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04

SUSTAINABLE DEVELOPMENT LAW ON ENVIRONMENTAL MIGRATION: THE STORY OF A BAG OF MARBLES, AN OBELISK AND A TAPESTRY

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SUSTAINABLE DEVELOPMENT LAW ON ENVIRONMENTAL MIGRATION: THE STORY OF A BAG OF MARBLES, AN OBELISK AND A TAPESTRY

Benoît Mayer¹

1. Introduction

2. The Obelisk: Environmental Migration Law

2.1. Environmental migration

2.2. Towards a specific law on Environmental Migration?

3. The Bag of Marbles: Laws Relevant in the Face of Environmental Migration

3.1. Laws relating to physical displacement

3.2. Laws relating to the environment

3.3. Other laws

3.4. Conclusion: The challenge of fragmentation

4. The Tapestry: Sustainable Development Law on Environmental Migration

4.1. Sustainable development

4.2. Sustainable development law

4.3. Sustainable development law as an “overarching concept”

4.4. Sustainable development law as an umbrella for laws relevant to environmental migration

4.5. Challenges to sustainable development law as an umbrella

5. Conclusion

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"When I talk about complexity, I am referring to the Latin elementary meaning of the word 'complexus' – 'what is woven together'. The components are different, but one needs to see the overall picture like in a tapestry. The real problem is that we have learnt to separate. We should better learn to link up. Linking up is not just about establishing a connection, but also establishing a connection that works like a loop."

Edgar Morin²

1. Introduction

It has become common sense to note that an unfortunate legal gap resulting from the absence of any international legal instrument specifically conceived to govern environmentally induced migration. International law-making bodies would have been somewhat inattentive to the growing concern of migration of many individuals as a consequence of environmental change, in particular in the context of climate change; or, at least, they would have been unaware of the forced nature of such movements. How, asked many scholars in the course of the last decade, could international law leave environmental "refugees" behind and only care for those who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,"³ are unable to return to their country of origin? If the 1951 Convention Relating to the Status of Refugees [Refugee Convention] aimed at protecting forced migrants, why did it contain such a complicated and limited definition (even after 1967, when its Protocol extended the convention to non-European, post-1951 refugees)?

To a great extent, the answer can be deduced from the question itself: the Refugee Convention did not aim at protecting forced migrants, but at protecting states from security concerns raised by groups of refugees.⁴ States inserted in the definition of a "refugee" nothing else than what they wanted to insert: in the context of the Cold War, "economic refugees," commentators rapidly submitted, were not granted any protection.⁵ In

² Edgar Morin, "La stratégie de reliance pour l'intelligence de la complexité" (1995) 9:2 *Revue Internationale de Systémique*, translated by the author ("Quand je parle de complexité, je me réfère au sens latin élémentaire du mot "complexus", "ce qui est tissé ensemble". Les constituants sont différents, mais il faut voir comme dans une tapisserie la figure d'ensemble. Le vrai problème (de réforme de pensée) c'est que nous avons trop bien appris à séparer. Il vaut mieux apprendre à relier. Relier, c'est-à-dire pas seulement établir bout à bout une connexion, mais établir une connexion qui se fasse en boucle.")

³ *Convention Relating to the Status of Refugees*, ,, 28 July 1951,)Entered into force on 22 April 1954([*Refugee Convention*] art1(A)2.

⁴ James C Hathaway, "Reconsideration of the Underlying Premise of Refugee Law, A" (1990) 31:1 *Harv Int'l L J* 129.

⁵ See for example: Patricia Anne Woods, "Term Refugee in International and Municipal Law: An Inadequate Definition in Light of the Cuban Boatlift" (1981) 5 *ASILS Int'l LJ* 39; Austin T Jr Fragomen, "Refugee: A Problem of Definition, The" (1970) 3 *Case W Res J Int'l L* 45; Laura V Kwiatkowski, "Economic Refugees - Do They Have a Place inside the Golden Door" (1984) 3 *Can-Am LJ* 189. Elizabeth Kay Harris, "Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label" (1993) 9 *Am UJ Int'l L & Pol'y* 269; Francis Gabor & John B Rosenquest IV, "Unsettled Status of Economic Refugees from the American and International Legal Perspectives-A Proposal for Recognition under Existing International Law, The" (2006) 41 *Tex Int'l LJ* 275; See also: R J Vincent, "Political and Economic Refugees: Problems of Migration, Asylum and Re-Settlement Report of Ditchley conference,

other words, the way international law framed the notion of refugees is not the result of a coincidence, but of a complex calculus of the interests of different states.

In this context, liberal legal researchers struggling for a better world have two options. Obviously, they can struggle for the law to be modified. The way of an international "*lex ferenda*," paved by universal treaties, regional coordination or ad hoc cooperation, has been extensively scrutinized by a number of scholars.⁶ It is however a long and tortuous project, for international law is made by states beyond the veil of ignorance, which are likely to be more sensible to their own interests than to ethical considerations. Some hope may come from a security-based approach: as for the Refugee Convention, states well-understood interests could push them to a certain form of cooperation.⁷ This is also a dangerous way. Security concerns may as well push states to support illiberal regimes that contain irregular out-migration, international trafficking and terrorism. I am not convinced that the "human security" project, if it is to be conceived as a simple addition, will be able to reconcile the humanistic project (the human rights or development agenda) with the drive for action stemming from the notion of "security." Lastly, anything approximating a reform of the Refugee Convention would open a Pandora box and, possibly, undermine the existing, however unsatisfying legal regime.

Yet, liberal legal researchers have mostly left beside the other option: exploring law as it is given to them, the "*lex data*,"⁸ and leading the way for its liberal interpretation. This involves to question the rapid assertion that, because no specific treaty exists to date, there is absolutely no legal protection offered to environmental "refugees," and to try and find a more nuanced understanding of the role that existing law may play to protect people displaced in the context of environmental change. This may be only a first step towards a more targeted law-making: once the precise, narrower legal gaps in different legal regimes are identified, transforming the law becomes less ambitious and more realistic a task.

Ditchley Park, Oxfordshire, 13–15 October 1989" (1989) 2:4 *Journal of Refugee Studies* 504 ; Andrew E Shacknove, "Who Is a Refugee?" (1985) 95:2 *Ethics* 274; Michelle Foster, *International Refugee Law and Socio-Economic Rights* Cambridge University Press, 2009).

⁶ In particular: Frank Biermann & Ingrid Boas, "Protecting Climate Refugees: The Case for a Global Protocol" (2008) 50:6 *Environment: Science and Policy for Sustainable Development* 8; Mike Hulme, Frank Biermann & Ingrid Boas, "Climate Refugees: Cause for a New Agreement?" (2008) 50:6 *Environment* 50; Frank Biermann & Ingrid Boas, "Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees" (2010) 10:1 *Global Environmental Politics* 60; David Hodgkinson et al, "The Hour When The Ship Comes In': A Convention for Persons Displaced by Climate Change" (2009); CRIDEAU, "Draft Convention on the International Status of Environmentally-Displaced Persons" (2008) 39 *RDUS* 451; DIDCE, *Draft Convention on the international status of environmentally displaced persons (second version - May 2010)* 2010; Benoit Mayer, "The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework" (2011) 22:3 *Colorado Journal of International Environmental Law and Policy* 357; Jane Mcadam, "Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer" (2011) 23:1 *International Journal of Refugee Law* 2.

⁷ Jon Barnett & W Neil Adger, "Climate Change, Human Security and Violent Conflict" (2007) 26:6 *Political Geography* 639; *Climate change and its possible security implications*, UN GA Res 63/281,, 11 June 2009, [*Climate change and its possible security implications*].

⁸ On the opposition between *lex ferenda* and *lex data* in the context of environmental migration, see: Christel Cournil, "Émergence et faisabilité des protections en discussion sur les « réfugiés environnementaux »" (2010) n°204:4 *Revue Tiers Monde* 35 at 43.

Following the second way opened to liberal legal researchers – rethinking existing laws, instead of, or before making new laws – this paper submits that environmentally displaced persons suffer from a confusion of many existing laws rather than from an absence of law.

As Edgar Morin showed, reconnecting is a constant necessity in a complex society. Each law and each legal field must be connected with other laws and with empirical realities. From a positivistic conception of laws, “legal gaps” (or “legal overlaps”) result from a lack of interconnectedness: all fields of law accidentally evade one particular point of space (or, in the case of legal overlaps, two or several fields of law converge on the same point).

To address such gaps, law can process through hybridizations. Hybridization is “a recombination of knowledge and competence in new specialized fields and an activation of the multidimensional network of specialties.”⁹ It is often necessary, Oestrenge argues, “because specialization leaves gaps between disciplines and specialties and those gaps have to be filled.”¹⁰ In laws, hybridization, as an essentially cognitive process, does not consist in *creating* new laws, but rather in *reinterpreting* existing laws. In international law, it does not require the unlikely general agreement of the international community through which new treaty (or, in a different manner, customary norms) must pass.

This paper argues that such a hybridization process may at least contribute in affirming a legal regime applicable, in many circumstances, towards environmentally displaced persons. Taken together, a set of normative frameworks differently relevant in the face of environmental migration constitutes quite an extensive legal nebula. There surely remains very significant gaps in the protection of environmentally displaced persons, but those gaps, because they are plural, are also slightly less fundamental, and easier to address, than the whole, single “legal gap” sometimes described.

