

Migration in the UNFCCC Workstream on ‘Loss and Damage’: An Assessment of Alternative Framings and Conceivable Responses

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Abstract

Discourses on ‘climate migration’ have played an instrumental role in initiating negotiations on ‘loss and damage’ under the UN Framework Convention on Climate Change. Yet, ‘climate migration’ has rather confusedly been framed, alternatively, as a tool for reducing loss and damage (hence essentially a form of adaptation) or as a source of loss and damage, either for the migrants or for other concerned communities. Meanwhile, proposed approaches to address migration as a form of loss and damage have extended beyond compensation, which remain controversial among industrial nations. In the highly politicized field of migration governance, however, this article submits that policy support and guidance in addressing loss and damage could prompt dangerous forms of political interference, such as the imposition of Western states’ objective of containing migrants in the Global South. It is thus suggested that top-down migration policies may not genuinely help vulnerable nations face loss and damage.

Key words

Climate change; migration; loss and damage; Warsaw International Mechanism on Loss and Damage; UNFCCC workstream on loss and damage; Paris Agreement.

1. INTRODUCTION

Empirical as well as theoretical migration studies published over the last two decades have established that environmental change has an impact on human mobility, in particular within

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states, and that climate change has been exacerbating this relation.² Rather than a distinct population of ‘climate refugees,’ these studies suggest that environmental change is a diffuse and indirect factor affecting migration ‘through its influence on a range of economic, social and political drivers.’³ Political narratives on ‘climate migration’ have developed, often through a simplification of these findings, to plead, among others, for climate change mitigation and for reforms in migration governance. Within the global climate change negotiations conveyed under the UN Framework Convention on Climate Change (UNFCCC), migration has first been discussed as a way for communities to adjust to the impacts of climate change (adaptation),⁴ but it has also been a central theme in the workstream on ‘approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.’⁵

The concept of ‘loss and damage’ remains equally vague and ill-defined, despite years of negotiations. The UNFCCC secretariat proposed a working definition that included ‘the actual and/or potential manifestation of impacts associated with climate change ... that negatively affect human and natural systems.’⁶ Loss and damage include the harms caused by climate change adaptation (e.g. expenses, unintended consequences) as well as unavoidable (or un-avoided) harms.⁷ An important challenge for this conceptual development relates to the

² For a review, see e.g. J. Morrissey, ‘Rethinking the “Debate on Environmental Refugees”’: From “Maximilists and Minimalists” to “Proponents and Critics” (2012) 19 *Journal of Political Ecology*, pp. 36-49.

³ Foresight agency, ‘Migration and Global Environmental Change: Final Project Report’ (The United Kingdom Government Office for Science, 2011), at 9.

⁴ Decision 1/CP.16, ‘The Cancún Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention’ (2010), para. 14(f).

⁵ Decision 3/CP.18, ‘Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity’ (2012), para. 7(a)(vi); Decision 1/CP.21, ‘Adoption of the Paris Agreement’ (2015), para. 50.

⁶ UNFCCC, Note by the Secretariat, ‘A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change’ (2012), FCCC/SBI/2012/INF.14, para. 2.

⁷ Comp. with decision 2/CP.19, ‘WIM for loss and damage associated with climate change impacts’ (2013), recital 5: ‘loss and damage ... includes, and in some cases involves more than, that which can be reduced by adaptation.’

attribution of physical weather or climate events to anthropogenic climate change, but frameworks on probabilistic event attribution that are under development could help overcome this challenge.⁸ An additional source of difficulty, however, relates to the identification of social loss and damage attributable to these physical events.⁹ Physical effects of climate change produce series of social effects which, like the concentric circles that an impact produces on a water surface, extend *ad infinitum* in time and space, through economic and other social processes. In these spheres of causality, ‘climate migration’ does not appear only as a consequence, but also as an intermediate factor to further social effects. Among migration and its multiple effects, identifying the *adverse* consequences of climate change inevitably involves value judgments. Migration has sometimes been conceived as a normal or opportune social process of adaptation; other times, it was depicted as a harmful phenomenon.

In this article, I wish to question the desirability of including considerations for human mobility within the UNFCCC workstream on loss and damage and future actions to which it may lead. More specifically, I show some grounds for scepticism regarding the ability of global institutions to ‘guide’ domestic migration policies to the benefit of the populations of the most vulnerable developing states. On the one hand, migration comprises multifaceted and complex human practices: national migration policies need to be carefully devised as part of a holistic approach of development, and top-down one-size-fits-all ‘solutions’ could be counterproductive. On the other hand, it cannot be ignored that Western states have their own political agendas, including a strongly perceived interest in containing migrants in the South,¹⁰ and that international guidance in addressing loss and damage could become a Trojan horse for a Western influence in the migration policies of the developing states most vulnerable to climate change impacts.

