and adapt creatively to the impacts of climate change. Migration is seen as a coping strategy among others — neither a painful confession, nor a last ditch solution after failing to protect themselves against the adverse effects of climate change. In this way, the Tuvaluans refuse to be considered as “environmental refugees” so as to resist being locked into a category that victimises them. Among those who plan to migrate, most consider their migration as a proactive strategy to reduce their environmental vulnerability, and/or an opportunity to pursue new projects in New Zealand.⁶²

Since 2001, Tuvalu and New Zealand have signed various cooperation agreements on migration, including a quota system that allows 75 labour immigrants to migrate every year to New Zealand. However, strict conditions must be met: migrants must be aged between 18 and 45 years, must be able to speak fluent English, and must display an ability to find work with enough ease that they should not become a burden on the country’s social system.⁶³ Clearly, these migration policies are more focused on economic objectives and are not designed to take into account the effects of environmental degradations. Indeed, no country has yet been willing to set a precedent by explicitly accepting climate migrants under a refugee category.⁶⁴ Although this quota

⁶¹ See Ibid, for a complete review of the outcome of the field survey.

⁶² Ibid.

⁶³ See New Zealand Government, *Pacific Access Category* (27 March 2014) Immigration New Zealand <<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>>.

⁶⁴ Oli Brown, ‘Climate Change and forced migration: Observations, Projections and Implications’ (Background Paper for the 2007 Human Development Report No 2007/17, United Nations Development

system may represent a noteworthy positive step, it cannot replace sustainable and viable long-term solutions since it does not imply any substantial additional responsibility from New Zealand in respect to the Tuvaluans.

This diversity of expectations and patterns of migration highlight several difficulties in protecting Indigenous cultural identity, language, and social and economic development while being relocated. Some authors argue for the desirability of shifting primary responsibility to neighbouring states to accommodate affected people.⁶⁵ However, these states may be no more responsible for the adverse effects of climate change than any other states. And one may wonder,

what about the neighbours who do not have the economic resources to decently receive [environmental migrants]? The host burden may weigh heavily on host states if there is no regional or international compensation funds, and thus lead to many political deadlocks in the negotiations, unless the international community decides to share the financial burden.⁶⁶

Nevertheless, given the current gaps in the international protection regime, regional and bilateral agreements can offer a more complete and reliable means of protection, as each contracting states' obligations can be clearly set out and defined. Besides, as rightly pointed out by Angela Williams,

taking into consideration the unwillingness of states to compromise their sovereignty, and acknowledging the reluctance of the United States to agree to the most basic of commitments via the Kyoto Protocol, it would seem unlikely that a new global agreement could be reached specifically in relation to climate change displacement.⁶⁷

Program, Human Development Report Office, 2007) 8

<http://www.iisd.org/pdf/2008/climate_forced_migration.pdf>.

⁶⁵ See, eg, Geremia Cometti, 'Quelle solution juridique pour Tuvalu? [What legal solution to Tuvalu?]'

[2010] *The Graduate Institute of International and Development Studies, Online Series*

<<http://iheid.revues.org/213>>; Office of the United Nations High Commissioner for Refugees, *Climate Change and the Risk of Statelessness: The situation of low-lying Island States* (Legal and Protection Policy Research Series, 2011); Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30(4) *Law and Policy* 502.

⁶⁶ Christel Cournil and François Gemenne, 'Les populations insulaires face aux changements climatiques : des migrations à anticiper [Island populations face climate change: Migration to anticipate]' (2010) 10(3) *Vertigo* (online) [30] <<http://vertigo.revues.org/10482#ftn6>>.

⁶⁷ Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30(4) *Law and Policy* 502, 517.

This is especially the case, as the immediate impacts of climate change are felt first at the regional level.

However, the main objective of forming bilateral and regional agreements is to provide full and complete protection to the human rights of displaced populations, and to ensure the different needs of Indigenous peoples are respected. Of additional benefit is that such agreements, by providing assistance to neighbouring states, are conducive to encouraging greater participation of states in regional forums and forming stronger links between neighbouring states. In this view, forming bilateral and regional agreements can assist in building stability and solidarity amongst neighbours, and can be a means of indicating to the international community the existence of close relationships between the states concerned.⁶⁸ In doing so, those involved would not only be preserving the economic, social, and cultural integrity of their region, but also potentially adding to its overall sustainability. Such regional agreements should be 'discussed and negotiated well in advance of the first signs or before irreversible damage to the island territory' to be most effective.⁶⁹

IV CONCLUSION

Accordingly, this study has brought to light some of the challenges we now face in relation to the increasing frequency and intensity of environmental degradations, particularly regarding statelessness and the threat of lost territory. In traversing these very sensitive issues, fundamental concepts of international public law must be thoroughly reinterpreted, now, and in the future. Although bilateral and regional agreements present a viable option for states suffering from population displacement, the international community must eventually address what will transpire of the political and legal institutions of states when their territories threaten to disappear completely. In the same way as it is necessary that Indigenous peoples can make their voices heard on the international scene, it is vital to this process that populations from islands at risk are heard in international climate change negotiations, and their fundamental rights to cultural integrity and security are ensured.

⁶⁸ Geremia Cometti, 'Quelle solution juridique pour Tuvalu? [What legal solution to Tuvalu?]' [2010] *The Graduate Institute of International and Development Studies, Online Series* <<http://iheid.revues.org/213>>.

⁶⁹ Christel Cournil and François Gemenne, 'Les populations insulaires face aux changements climatiques: des migrations à anticiper [Island populations face climate change: Migration to anticipate]' (2010) 10(3) *Vertigo* (online) [29] <<http://vertigo.revues.org/10482#ftn6>>.

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