While there certainly are other means for synthesizing laws relevant in the face of environmental migration, this article argues that sustainable development law may shape a broad umbrella under which many isolated legal fields – such as laws relating to physical movement, environmental laws, laws on development, human rights laws, laws on disaster management, on humanitarian relief and on responsibility – may be considered together in a comprehensive and inclusive way. This synthesis is probably also what the project of “human security” attempts to constitute, but in a less explicit and less ambitious manner. The concept of human security may well reconnect rights-based approaches with development and security languages, but it leaves behind any responsibility-based discourse on climate change law, for instance. More comprehensive than the project of “human security,” thus, the project of sustainable development law aims at shaping a coherent synthesis of

⁹ Willy Oestrenge, “Crossing Scientific Boundaries by Way of Disciplines” (2006) 2007 *Complexity Interdisciplinary Communications* 11 at 12–13.

¹⁰ *Ibid.*

negatively or positively conflicting laws, inter alia when addressing environmental migration.

It must be kept in mind that this paper is not the end of a research, but a start. It suggests a research project based on the ideas previously exposed: reconnecting different fields of laws relevant in the face of environmental migration and synthesizing them in something greater, more coherent and, therefore, more efficient, under the concept of sustainable development. Therefore, this paper should be read as an hypothesis rather than as a conclusion.

The structure of this paper is as follows. Section 2 discusses the (absence of) "environmental migration law." Section 3 inquires further into the multitude of "laws relevant in the face of environmental migration" – that are, laws that have not been designed expressly to address environmental migration, but which play, or could play an instrumental role in realizing the liberal project. Lastly, section 4 pleads for the role of sustainable development law with regard to environmental migration.

2. The Obelisk: Environmental Migration Law

Simplicity is a constant intellectual temptation. Environmental migration, once identified as an issue on the researcher's agenda, has generally been conceived as one issue. Hence the search for an obelisk: a giant vertical monolith, unalterable construction that would comprehend the whole issue of environmental migration. This section discusses environmental migration law as an obelisk.

2.1. Environmental migration

2.1.1. Definitions

Environmental migration is the movement of people induced by the environment.¹¹ It includes climate migration, i.e. environmental migration induced by the specific global climate change. Walter Kälin, the UN special rapporteur on the human rights of internally displaced persons, distinguished between five scenarios of environmental migration:

- 1) "*sudden-onset disasters*, such as flooding, windstorms [...] or mudslides caused by heavy rainfalls";
- 2) "*slow-onset environmental degradation* caused, inter alia, by rising sea levels, increased salinisation of groundwater and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification";
- 3) "so-called '*sinking*' *small island states*";
- 4) areas designated by governments as "*high-risk zones* too dangerous for human habitation on account of environmental dangers"; and

¹¹ The IOM defines environmental migrants as "persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects 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." Frank Laczko & Christine Aghazarm, *Migration, Environment and Climate Change: Assessing the Evidence* (IOM, 2009) at 19.

- 5) displacement following “*unrest seriously disturbing public order, violence or even armed conflict*” that “may be triggered, at least partially, by a decrease in essential resources due to climate change.”¹²

Scenarios 1 to 3 constitute the core of the environmental migration debate, while scenarios 4 and 5 are less often addressed within the notion of environmental migration. Also, scenario 3 (sinking islands) is, in fact, a sub-category of scenario 2 (slow-onset environmental degradation). Thus, the two main scenarios are migration induced by a natural disaster or by slow-onset environmental degradation.

Beyond these scenarios, environmental migration is characterized by a great diversity. It can be planned at an early stage or it can occur spontaneously before, during or after a “natural” disaster (which, sometimes, could have been foreseen, managed, or even prevented) or during a slow-onset environmental degradation. Displacement can be temporary or definitive or recurrent. One should also keep in mind that, in many circumstances, not everybody moves: the most vulnerable are often unable to afford displacement.

Unlike a common misrepresentation, empirical studies (in particular the EACH-FOR project, which included case studies in 23 countries or regions)¹³ show that most environmental migration is internal. Cross-border migrating is a second choice and most often people go to a directly neighboring country, or at least to a country of the region. Thus, migration from developing to developed countries in the context of environmental change is rare, perhaps even exceptional. People migrate only up to where their resources allow them to go.

2.1.2. Environmental “migrants” (or “refugees”) or environmental “migration”?

There is a sensible argument in favor of concentrating on individuals (migrants/refugees) instead of abstract phenomena (migration).¹⁴ However, notions such as “environmental refugees” or “environmental migrants” are very problematic. “Environmental refugees” is a legal misnomer, for the 1951 Refugee Convention and its 1967 Protocol limit the definition of refugees to a 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁵ Environmentally displaced persons do not, as such, fall within the category of (political) refugees.

¹² Walter Kälin, “Conceptualizing Climate-Induced Displacement” in *Climate Change and Displacement: Multidisciplinary Perspectives*, Jane M'Adam ed (Oxford: Hart, 2010) 81 at 85–86.

¹³ EACH-FOR Synthesis Report, 2009, www.each-for.eu

¹⁴ Per analogy, see: James C Hathaway, “Forced Migration Studies: Could We Agree Just to ‘Date’?” (2007) 20:3 *Journal of Refugee Studies* 349 .

¹⁵ Refugee Convention, *supra* note --- art 1(A)(2); *Protocol Relating to the Status of Refugees*, ,, 13 January 1967, [*Protocol Relating to the Status of Refugees*] art 1(2).

More fundamentally, any conceptualization of environmental “migrants” or “refugees” as individuals distinct from others has revealed problematic. Such categories lack coherence: environmental change may lead to migration through very different avenues. People may be forced to move because of environmental change, but, most often, the environment is only one in a multitude of causes that lead to an individual decision to migrate.¹⁶ In most cases, migration studies and empirical case-studies show that environmental factors are only “one in a cluster of causes.”¹⁷ To this extent, the presentation of simple figures of “environmental refugees” or “environmental migrants,” as a group of individuals who can practically be distinguished from others, is simplistic and misleading.¹⁸ Therefore, I prefer to deal with “environmental migration” every time this is possible, and I use the notion of “environmentally displaced person,” when necessary, as a more vague notion.

2.2. Towards a specific law on Environmental Migration?

The Refugee Convention defines a refugee as a persons 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁹ As I mentioned, the definition is, and intend to be limitative: the *travaux préparatoire* show the negotiators’ fear for “[t]oo vague a definition, which would amount, so to speak, to a blank check.”²⁰ According to the *travaux préparatoires*, the drafters attached the outmost important to the demand that “[t]he categories of refugees coming under the convention should [...] be clearly and specifically determined.”²¹

Yet, as has been shown in the previous sub-section, environmentally displace persons cannot be defined in the same way as political refugees. They do not belong to a particular category of people that, in the case of the Refugee Convention, a state can identified as being possibly persecution. Overall, environmental change can act indirectly, through economic medias, and environmentally displaced persons are not necessarily conscious of the environmental indirect causality of their migration. States are unlikely to approve any binding obligation towards

¹⁶ Graeme Hugo, “Environmental Concerns and International Migration” (1996) 30:1 International Migration Review 105 at 107 See also figure 1 at 108.

¹⁷ Astri Suhrke, *Pressure Points: Environmental Degradation, Migration and Conflict* Cambridge, American Academy of Art and Science, 1993) at 5. See also: François Gemenne, “Why the numbers don’t add up: A review of estimates and predictions of people displaced by environmental changes” (2011) Global Environmental Change.

¹⁸ On the debate between “maximalists” (or “alarmists”) and “minimalists” (or “sceptics”), see James Morrissey, *Environmental Change and Forced Migration: A State of the Art Review* Refugee Studies Center, Oxford Department of International Development, 2009). I will very soon be circulating a draft article tentatively entitled “The Unbearable Impossibility of Defining ‘Environmental Refugees’: A Matter of Words and their Consequences.”

¹⁹ Refugee Convention, *supra* note --- art 1(A)(2); Protocol Relating to the Status of Refugees, *supra* note --- art 1(2).

²⁰ UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Third Meeting Held at Lack Success, New York, on Tuesday, 17 January 1950, at 3 pm 1950*) at 37.

²¹ Executive Committee of the High Commissioner’s Programme, *Report of the Forty-Fifth Session* (Geneva: UNHCR, 1994) at 40.

an ill-defined legal category of individuals, especially if large numbers are cited by an alarmist discourse.

A rights-based normative framework addressing environmentally displaced persons would also have the undesirable consequence of excluding those who most urgently need assistance, for the poorest often cannot move. Certainly, social vulnerability is a consequence of displacement, as displaced persons lose their social and economic, cultural and sometimes linguistic networks. Yet, a danger is that attention goes to people displaced, but not to the more discrete victims of environmental change who are not able to move.

In the context of conventional refugees, Lubkemann engaged in an original conceptual discussion on "involuntary immobility,"²² highlighting the fact that a fundamental change in the "human lifescape" could induce what he calls a "displacement in place."²³ In other words, even if people are not moving, their environment is nonetheless changing, requiring a certain protection. Indeed, Lubkemann's argument is more likely to flourish in the context of environmental migration than regarding political asylum. When a government persecutes part of its population, the distinction between people fleeing their country and the others is legally relevant, as it can be assumed that such a government is unwilling to authorize the international community to come and protect persecuted people: only once they have reached the territory of a safe state can conventional refugees be protected. Yet, the situation is very different in the context of environmental migration where the local and national authorities would most often be willing to reach an agreement with the international community for an international assistance to people not physically displaced.