⁸ P. Pall, et al., ‘Anthropogenic Greenhouse Gas Contribution to Flood Risk in England and Wales in Autumn 2000’ (2011) 470(7334) *Nature*, pp. 382-5. See however M. Hulme, ‘Attributing Weather Extremes to “Climate Change”’: A Review’ (2014) 38(4) *Progress in Physical Geography*, pp. 499-511.

⁹ Lawyers have developed relevant reflections on the attribution of injuries, in particular in the common law of tort, the civil law of extra-contractual responsibility, and the international law of state responsibility for internationally wrongful acts.

¹⁰ See, for a dated but strong theoretical discussion: B.S. Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11(4) *Journal of Refugee Studies*, pp. 350-74.

This article is structured as follows. Section 2 provides a general background by retracing the emergence of discussions about migration and loss and damage within the UNFCCC. Section 3 distinguishes and engages with three framings of migration in relation to loss and damage as a way to reduce loss and damage or a source of loss and damage for either migrants themselves or for surrounding communities. Lastly, section 4 explores possible approaches to address migration aspects of loss and damage on the basis of proposals submitted to the UNFCCC and beyond.

2. MIGRATION WITHIN THE CLIMATE REGIME: FROM ‘ADAPTATION’ TO ‘LOSS AND DAMAGE’

2.1. The Climate-Migration Nexus

Dominant migration theories during most of the 20th Century attributed human mobility mostly to economic or political conditions.¹¹ Starting from the mid- to late-1980s, the relevance of environmental factors of migration came progressively to the fore in the context of a growing awareness of the interactions between human societies and their environment.¹² As climate change appeared as the main (environmental) issue of our time, scholars and activists came naturally to promote some global governance reform to take ‘climate migration’ into consideration. Their political agendas diverged and extended, among others, to the protection of the rights of migrants, a reinforcement of efforts to mitigate climate change, humanitarian assistance to concerned communities, and even greater investments in border surveillance.¹³

Within the climate regime, the climate-migration nexus was first discussed within the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), as part of a process launched by the 2007 Bali Action Plan (COP 13) in order, among others, to

¹¹ For an influential example, see A. Lee, ‘Theory of Migration’ (1966) 3(1) *Demography*, pp. 47-57.

¹² See generally E. Piguet, ‘From “Primitive Migration” to “Climate Refugees”’: The Curious Fate of the Natural Environment in Migration Studies’ (2013) 103(1) *Annals of the Association of American Geographers*, pp. 148-62.

¹³ See generally B. Mayer, “‘Environmental Migration’ as Advocacy: Is It Going to Work?” (2014) 29(2) *Refuge*, pp. 27-41.

‘enhance ... action on adaptation.’¹⁴ Such discussions were mostly promoted by developing states as an argument in favour of North-South climate finance.¹⁵ As a result of these discussions, subparagraph 14(f) of the 2010 Cancún Agreements (COP 16) called all parties to take ‘[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels.’¹⁶ This provision dissipated any doubts about the possibility of framing relevant migration policies as adaptation, making them eligible to dedicated technical or financial assistance.¹⁷ While promoting migration as a viable policy option,¹⁸ subparagraph 14(f) has also contributed to set the climate-migration nexus on the agenda of various research and advocacy institutions. Nevertheless, as Koko Warner noted, this provision did not fully satisfy some of its advocates because it ‘framed [migration] as matters for cooperation, rather than issues of fault, liability, or legality.’¹⁹

2.2. The UNFCCC Workstream on Loss and Damage

Claims for the responsibility of industrial nations toward those most severely affected by climate change impacts are nothing new.²⁰ Taking a prominent part in the ‘blame game’ of the early 1990s, Malaysia’s Prime Minister Mahathir Mohamad contrasted the ‘pittance’ offered

¹⁴ Decision 1/CP.13, ‘Bali Action Plan’ (2007), para. 1(c).

¹⁵ See K. Warner, ‘Human Migration and Displacement in the Context of Adaptation to Climate Change: The Cancún Adaptation Framework and potential for Future Action’ (2012) 30 *Environment and Planning C: Government and Policy*, pp. 1061-77.

¹⁶ Decision 1/CP.16, n. 4, para. 14(f). The Cancún Agreements do not contain any definition of ‘migration’ and ‘displacement.’ A subsequent UNFCCC technical paper reflects a general understanding that ‘migration tends to refer to voluntary movement, while displacement tends to refer to forced movement.’ See UNFCCC technical paper, ‘Non-economic losses in the context of the work programme on loss and damage’ (2013), FCCC/TP/2013/2, para. 82.

¹⁷ Adaptation remains heavily underfunded in comparison with migration. See e.g. B Buchner et al., ‘Global Landscape of Climate Finance 2014’ (Climate Policy Initiative, Nov. 2004).