Environmentally displaced persons can be conceived in two different ways, and, in both cases, they are only part of a larger category. On the one hand, they are part of the larger category of the displaced persons, who, because they are often socially isolated, are more vulnerable. On the other hand, they are part of the larger category of people affected by environmental change, either displaced or not, or "displaced in place." As a result, a specific rights-based protection of environmentally displaced persons is necessarily shaky, as its *raison d'être* – protecting individuals either on the ground of their physical displacement, or because they are affected by environmental change – is uncertain and in both cases a protection of the sole environmentally displaced persons would be too narrow to be coherent. Instead of one issue, this analysis results in two different problems: the protection of displaced persons on the one hand, and the protection of people affected by environmental change on the other hand.

²² Stephen C Lubkemann, "Involuntary Immobility: On a Theoretical Invisibility in Forced Migration Studies" (2008) 21:4 *Journal of Refugee Studies* 454 .

²³ Stephen C Lubkemann, *Culture in Chaos: An Anthropology of the Social Condition in War* University of Chicago Press, (2008).

3. The Bag of Marbles: Laws Relevant in the Face of Environmental Migration

McAdam highlighted the need to reconcile a “plethora of existing as well as potential governance mechanisms, processes, and institutions [...] across the fields of migration, environment, development, human rights, disaster management, and humanitarian relief.”²⁴ This section lists some of the laws relevant in the face of environmental migration and shapes a collection of “marbles.”

3.1. Laws relating to physical displacement

3.1.1. Laws on internal displacement

The guiding principles on internal displacement were elaborated by the representative of the Secretary General to Internally Displaced Persons (IDPs), Francis Deng, on the demand of the UN Commission on Human Rights. The Guiding Principles were presented to the Commission on Human Rights in 1998, but they were never open to ratification: they are a “soft law” instrument. Beside some general provisions,²⁵ the Guiding principles address the protection from displacement,²⁶ during displacement,²⁷ the framework for humanitarian assistance²⁸ and the norms applicable to return, resettlement and reintegration.²⁹

The guiding principles adopt a broad definition of IDPs as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”³⁰ Therefore, environmentally displaced persons fall within the definition of IDPs under two conditions:

- They must not have crossed any international border;
- A threshold of forcedness must be reached.

One obvious limitation of the legal authority of the Guiding Principles is their soft legal nature. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted in 2009 but not yet entered into force, is an attempt to increase the legal authority of these norms in a regional context.³¹

²⁴ Jane McAdam, “6 Environmental Migration” in *Global Migration Governance*, 1st ed (Oxford, England: Oxford University Press, 2011) 153 at 153..

²⁵ *Ibid*, principles 1-4.

²⁶ *Ibid*, principles 5-9.

²⁷ *Ibid*, principles 10-23.

²⁸ *Ibid*, principles 24-27.

²⁹ *Ibid*, principles 28-30. See generally: Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (Washington DC: The American Society of International Law, 2008).

³⁰ *Guiding Principles on Internal Displacement*, „ [Guiding Principles] introduction, para 2.

³¹ *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, „ 22 October 2009, [Kampala Convention]; Allehone Mulugeta Abebe, “The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges” (2010) 29:3 Refugee Survey Quarterly 28 ; Stephane Ojeda, “The Kampala Convention on Internally

3.1.2. Laws on international displacement

- Law on migration

International laws on migration exclusively deal with *international* migration; therefore, they may address part of the environmentally displaced persons excluded from the scope of international law on internal displacement.

When Jorge Bustamante, the previous special rapporteur on the human rights of migrants, left office, he indicated "migration in the context of climate change" as one of the "possible themes for further studies." His successor, Prof. François Crépeau, will probably make of environmental migration one of the priorities of his mandate.

International law on migration is however a work in progress. The 1990 UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families has been ratified by no than more forty-five countries, all from the "global South."³² The ILO conventions on migrant workers³³ do not go as far, in particular because they exclude all irregular migrants. Indeed, it may be that the strongest protection of the human rights of migrants indeed come from general human rights instruments: constitutions, regional and international institutions that protect equal rights for everyone, including the aliens.³⁴

- Law on statelessness

The 1954 Convention relating to the Status of Stateless Persons may be applicable to some environmentally displaced persons in the eventuality that the whole territory of some small islands developing state would disappear or, at least, become uninhabitable.³⁵ Much ink has recently been spilled on the possibility that the territory of a state disappears and the consequences that would be associated to this, notably regarding the existence of the state and the status of its nationals. Yet, this debate goes

Displaced Persons: Some International Humanitarian Law Aspects" (2010) 29:3 Refugee Survey Quarterly 58 .

³² *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, ,, 18 December 1990, [*International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*]; Euan MacDonald & Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives* UNESCO, 2007) See also; Juhani Lonroth, "The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation" (1991) 25:4 *International Migration Review* 710.

³³ *Migration for Employment Convention (Revised)*, ILO C97,, 1949, [*Migration for Employment Convention (Revised)*]; *Migrant Workers (Supplementary Provisions) Convention*, ILO C143,, 1975, [*Migrant Workers (Supplementary Provisions) Convention*].

³⁴ See in particular: Human Rights Committee, *General Comment No 15: The position of aliens under the Covenant* 1986).

³⁵ *Convention relating to the Status of Stateless Persons*, ,, 28 September 1954, [*Convention relating to the Status of Stateless Persons*]; Jane McAdam, "Disappearing States', Statelessness and the Boundaries of International Law" in Jane McAdam, ed, *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart, 2010) 105; Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States* UNHCR, 2011); Brad K Blitz, "Statelessness and Environmental-Induced Displacement: Future Scenarios of Deterritorialisation, Rescue and Recovery Examined" (2011) 6 *Mobilities* 433.

against commonsensical considerations. Until the territory of a state disappears or, at least, become uninhabitable, any argument based on the law on statelessness is bound to fail, as the protection afforded by the 1954 Convention applies only to individuals who are not considered as nationals by any (existing) state under the operation of its law.³⁶ Only when the territory *has* become uninhabitable or *has* disappeared, one may argue for an application of the law on statelessness; but, at this time, the population should hopefully already have been relocated. The period between the desirable relocation of a population increasingly exposed to extreme weather events and the disappearance of the state may span over several years, perhaps decades.

- Law on political asylum

As a general rule, the Refugee Convention does not apply to environmentally displaced persons.³⁷ As McAdam argued, “[t]he effects of rising sea levels, salination, and increasingly frequent storms, earthquakes, and floods on people's homes, (p. 163) livelihoods, and health may be harmful, but they do not constitute ‘persecution’ as it is understood in international and domestic law”³⁸ as part of the definition of a “refugee.” However, in principle at least, the convention may apply in two circumstances:

- A coincidental overlap of the environmental inducement with a persecution;
- A causal relation between environmental change and persecution – for instance, if people are persecuted as a result of a conflict triggered by environmental change.³⁹

- Law on subsidiary protection

If environmentally displaced persons do not generally qualify as refugees as defined by international law, states may take the initiative to extend the protection granted to refugees to a subsidiary category of individuals. Sweden and Finland protect people who, “by reason of an environmental catastrophe, cannot return to his home country.”⁴⁰ By contrast, neither the Cartagena Declaration on Refugees, nor the Convention Governing the Specific Aspects of Refugee Problems in Africa have extended the definition of refugees to environmentally displaced persons.⁴¹ Indeed, as was

³⁶ Convention relating to the Status of Stateless Persons, *supra* note --- art 11.

³⁷ Refugee Convention, *supra* note ---; Protocol Relating to the Status of Refugees, *supra* note ---.

³⁸ McAdam, *supra* note --- at 162–63.

³⁹ See generally: Scott Edwards, “Social Breakdown in Darfur” (2008) 31 *Forced Migration* 23; Nils Petter Gleditsch, “Environmental Conflict: Neomalthusians vs Cornucopians” in *Security and Environment in the Mediterranean: Conceptualising Security and Environmental Conflicts*, Hans Günther Brauch ed (Springer, 2003) 477; Thomas F Homer-Dixon, *Environment, scarcity, and violence* (Princeton University Press, 1999); Barnett & Adger, *supra* note ---; Vikram Kolmannskob, *Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa* (UNHCR, working paper series on New Issues in Refugee Research, Working paper No 180, 2009); William AV Clark, “Social and Political Contexts of Conflict” (2008) 31 *Forced Migration* 22.

⁴⁰ *Swedish 2005 Aliens Act*, SFS 2005:716, Chapter 4, sect. 2, para. 3, online: Swedish Government (official translation in English) < <http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf> >. See also: *Finish Aliens Act*, 301/2004, Sect. 88a(1), online: Finish Ministry of the Interior (unofficial translation) < <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf> >.

⁴¹ See: David Keane, “Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees” (2003) 16 *Geo. Int'l Env'tl. L. Rev.* 217 at 217; Kara K. Moberg, “Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary

recalled regarding “environmental migration law,” there are strong conceptual impediments against an extension of a refugee-like protection to environmentally displaced persons.⁴²

- Law on temporary protection

Some domestic and regional laws provide for temporary protection of groups of people displaced by environmental change.⁴³ This is the case of the EU Directive 2001/55 on “minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.”⁴⁴ Yet, this system was never enforced, and the qualified majority of the council that is required to implement this directive is unlikely to be met but for very exceptional circumstances.

In the United States, the 1990 Immigration Act set up a “temporary protected status” (TPS).⁴⁵ The TPS has been implemented, for instance, to suspend deportations to Haiti soon after the January 2010 earthquake.⁴⁶ Thus, the TPS, as a favor voluntarily granted by a state to a population, relies entirely on the engagement of civil society movements; once a population feels less concerned by the lot of another nation, it can be interrupted at any time. In December 2010, while Haiti was facing an epidemics of cholera, the United States suspended the application of the temporary protected status.⁴⁷

3.1.3. Conclusion: the general limitation of laws relating to physical displacement

Existing norms on physical displacement can bring some rights-discourse background to the debate on the protection of environmentally displaced persons. Internal displacements, even more than international migration, is still an underdeveloped field of international law, arguably because of the long-lasting idea that international law should not meddle in domestic affairs of states.

Protection” (2009) 94 Iowa L. Rev. 1107, online: < http://www.uiowa.edu/~ilr/issues/ILR_94-3_Moberg.pdf > at 1116.

⁴² Benoit Mayer, “Pour en finir avec la notion de « réfugiés environnementaux » : Critique d’une approche individualiste et universaliste des déplacements causés par des changements environnementaux” (2011) 7:1 McGill International Journal for Sustainable Development Law and Policy 33; Mcadam, *supra* note --- at 14–15.

⁴³ See generally: Benoit Mayer, *Fraternity, Responsibility and Sustainability: The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads* CISDL; Earth System Governance, 2011) at 14ff.

⁴⁴ Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, ,, 20 July 2001, [Directive 2001/55].

⁴⁵ An Act to amend the Immigration and Nationality Act to change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization, and for other purposes (“Immigration Act of 1990”) , PL 101-649, 1990 S 358, Sect. 302, 8 USCA § 1254a.

⁴⁶ Julia Preston, “In Quake Aftermath, U.S. Suspends Deportations to Haiti” New York Times (13 January 2010).

⁴⁷ Letter from the American Civil Liberties Association to president Barack Obama (29 December 2010), online: <http://www.aclufl.org/pdfs/HaitianLetter-2010-12-29.pdf>

When applied to environmentally induced migration, displacement-based laws generally fail to take into account the specific responsibility of third states. Therefore, this focus of such laws on the primary responsibility of a state to protect its own population may evade ethical arguments for a climate justice, or the legal notion of a "common but differentiated responsibility." The next sub-section shows how environmental laws deal with such elements.

3.2. Laws relating to the environment

3.2.1. Law on climate change

Principle 7 of the Rio Declaration on Environment and Development provides that:

*"States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."*⁴⁸

The notion of a common but differentiated responsibility is further affirmed in the United Nations Framework Convention on Climate Change [UNFCCC]⁴⁹ and in many instruments adopted by the Conference of the Parties to the UNFCCC [COPs]. The Bali Action Plan, adopted by COP 13 in 2007, defined "enhanced action on adaptation" as one of the pillars of international cooperation on climate change, in equality with "enhanced national/international action on mitigation of climate change."⁵⁰ Yet, the notion of "migration" was not addressed by the UNFCCC regime before 2010, when COP 16 adopted the "Cancun Agreements." Section 14 of the Cancun Agreement provides that all Parties are invited to:

*"enhance action on adaptation under the Cancun Adaptation Framework, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, by undertaking, inter alia, the following: [...] (f) Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels."*⁵¹

⁴⁸ Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, 3 June 1992, [Rio Declaration] principle 7.

⁴⁹ The United Nations Framework Convention on Climate Change, 14 June 1992, [UNFCCC] 6th recital, art 3(1) and art 4.

⁵⁰ "Bali Action Plan", Decision 1/CP.13, 13th Conference of the Parties to the UNFCCC, 2007, [Bali Action Plan].

⁵¹ Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, 10 December 2010, [Cancun Agreements] section 14; See generally: Koko Warner, *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations* Background paper presented for UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, 2011).

The language of COP 16 on migration remains, however, weak. It is uncertain whether the Cancun Agreements pave the way for an international funding of “displacement, migration and planned relocation” policies through the funds dedicated to support adaptation. Despite recent works calling for “migration as adaptation,”⁵² the dominant paradigm of adaptation remains “adaptation in situ.” Further research is needed on the practice of international adaptation funds regarding programs supporting or promoting “migration as adaptation.”

Efforts to mitigate climate change may also have a relevance, although indirectly, as they may reduce the future environmental change.⁵³ However, a risk is to use the spectrum of environmentally displaced persons to trigger supplementary international cooperation regarding climate change mitigation.

3.2.2. Other environmental laws

Beside environmental laws dealing specifically with climate change, a background of laws can have some relevance in the face of environmental migration. Climate change is not the only circumstance in which environmental migration occurs: as long as they have existed, states have tried to control the settlement of their territory. From 1905 to 1989, the Indonesia policy of “transmigration” relocated close to five million individuals from over-populated central islands to peripheral ones, with a very disputed social and environmental outcome.⁵⁴ In other cases, large public projects such as dams have displaced entire communities – often Indigenous. In many such cases, both advocates and opponents to the project may resort to arguments based on the protection of the environment as a whole, or on the protection of environmental rights (for instance, the right to access to water or the right to a healthy environment of populations benefiting from the project).⁵⁵ Policies taken following industrial disasters – from Bhopal to Fukushima – may also be a source of inspiration for legal approaches of environmental migration. Generally speaking, however, these questions have been little studied.

⁵² See in particular: Jon Barnett & Michael Webber, “Migration as Adaptation: Opportunities and Limits” in Jane McAdam, ed, *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart, 2010) 41; IOM, *Disaster Risk Reduction, Climate Change Adaptation and Environmental Migration: A Policy Perspective* 2010); Jon Barnett & Natasha Chamberlain, “Migration as Climate Change Adaptation: Implications for the Pacific” in Bruce Burson, ed, *Climate Change and Migration: South Pacific Perspectives* (Wellington: Institute of Policy Studies, 2010) 51; R McLeman & B Smit, “Migration as an Adaptation to Climate Change” (2006) 76 *Climatic Change* 31; ADB, *Facing the Challenge of Environmental Migration in Asia and the Pacific* ADB, 2011).

⁵³ See eg François Gemenne, “Climate-induced population displacements in a 4 C+ world” (2011) 369:1934 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 182 at 4..

⁵⁴ Very different views appear for instance in the following documents: Philip M Fearnside, “Transmigration in Indonesia: Lessons from Its Environmental and Social Impacts” (1997) 21 *Environmental Management* 553; Colin MacAndrews, “Transmigration in Indonesia: Prospects and Problems” (1978) 18:5 *Asian Survey* 458; World Bank, *Transmigration in Indonesia*; Anthony J Whitten, “Indonesia’s Transmigration Program and Its Role in the Loss of Tropical Rain Forests” (1987) 1:3 *Conservation Biology* 239.

⁵⁵ Benoit Mayer, “Human Rights Concerns in Hydroelectric Projects” (2011) SSRN eLibrary.. Most recently, see the on-going debate before the Inter-American Court on Human Rights on the Belo Monte hydroelectric project.

3.3. Other laws

3.3.1. Human rights laws

Much ink has been spilled on the relations between human rights and the environment – in particular climate change. Environmental change does not violate human rights – for “environmental change” is not a legal person, and human rights generally establish exclusively a vertical relation between a state and the population it controls – but it is a major hurdle to the obligation of states to respect, protect and fulfill human rights.⁵⁶ A growing discourse demands that human rights guide domestic and international laws and policies addressing environmental change generally.⁵⁷

A contradiction may appear between a rights-based discourse, establishing the primary responsibility of a state to protect the population on its territory, and a responsibility-based discourse calling for the polluters to pay. Human rights law takes position for the first approach: the protection of a population rests primarily upon the state that is territorially competent, notwithstanding the responsibility for global environmental change. The result is arguably unfair: why should developing states bear the cost of the past development of Western states?

More importantly, however, this also undermines the efficiency of the protection: international law recognizes that the obligation of a state to realize social, economic and cultural rights is contingent of their “available resources,”⁵⁸ meaning that developing states do not have the same level of obligation than developed ones. In other words, the state-centeredness of international human rights law results in a system whereby law does not even aim at offering similar standards of protection to developing countries’ populations. Many developing countries severely affected by environmental change are unable to ensure the safety of their population in anything like a satisfactory manner.

Certainly, human rights law has a little capacity to foster international cooperation. In particular, the International Covenant on Economic, Social and Cultural Rights calls for “international assistance and co-operation, especially economic and technical.”⁵⁹ Moreover, the universality and equal enjoyment of human rights demands that a state recognizes and protects the rights of aliens on its territory just as it does for its own citizens (the only exception being the right to enter the territory and the right to

⁵⁶ See in particular: Siobhan McInerney-Lankford, “Climate Change and Human Rights: An Introduction to Legal Issues” (2009) 33 Harv Envtl L Rev 431.

⁵⁷ “Human rights and climate change”, *Human Rights Council Resolution 18/*, Human Rights Council,, 28 September 2011, [*Human Rights Council Resolution 18/*]; “Human rights and the environment”, *Human Rights Council Resolution 16/11*, Human Rights Council,, 24 March 2011, [*Human Rights Council Resolution 16/11*]; “Human rights and climate change”, *Human Rights Council Resolution 10/4*, Human Rights Council,, 25 March 2009, [*Human Rights Council Resolution 10/4*]; “Human rights and climate change”, *Human Rights Council Resolution 7/23*, Human Rights Council,, 28 March 2008, [*Human Rights Council Resolution 7/23*]; Cancun Agreements, *supra* note ---7th recital.

⁵⁸ *International Covenant on Economic, Social and Cultural Rights*, ,, [*International Covenant on Economic, Social and Cultural Rights*] art 21.

⁵⁹ *Ibid* art 21.

vote).⁶⁰ In particular, Wouters has argued that some international human rights treaties contain an obligation not to expel aliens who could not return in dignity in their home country.⁶¹ Yet, neither these remarks, nor the discourse on a responsibility to protect have remedied the absence of any compulsory cooperation with a state unable to protect the individuals under its jurisdiction. A stronger incentive for international cooperation is essential: human rights, too often, are conceived as a relation between a nation and a state, and this conception does not lead to a discourse sufficiently supportive of cross-border cooperation.

3.3.2. Laws on development

There is a strong, but ill-defined link between environmental migration and development. Certainly, development has a decisive impact on the adaptation capacity: this may be illustrated, for instance, by a comparison between the Netherlands (one fourth of the territory lies *below* sea-level) and Bangladesh. But a more sophisticated conceptual discussion is necessary. The conceptual relationship between migration and development is complex: migration may help development (in particular through remittances), but a “brain drain” may also undermine development; on the other hand, under-development may be a cause of out-migration, but a certain quantity of available resources is necessary to undertake any migratory plan: therefore, development may, indeed, accelerate migration.⁶² A report of the World Resource Institute has shown a further paradox in that, on the one hand, “[f]ailure to clarify the relationship between adaptation and development runs the risk that funding mechanisms will create redundancies or leave gaps in the landscape of activities that receive support,” while, on the other hand, “efforts to draw a distinct line between adaptation and development can prove counterproductive.”⁶³

International development law is mainly constituted by a set of soft legal instruments – General Assembly Resolutions, conference statements, etc. – calling for official development assistance. In particular, in 1970, the International Development Strategy for the Second United Nations Development Decade, adopted by the General Assembly, conceded that “[d]eveloping countries must, and do, bear the main responsibility for financing their development,” but also provided that:

“[i]n recognition of the special importance of the role which can be fulfilled only by official development assistance, a major part of financial resource transfers to the developing countries should be

⁶⁰ Human Rights Committee, *supra* note ---; François Crépeau, Special Rapporteur on the Human Rights of Migrants, *The Human Rights of Migrants (Statement to the 66th session of the General Assembly, Third Committee, Item 69 (b), (c))* (New York: 2011).

⁶¹ See generally: C Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Antwerp ;Portland ;Portland OR: Intersentia ;;Distribution for the USA and Canada International Specialized Book Services, 2009).

⁶² Graeme Hugo, *Migration, Development and Environment* IOM, 2008) at 20 et passim.

⁶³ Heather McGray, Anne Hammill & Rob Bradley, *Weathering the Storm: Options for Framing Adaptation and Development* World Resources Institute, at 4; See also: Hein de Haas, *Turning the Tide? Why “Development Instead of Migration” Policies are Bound to Fail* International Migration Institute, University of Oxford, Working Paper, paper 2, 2006).

provided in the form of official development assistance. Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 per cent of its gross national product at market prices by the middle of the Decade.”⁶⁴

Most developed countries have never reached this laudable target, reaffirmed several times since 1970⁶⁵: according to the OECD, in 2010, official development assistance from developed countries represented only 0.32% of their GNI.⁶⁶ Over the last decade, attention has been diverted from quantitative targets by an emphasis on qualitative development.⁶⁷

Further research is needed on literature and discourses on development, and their legal significance when the international community faces environmentally induced migration. Can the right to development, declared by the General Assembly in 1986,⁶⁸ be a vector to address environmental migration? What role can official development assistance play? A meaningful contribution of international development law to the issue of environmental migration could be the holistic approach: the development discourse generally comes hand in hand with calls for international cooperation.⁶⁹

3.3.3. Laws on humanitarian relief and disaster management

Humanitarian law often refers to a set of protective norms applicable in arms conflicts, whose core is constituted by the four 1949 Geneva Conventions and their three additional protocols.⁷⁰ This law may be

⁶⁴ *International Development Strategy for the Second United Nations Development Decade*, GA Res 2626 (XXV), 24 October 1970, [*International Development Strategy for the Second United Nations Development Decade*] at 41, 43.

⁶⁵ Most recently, see: , *General Assembly resolution 65/159, Protection of global climate for present and future generations of humankind* UN Doc A/RES/65/159, 2010) para 78(f).

⁶⁶ OECD website, retrieved on 9 November 2011, <http://webnet.oecd.org/oda2010/>

⁶⁷ *Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability*, 2005, [*Paris Declaration on Aid Effectiveness*]; *Accra Agenda for Action*, Ministers of developing and donor countries responsible for promoting development and Heads of multilateral and bilateral development institutions, 4 September 2008, [*Accra Agenda for Action*].

⁶⁸ *Declaration on the Right to Development*, GA Res 41/128, 41th session, UN Doc A/RES/41/128, 4 December 1986, [*Declaration on the Right to Development*] at 128.

⁶⁹ See for instance, *ibid.*, in particular: art. 3.1 (“States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development” [emphasis added], departing from the standard language when it adds “and international”), art. 4.1 (“States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.”) and art. 1.2 (“The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”)

⁷⁰ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, [*Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*]; *Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, [*Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*]; *Convention (III) relative to the Treatment of Prisoners of War*, 12 August 1949, [*Convention (III) relative to the Treatment of Prisoners of War*]; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, [*Convention (IV) relative to the Protection of Civilian Persons in Time of War*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, [*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the*

relevant, in particular in interaction with refugee law, in the case of environmentally induced migration caused by conflicts, themselves fueled by environmental change.⁷¹ However, international humanitarian relief spans much further than situations of armed conflicts, and extends in particular to humanitarian emergency in the context of natural disasters.

Except for the particular circumstance of the law on armed conflicts, international humanitarian relief has not been supported by strong, binding legal norms. Like official development assistance, international efforts pursuant humanitarian relief developed as discretionary action of states. Unable to curbe the state-centeredness of the Westphalian international relations, international and non-governmental organizations have, at most, tried to direct the resources that states made available within a multilateral regime.⁷²

In 1991, General Assembly resolution 46/182 adopted a "text [...] for the strengthening of the coordination of emergency humanitarian assistance of the United Nations system."⁷³ This text included "guiding principles" inspired from the Geneva Conventions: noting that "humanitarian assistance is of cardinal importance for the victims of natural disasters and other emergencies," they highlight that "humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality."⁷⁴ The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) was established as a medium to "bring [...] together humanitarian actors to ensure a coherent response to emergencies."⁷⁵ In its resolution 58/177 in 2003, the General Assembly highlighted the "central role" of the head of OCHA "for the inter-agency coordination or protection of and assistance to internally displaced persons."⁷⁶

However, humanitarian relief necessarily comes too late: preventing a disaster, whenever possible, is in principle a better option that mitigating human suffering. The notion of a "natural" disaster often hides the responsibilities of actors who have not been able to prevent an

Protection of Victims of International Armed Conflicts (Protocol I)]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, ,, 8 June 1977, [*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*]; *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, ,, 8 December 2005, [*Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*].

⁷¹ On the interplay of international humanitarian law and refugee law, see for instance: Stephane Jaquemet, "The cross-fertilization of international humanitarian law and international refugee law" (2001) 843 *International Review of the Red Cross*.

⁷² On the importance of multilateral (as opposed to bilateral) humanitarian relief, see for instance: John Holmes, *Opening Remarks by Sir John Holmes, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator* (2008).

⁷³ *Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, GA Res 46/182, 46th session,, 19 December 1991, [*Strengthening of the coordination of humanitarian emergency assistance of the United Nations*] art1.

⁷⁴ *Ibid* Annex, para 1, 2; Compare for instance with: Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law* (Humanitarian Policy Group, 2000).

⁷⁵ "Who we are," OCHA website, retrieved at <http://www.unocha.org/about-us/who-we-are>

⁷⁶ *Protection of and assistance to internally displaced persons*, GA Res 58/177, 58th Session, UN Doc A/RES/58/177,, 22 December 2003, [*Protection of and assistance to internally displaced persons*] para 12.

environmental phenomenon from impacting individuals.⁷⁷ Therefore, humanitarian relief has often come along with strategies to prevent situations where humanitarian relief is required.

Disaster risk reduction (DRR), in particular, flourished out of a growing awareness that responding to natural disasters is not enough. The United Nations International Strategy for Disaster Reduction defined DRR as “[t]he concept and practice of reducing disaster risks through systematic efforts to analyse and manage the causal factors of disasters, including through reduced exposure to hazards, lessened vulnerability of people and property, wise management of land and the environment, and improved preparedness for adverse events.”⁷⁸ In 2005, the World Conference on Disaster Reduction adopted the “2005-2015 Hyogo Framework for Action: Building the Resilience of Nations and Communities to Disaster.”⁷⁹ This framework is based on the assumption that DRR should be addressed as a cross-cutting issue:

“efforts to reduce disaster risks must be systematically integrated into policies, plans and programmes for sustainable development and poverty reduction, and supported through bilateral, regional and international cooperation, including partnerships. Sustainable development, poverty reduction, good governance and disaster risk reduction are mutually supportive objectives, and in order to meet the challenges ahead, accelerated efforts must be made to build the necessary capacities at the community and national levels to manage and reduce risk. Such an approach is to be recognized as an important element for the achievement of internationally agreed development goals, including those contained in the Millennium Declaration.”⁸⁰

Therefore, the Hyogo framework defines three strategic goals, showing the integrative approach of DRR within sustainable development and poverty reduction policies. These goals are to pursue:

⁷⁷ A dispute on the anthropogenic responsibility for natural catastrophes occurred during the 18th Century, in particular between Voltaire and Rousseau after the disaster of Lisbon (a seism, a tsunami and a fire killed around fifty thousand inhabitants). In a “Poème sur le Désastre de Lisbonne,” Voltaire presented a classical thesis according to which the fate is responsible for Human sufferings [Voltaire, *Œuvres complètes*, Vol. 1: *Poésie - Poèmes sérieux* (Paris: Plancher ; 1756) at 353ff (“Tout est arrangé, tout est ordonné, sans doute, par la Providence ... Dieu s’est vengé”). Replying to Voltaire, Rousseau wrote a “Lettre sur la Providence” in which he adopted a modern conception of the human responsibility [Jean-Jacques Rousseau, *Oeuvres Complètes* Vol. 10 (Paris: Hachette; 1872) at 122 (“Je ne vois pas qu’on puisse chercher la source du mal moral ailleurs que dans l’homme libre, perfectionné, partant corrompu ; et, quant aux maux physiques, ils sont inévitables dans tout système dont l’homme fait partie ; la plupart de nos maux physiques sont encore notre ouvrage. Sans quitter votre sujet de Lisbonne, convenez, par exemple, que la nature n’avait point rassemblé là vingt mille maisons de six à sept étages, et que si les habitants de cette grande ville eussent été dispersés plus également, et plus légèrement logés, le dégât eût été beaucoup moindre, et peut-être nul. Combien de malheureux ont péri dans ce désastre, pour vouloir prendre l’un ses habits, l’autre ses papiers, l’autre son argent ? ”)]. On this dispute and the evolution of the conception of the human responsibility for natural disaster, see generally: Alessandro Zanconato, *La dispute du fatalisme en France: 1730-1760* (Paris: Presses de la Sorbonne; 2004).

⁷⁸ 2009 UNISDR Terminology on Disaster Risk Reduction, retrieved from http://www.unisdr.org/files/7817_UNISDRTerminologyEnglish.pdf

⁷⁹ *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disaster*, World Conference on Disaster Reduction, UN Doc A/CONF.206/6,, 18 January 2005, [*Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disaster*].

⁸⁰ *Ibid* para 4.

- "(a) *The more effective integration of disaster risk considerations into sustainable development policies, planning and programming at all levels, with a special emphasis on disaster prevention, mitigation, preparedness and vulnerability reduction;*
- (b) *The development and strengthening of institutions, mechanisms and capacities at all levels, in particular at the community level, that can systematically contribute to building resilience to hazards;*
- (c) *The systematic incorporation of risk reduction approaches into the design and implementation of emergency preparedness, response and recovery programmes in the reconstruction of affected communities.*"⁸¹

DDR has a direct significance on environmentally induced migration. In a 2010 report, the IOM highlighted that "DRM [Disaster Risk Management], DRR and CCA [Climate Change Adaptation] are complementary tools and have a cumulative effect, reinforcing each other in building resilience and the capacity to cope with adverse and changing conditions. [...] Beyond the so-called institutional divide between the humanitarian, development and environmental communities, IOM, looking at the cross-cutting issue of migration, believes that we share a common goal of promoting the resilience of communities and countries based on understanding the nature of risks and vulnerability and the need to adjust accordingly."⁸²

3.3.4. Laws on responsibility

A last field of law that may be relevant in the face of environmental migration is responsibility. In international law, the Trail Smelter case of 1941 established that, "under the principles of international law, [...] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."⁸³ The "no harm principle," understood as a "due diligence requirement to prevent trans-boundary pollution,"⁸⁴ was later reassessed in several soft-law instruments⁸⁵ and is now part of international customary law.⁸⁶ Moreover,

⁸¹ *Ibid* para 12.

⁸² IOM, *supra* note --- at 12.

⁸³ *United States of America v. Canada* (1941) 3 R.I.A.A. 1911 (Mixed Arbitral Tribunal) [*Trail Smelter*] at 1965. See also: *Corfu Channel Case (United Kingdom v. Albania)*, Merits, *supra* note **Error! Bookmark not defined.**, at 22; *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, (1996) P.C.I.J. (Ser. A/B) No. 226 at 241; *Case concerning the Gabčíkovo-Nagymaros project (Hungary v. Slovakia)*, *supra* note **Error! Bookmark not defined.** at 41.

⁸⁴ See Nicolas de Sadeleer, *Environmental Principles, From Political Slogans to Legal Rules* (Oxford University Press, 2002) at 63.

⁸⁵ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, entered into force on 21 March 1994 ["UNFCCC"], recitals 8 and 9; *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc. A/Conf.48/14/Rev. 1, 11 I.L.M. 1416, principle 21; *Rio Declaration on Environment and Development*, 14 June 1992, UN Document A/CONF.151/26 (Vol. I), principle 2.

⁸⁶ See: Rudiger Wolfrum, "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance" in Fred Morrison & Rudiger Wolfrum (eds.), *International, Regional and National Environmental Law* (Boston: Kluwer, 2000), at 7; Joseph Smith & David J. C. Shearman, *Climate Change Litigation: Analyzing the Law, Scientific Evidence & Impacts on the Environment, Health & Property* (Sidney: Presidian, 2006) at 49; P. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles" in W. Lang (ed.), *Sustainable Development and International Law* (London: Graham & Trotman, 1995) 53 at 62.

the Draft Articles on State Responsibility for Wrongful Act established that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”⁸⁷ Accordingly, the “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.”⁸⁸

Nonetheless, Tuvalu’s repeated threat to lodge a claim before the ICJ against Australia and the United States, arguing that these countries are responsible for the consequences of environmental changes in this tiny insular state, is unlikely to succeed, not least because Australia and the United States should first accept the jurisdiction of the ICJ in this matter.⁸⁹ Significant causation issues would certainly impede any legal proceedings: Tuvalu would not only have to prove that GHG emission in Australia and the United States (partly) cause a global environmental change, but also that the global environmental change (and no other natural or man-made phenomenon) is the cause of environmental degradation in Tuvalu. While there is little doubt that the environmental degradation of small island developing states is of “serious consequences,” the contribution of one given state to global environmental change is only a very partial cause of these consequences. Certainly, the standard, bilateral conception of state responsibility *vis-à-vis another state* is ill-conceived to address environmental migration.

However, several other forms of responsibility may be relevant in the face of environmental migration. In particular, the responsibility of a state may be sought before human rights bodies, where the standard of causation and of review may be lower. At least two such petitions have currently pending before the Inter-American Commission for Human Rights: one on behalf of Inuit Peoples against the United States,⁹⁰ another on behalf of aboriginal communities of the Amazon against Brazil’s plan to displace them as part of the Belo Monte hydroelectric project.⁹¹

Not only states can be held accountable for environmental change: multinational corporations are another possible culprit. This legal avenue was taken by Kivalina, a 400 inhabitant Alaskan native village that had to be relocated further from the coast, as global warming allegedly resulted in the reduction of sea ice, erosion and a greater vulnerability to storm

⁸⁷ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission,, November 2001, [*Draft Articles on State Responsibility*] art 1.

⁸⁸ *Ibid* art 34.

⁸⁹ Kalinga Seneviratne, “Tiny Tuvalu Steps up Threat to Sue Australia, U.S.” *Inter Press Service* (5 September 2002), online: Common Dreams < <http://www.commondreams.org/headlines02/0905-02.htm> >; Apisai Ielemia, “A Threat To Our Human Rights: Tuvalu’s Perspective On Climate Change” (2007) 44 UN Chronicle 18. The United States has not accepted the compulsory jurisdiction of the ICJ. Australia has done so, but only “in relation to any other State accepting the same obligation” (declaration received on 22 March 2002, retrieved from <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=AU>). Tuvalu has not accepted the compulsory jurisdiction of the ICJ.

⁹⁰ Chritina Voigt, “Book Review” (2006) 75 *Nordic Journal of International Law* 357 at 357.

⁹¹ , “Brazil Breaks Relations With Human Rights Commission Over Belo Monte Dam”, *Latin America News Dispatch* (3 May 2011) , online: <<http://latindispatch.com/2011/05/03/brazil-breaks-relations-with-human-rights-commission-over-belo-monte-dam/>>.

waves and surges.⁹² The village brought a suit “to damages from global warming”⁹³ against twenty-four major industrial companies in reason of their “contributions to global warming.”⁹⁴ In *Native Village of Kivalina v. ExxonMobil Corp.*, the Northern district court of California dismissed the suit of Kivalina as a non-justiciable political question.⁹⁵ This decision is currently under appeal before the ninth circuit Court of Appeal.⁹⁶

3.4. Conclusion: the challenge of fragmentation

Many laws are, or may be relevant in the face of environmental migration. A thorough analysis of these laws is necessary to identify possible complementarities, overlaps and gaps. The difficulty of this analysis is that each legal field has developed its own culture – a set of notions, standards, way of analyzing the reality – and pursues its own objectives.⁹⁷ One example out of many, Prof. Ellis highlighted that “reforestation and afforestation to create carbon sinks may be carried out in a manner that is harmful to biological diversity.”⁹⁸ In other words, the bag of marbles, if it gets too full and too heavy, threatens to break. Next section pleads for sustainable development law as a project to reconcile these different approaches.

4. The Tapestry: Sustainable Development Law on Environmental Migration

Edgar Morin suggests a tapestry as the representation of a coherent synthesis to our world’s complexity. This section argues that sustainable development law may be the frame on which relevant legal approaches may be woven.

4.1. Sustainable development

In 1987, the World Commission on the Environment and Development, commissioned by a General Assembly resolution⁹⁹ and chaired by Gro Harlem Brundtland, issued a report entitled “Our Common Future,” also known as the Brundtland report. This document famously defined sustainable development as “development that meets the needs of the

⁹² Luke W. Cole & Brent Newell, Attorneys for Plaintiffs Natie Village of Kivalina and City of Kivalina, Complaint for damages, 26 February 2008, online: <http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf>, §16.

⁹³ *Ibid.* §1.

⁹⁴ *Ibid.* §2.

⁹⁵ *Native Village of Kivalina v. ExxonMobil Corp. et al.*, 663 F.Supp.2d 863, 2009 WL 3326113 (N.D. Cal. 2009). See also: Ashley E. Breakfield, “Political Cases or Political Questions: The Justiciability of Public Nuisance Climate Change Litigation and the Impact on *Native Village of Kivalina v. ExxonMobil*” (2011) 17 *Hastings W.-Nw. J. Env. L. & Pol’y* 39.

⁹⁶ 9th circuit court of appeal, docket number 09-17490.

⁹⁷ Jaye Ellis, “Sustainable Development and Fragmentation in International Society” in Duncan French, ed, *Global Justice and Sustainable Development* (Leiden: Martinus Nijhoff Publishers, 2010) 57 at 59.

⁹⁸ *Ibid.*

⁹⁹ *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*, General Assembly Res 38/161, UN Doc A/RES/38/161,, 19 December 1983, [*Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*].

present without compromising the ability of future generations to meet their own needs."¹⁰⁰

The Brundtland commission surely did not invent the notion of sustainable development, which was mentioned by the General Assembly in the definition of its mission.¹⁰¹ Even beyond the notion of "sustainable development," as Segger and Khalfan argued, the idea that "the humanity must live with the carrying capacity of the earth, and manage natural resources so as to meet both current demand and the needs of future generation [...] has long been recognized."¹⁰² Yet, the Brundtland report did "popularize [...] the concept of sustainable development in international discourse."¹⁰³

In the last fourth of a century, the concept has been increasingly used and, as Prof. Ellis showed, it "has become a concept that it is virtually impossible to oppose outright, but it is far from possessing a taken-for-granted quality."¹⁰⁴ The concept has however been extremely efficient in fostering debates on the advancement of a global social, economic and environmental agenda. Prof. Ellis explained that:

*"There are a number of interesting features of discourses, debates and rhetoric about sustainable development. One is the explicit normative focus of many of these discourses: very often, emphasis is placed on what is fair, equitable or just. Another is the number and variety of for a in which the concept is debated and attempts made to operationalise and implement it. A third is that the concept occupies highly contested ground: concerns are often voiced about the strategic use to which sustainable development is so often put, as a means to paper over deep and genuine disagreements and, in a more sinister vein, as a means to justify economic development at the expense of environmental protection and protection of human rights."*¹⁰⁵

4.2. Sustainable development law

Following the 1987 Brundtland report, the concept of sustainable development was recognized at the 1992 United Nations Conference on Environment and Development (UNCED), often referred to as the Rio "Earth Summit." The 27 principles of the Rio Declaration on Environment and Development refer twelve times to the concept of sustainable development.¹⁰⁶ The 1992 Earth Summit also adopted the United Nations Framework Convention on Climate Change and the United Nations Convention on Biological Diversity, both of which referred to the concept of

¹⁰⁰ Gro Harlem Brundtland, *Our Common Future* ("Brundtland report") UN General Assembly, 1987) at 87.

¹⁰¹ Process of preparation of the Environmental Perspective to the Year 2000 and Beyond, *supra* note -- at 8a.

¹⁰² Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford: Oxford University Press, at 16.

¹⁰³ *Ibid.*

¹⁰⁴ Ellis, *supra* note --- at 66.

¹⁰⁵ *Ibid.*

¹⁰⁶ Rio Declaration, *supra* note --- principles 1, 4, 5, 7, 8, 9, 12, 20, 21, 22, 24 and 27.

sustainable development.¹⁰⁷ The Agenda 21 detailed, over 800 pages, a plan to organize “global partnership for sustainable development.”¹⁰⁸ The 1992 “Earth Summit” was followed by the 1997 “Rio+5” General Assembly special session on sustainable development.¹⁰⁹ More importantly, the 2002 World Summit on Sustainable Development in Johannesburg “reinvigorate[d] global commitment to sustainable development”¹¹⁰ and adopted the Johannesburg Declaration on Sustainable Development. Judge Weeramantry argued, in his separate opinion in the ICJ Gabčíkovo-Nagymaros case, that sustainable development is a “principle of international law,” and he highlighted the “wide and general recognition of the concept” in international legal instruments.¹¹¹

While it is not the goal of this paper to discuss specifically the content of these instruments, some remarks on the nature of sustainable development in international law are necessary. According to Prof. Ellis, “[s]ustainable development holds an uncertain place in international law. It has variously been described as a principle of international law, an umbrella concept which draws together a number of international legal principles, a body of international law on its own right, and as an influential concept which, though it does not itself have the status of a legal norm, has immense actual and potential significance to legal norms and institutions.”¹¹² In other words, although the place of sustainable development in international law may be uncertain, it is uncontested that sustainable development does play a role in international law. As Judge Weeramantry put forward, “[s]ustainable development is one of the most vibrant current topics in the development of domestic and international law. It is also one of the least developed topics in international law, legal jurisprudence and scholarship.”¹¹³ Judge Weeramantry also underscored that the concept of sustainable development is not just “‘soft’ law”, nor is it just “aspirational”: “sustainable development is a substantive area of the law in a very real sense. Courts and countries must endeavour to administer and implement sustainable development law, just as is done with other ‘hard’ and established rules.”¹¹⁴ Accordingly, “the concept of sustainable development is a new truly global concept which is fast gathering momentum, and has become part of accepted international law.”¹¹⁵

As for what concerns national law, sustainable development has rapidly been recognized as an important normative principle. In 2008, Schrijver noted that 24 national constitutions referred to sustainable

¹⁰⁷ UNFCCC, *supra* note --- art 3(4); *United Nations Convention on Biological Diversity*, ,, 5 June 1992, [*United Nations Convention on Biological Diversity*] art 8(e).

¹⁰⁸ United Nations Conference on Environment and Development, *Agenda 21* (Rio de Janeiro: United Nations, 1992) at 11.

¹⁰⁹ This session adopted the Programme of Further Action to Implement Agenda 21, UN Doc. A/Res/57/2 (1997).

¹¹⁰ Segger & Khalfan, *supra* note --- at 25.

¹¹¹ *Separate opinion of Vice-President Weeramantry in Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 ICJ, 37 ILM 162 (1998), [*Separate opinion of Vice-President Weeramantry in Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 ICJ, 37 ILM 162 (1998)].

¹¹² Ellis, *supra* note --- at 64-65.

¹¹³ HE judge Christopher G Weeramantry, “Foreword” in *Sustainable Development Law: Principles, Practices, & Prospects* (Oxford: Oxford University Press, 2004) at ix.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at x.

development,¹¹⁶ and the number has probably increased since then. For instance, the constitution of Venezuela provides that “the State will develop a policy of arrangement of the territory attending to the ecological, geographical, population, social, cultural, economic [and] political realities, in accordance with the premises of sustainable development, that include information, consultation and civic participation.”¹¹⁷

4.3. Sustainable development law as an “overarching concept”¹¹⁸

The global enthusiasm for the concept of sustainable development in the legal literature results from its capacity to structure knowledge from isolated fields in a coherent manner. In this sense, Prof. Ellis, for example, considered that “[w]hat sustainable development seems to offer is an overarching concept of set or policy goals on which broad consensus can be won, and which can then serve to orient and coordinate developments in various bodies of international law.”¹¹⁹ Similarly, Segger and Khalfan showed that, as a law on interstitial spaces, sustainable law defines the “intersections of international economic, social and environmental law.”¹²⁰

The International Law Association took a similar position when it noted that “the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.”¹²¹

How far can sustainable development go in including different fields of laws (and policies) in coherence is uncertain – and the question goes much beyond this paper. It might be, as Fischer-Lescano and Teubner argued, that “[l]egal fragmentation cannot itself be combated” and that nothing more than a “weak normative compatibility of the fragments might be achieved.”¹²² At least, however, legal and interdisciplinary coherence should be considered an ideal, and sustainable development is likely to help working towards this ideal.

4.4. Sustainable development law as an umbrella for laws relevant to environmental migration

¹¹⁶ Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Leiden: Martinus Nijhoff Publishers, 2008) at 153.

¹¹⁷ 1999 Constitution of the Bolivarian Republic of Venezuela, art. 128, cited in *Ibid* at 160.

¹¹⁸ Ellis, *supra* note --- at 59.

¹¹⁹ *Ibid*.

¹²⁰ Segger & Khalfan, *supra* note --- at 51.

¹²¹ *ILA resolution 3/2002, New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, ,, [ILA resolution 3/2002, New Delhi Declaration of Principles of International Law Relating to Sustainable Development].

¹²² Gunther Teubner & Andreas Fischer-Lescano, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” SSRN eLibrary at 1004.

In a 2010 report on “disaster risk reduction, climate change adaptation and environmental migration” presented at the Cancun Conference on climate change, IOM highlighted that “beyond the so-called institutional divide between the humanitarian, development and environmental communities, IOM, looking at the cross-cutting issue of migration, believes that we share a common goal of promoting the resilience of communities and countries based on understanding the risks and vulnerability and the need to adjust accordingly.”¹²³ This adjustment is precisely what sustainable development proposes.

The different laws relevant in the face of environmental migration can be structured along the three pillars of sustainable development:

- Social pillar: laws on internal displacement, statelessness, political asylum and subsidiary protection, temporary protection, human rights, humanitarian relief, responsibility, etc.;
- Economic pillar: laws on rights-based approach to development, international cooperation for development and development projects, etc.;
- Environmental pillar: laws on climate change, land use, etc.

Some other laws relevant in the face of environmental migration span over two or three pillars. This is the case of:

- Laws on migration (social and economic pillars);
- Laws on disaster management (social, economic and environmental pillars).

There is an immense potential for sustainable development to coordinate and, possibly, reconcile different laws relevant in the face of environmental migration. On a technical point of view, sustainable development may act as an interpretative principle, in particular when different laws relevant in the face of environmental migration are contradictory. But more broadly, sustainable development may help in framing new normative frameworks to be applied in the face of environmental migration, and it may be used as the touchstone to evaluate existing policies. As the report of IOM suggested, a common goal of different normative approaches may be the promotion of resilience or sustainability in the face of situations that would lead to displacement, as well as during and after such a displacement.

Sustainable development is surely more than a mere addition of existing laws: rather, it is a synthesis of these approaches in the form of a new, independent, comprehensive and coherent structure of thought. Sustainable development has its own logic, its own cultural references, and its own vocabulary. As judge Weeramantry put forward, it is based on the assertion that “we have passed out of the era of co-existence, into the era of cooperation”¹²⁴ – not only between the peoples, but also, more broadly, between the disciplines and the generations. Sustainable development assumes that “our vision must not only extend in space, to States beyond national frontiers, but also in time, beyond generational frontiers. We have

¹²³ IOM, *supra* note ---.

¹²⁴ Weeramantry, *supra* note --- at xi.

to cast our vision beyond the present generation and look forward into the future."¹²⁵

4.5. Challenges to sustainable development law as an umbrella

Prof. Ellis submitted that, "[i]f fragmentation within law, and among social systems more generally, is to be understood as the inevitable consequence of increased complexity in society, then a concept like sustainable development, with its explicitly integrative thrust, is concurrently extremely useful and very difficult to implement."¹²⁶ While sustainable development may establish a comprehensive normative framework on environmental migration, several hurdles will have to be overcome.

The first obstacle is related to the difficulties of carrying cross-cutting studies on environmental migration. Much research will be needed to understand how each field of law relevant in the face of environmental migration may be connected with other fields. Such a research is inherently interdisciplinary, and research teams will need to bring together researchers who are not used to work together, or even who ignore the existence of other research carried out on the same phenomena by colleagues from other fields.

A second challenge derives from the striking lack of available empirical information on laws and policies implemented to face environmental migration, in particular at the community, local or domestic level of governance. It is urgent that such laws and policies be compiled, put in parallel and evaluated, so that evidence-based analyses of the interplay of different fields of laws could be developed, leading to integrative, policy-relevant studies and improvement of those laws and policies. In particular, there is a great need for bi-dimensional best practices which would assemble information on laws and policies developed in different places and in different fields of governance.

It is undeniable that there is a pressing need for new laws and policies to be developed in response to on-going environmental migration. Nonetheless, such new laws and policies should ideally not be designed without a detailed analysis of the role played by existing laws relevant in the face of environmental migration, nor should they be developed without due regard to outcomes of prior policies.

5. Conclusion

In a somewhat provocative blog article, Ming Chen, the dean of Louis D. Brandeis School of Law, university of Louisville, established a "hierarchy of legal scholarship." At the lower stage, Ming Chen situates blog posts¹²⁷ and "publication of what are essentially blog posts with footnotes." Directly

¹²⁵ *Ibid.*

¹²⁶ Ellis, *supra* note --- at 58.

¹²⁷ I do not completely agree with situating blog articles as the lowest quality legal scholarships. Blogs, or new information technologies generally, are only a media, on which good and bad scholarships can be mediated: looking down at blogs does not make more sense than criticizing recycled paper journals.

higher stages include different kinds of doctrinal works ("doctrinal reviews of the state of the law" and "of interesting questions of law," and "doctrinal synthesis of developments in law"). Then come policy-relevant scholarships: "normative policy analysis of law" without, or with "substantial reform proposals." "Legal theories" follow. Finally, Ming Chen situates "'Law and' interdisciplinary studies," "empirical studies of legal institutions" and "empirical studies of law's impact on society" at the top of his hierarchy.

This hierarchy applies strikingly well to the emerging debate on environmental migration and the law. "Blog posts with footnotes" were developed by well-meaning researchers and practitioners, but they lacked a solid legal analysis. Doctrinal works followed, looking at the application of existing laws on refugees, stateless persons, human rights, migration, subsidiary protection, etc. From the mid-2010, plenty of normative policy analyses were published, and some substantial reforms based on legal analyses rapidly followed.

However, probably no existing legal scholarship on environmental migration has yet reached the last four stages: "legal theories," "'Law and' interdisciplinary studies," "empirical studies of legal institutions" and "empirical studies of law's impact on society." I believe that such analyses are urgently needed, and that they could be triggered by an approach based on the notion of sustainable development.

Identifying people in need and pleading for their protection is an essential, but insufficient task. The approach of environmental migration law as an obelisk – ie. the erection of a monolithic heavy legal structure – is at best a very long term undertaking, and, at worse, an impossible mission. A more practical work is to shape a collection of "marbles," these little normative elements that, taken together, may help international law to play a role for the protection of people displaced in the context of environmental change. Yet, a bag of marbles is fragile, and a constant risk is to lose some marbles if the bag breaks, or not to play the right marble at the right time. Therefore, this paper argues for further research to be based on the project of sustainable development law, as a tapestry that wows together all relevant legal fields and seeks a coherence.

The vagueness of sustainable development does not prevent it from at least being the forum for a discussion, but it enables it to explore many promising issues and to serve as a promising mindset, putting isolated legal fields and different disciplines in perspective. Sustainable development law does not look only at legal norms, but also at their implementation and their impact on society. In other words, a sustainable development legal framework calls for nothing else than the last four categories of Ming Chen's hierarchy of law: legal theories, 'law and' studies, empirical studies on legal institutions and law's impact on society.

Thus, according to Prof. Ellis, sustainable development law "still has the potential to play a role in challenging or disrupting settled assumptions about what is reasonable or acceptable, and it is still sufficiently controversial, even among those who accept its broad objectives, to

generate real debate and discussions. It therefore has a great potential to bring people together in argumentation and debate."¹²⁸ As a framework, a mindset, or an umbrella, as you will, sustainable development does not bring much answers, but raises issues in a provocative way and push for cross-cutting answers to be given – and this is precisely the way through which new issues may develop coherence and affirm importance. Flexibility, vagueness or indetermination are assets, not drawbacks, when foundations remain to be laid: existential doubts proper to the notion of sustainable development, in such circumstances, are not only useful, but probably necessary.

¹²⁸ Ellis, *supra* note --- at 66.

International Development Law Organization (IDLO)

IDLO is an intergovernmental organization that promotes legal, regulatory and institutional reform to advance economic and social development in transitional and developing countries.

Founded in 1983 and one of the leaders in rule of law assistance, IDLO's comprehensive approach achieves enduring results by mobilizing stakeholders at all levels of society to drive institutional change. Because IDLO wields no political agenda and has deep expertise in different legal systems and emerging global issues, people and interest groups of diverse backgrounds trust IDLO. It has direct access to government leaders, institutions and multilateral organizations in developing countries, including lawyers, jurists, policymakers, advocates, academics and civil society representatives.

Among its activities, IDLO conducts timely, focused and comprehensive research in areas related to sustainable development in the legal, regulatory, and justice sectors. Through such research, IDLO seeks to contribute to existing practice and scholarship on priority legal issues, and to serve as a conduit for the global exchange of ideas, best practices and lessons learned.

IDLO produces a variety of professional legal tools covering interdisciplinary thematic and regional issues; these include book series, country studies, research reports, policy papers, training handbooks, glossaries and benchbooks. Research for these publications is conducted independently with the support of its country offices and in cooperation with international and national partner organizations.

Centre for International Sustainable Development Law (CISDL)

The Centre for International Sustainable Development Law (CISDL) is an independent legal research institute that aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

As a charitable foundation with an international Board of Governors, CISDL is led by 2 Directors, and 9 Lead Counsel guiding cutting-edge legal research programs in a fellowship of 120 legal researchers from over 60 developing and developed countries. As a result of its ongoing legal scholarship and research, the CISDL publishes books, articles, working papers and legal briefs in English, Spanish and French. The CISDL hosts academic symposia, workshops, dialogues, and seminar series, including legal expert panels parallel to international treaty negotiations, to further its legal research agenda. It provides instructors, lecturers and capacity-building materials for developed and developing country governments, universities, legal communities and international organisations on national and international law in the field of sustainable development. CISDL members include learned judges, jurists and scholars from all regions of the world and a diversity of legal traditions.

With the International Law Association (ILA) and the International Development Law Organization (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership on 'International Law for Sustainable Development' that was launched in Johannesburg, South Africa at the 2002 World Summit for Sustainable Development to build knowledge, analysis and capacity about international law on sustainable development. Leading CISDL members also serve as expert delegates on the International Law Association Committee on International Law on Sustainable Development. For further details see www.cisdl.org.