¹⁸ See K. Warner et al., ‘National Adaptation Plans and Human Mobility’ (2015) 49 *Forced Migration*, pp. 8-9.

¹⁹ Warner, n. 15, at 1066.

²⁰ The responsibility of Western states was already invoked by developing states in the Caracas Declaration of the Ministers of Foreign Affairs of the Group of 77 on the Occasion of the Twenty-Fifth Anniversary of the Group (1989), para. II-34.

by Western states as development assistance or promises of climate finance to the much greater ‘loss of earnings by the poor countries.’²¹ In 1991, the Alliance of Small Island States (AOSIS) proposed the creation of an insurance mechanism funded by industrialized states to ‘compensate the most vulnerable small island and low-lying coastal developing countries for loss and damage resulting from sea level rise.’²² In lieu of such a mechanism, however, the UNFCCC only provided for a vague duty for developed states to ‘assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.’²³ Daniel Bodansky attributed the disregard of AOSIS’s proposal to the fact that the states most severely affected by climate change ‘had [little] to offer the developed world in exchange for financial transfers.’²⁴

Clearer scientific evidence of the actual or future and inevitable impacts of climate change on poorer communities, in the context of stalling international negotiations on climate change mitigation, led progressively to more sympathy for claims for climate change reparations among a larger numbers of developing states and non-governmental organizations.²⁵ The 2007 Bali Action Plan (COP 13) contained a section inviting the AWG-LCA to consider ‘means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.’²⁶ This topic was however largely side-lined, within the work of the AWG-LCA, by the attempt of developed states to ‘avoid discussions related to proposals around compensation for loss and damage’²⁷ by

²¹ UNCED report, Statements by the Heads of State or Government at the Summit Segment of the Conference, A/CONF.151/26/Rev.1(Vol. III) (1992) at 233.

²² Submission by Vanuatu, ‘Draft annex relating to insurance’, in INCFCC, *Negotiation of a Framework Convention on Climate Change: Elements relating to mechanisms* (1991), A/AC.237/WG.II/CRP.8, at 2. For a comparable proposal to the AWG-LCA, see AOSIS submission, ‘Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts’, in *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan: Submissions from Parties* (2008) FCCC/AWGLCA/2008/Misc.5/Add.2(Part I) at 24.

²³ UN Framework Convention on Climate Change, art. 4(4).

²⁴ D. Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18 *Yale Journal of International Law*, pp 451-558, at 528.

²⁵ The fourth assessment report of the IPCC was published in 2007; the Stern review, in 2006.

²⁶ Decision 1/CP.13, n. 14, para. 1(c)(iii).

²⁷ K. Warner & S. Zakieldeen, ‘Loss and Damage Due to Climate Change: An Overview of the UNFCCC Negotiations’ (European Capacity Building Initiative, 2012), at 4.

proposing an alternative focus on risk management, in particular through risk-sharing mechanisms and disaster risk reduction strategies.

After three years and little progress, the 2010 Cancún Agreements (COP 16) established a ‘work programme,’ assigned to the Subsidiary Body for Implementation (SBI), in order, again, ‘to consider, including through workshops and expert meetings, as appropriate, approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.’²⁸ The Cancún Agreements also clarified that this work programme would cover ‘the impacts related to extreme weather events and slow onset events,’²⁹ such as ‘sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity and desertification.’³⁰ While the Cancún Agreements emphasized the relevance of migration for adaptation, as noted above,³¹ no connection was made between migration and loss and damage.

The 2011 Durban conference (COP 17) defined three thematic areas for the work programme on loss and damage: assessing the risk of loss and damage, developing approaches to address loss and damage, and defining the role of UNFCCC negotiations.³² Building up on the last one, the 2012 Doha conference (COP 18) determined the role of the Convention in relation to loss and damage as (a) ‘enhancing knowledge and understanding,’ (b) ‘strengthening dialogue, coordination, coherence and synergies,’ and (c) ‘enhancing action and support, including finance, technology and capacity-building.’³³ While developed states continued to oppose any reference to ‘redress’ or ‘compensation,’ they progressively agreed to redirect discussions on possible forms of technical or financial ‘support’ to the most vulnerable developing countries.

An important step was made in 2013 (COP 19) with the decision to establish the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts

²⁸ Decision 1/CP.16, n. 4, para. 26, and note 3 under para. 25.

²⁹ *Ibid.* para. 25.

³⁰ *Ibid.* para. 25, note 3.

³¹ See n. 16.

³² Decision 7/CP.17, ‘Work programme on loss and damage’ (2011).

³³ Decision 3/CP.18, n. 5, para. 5.

(‘WIM’).³⁴ Specific arrangements were adopted the following year at the Lima conference (COP 20), including the composition of the Executive Committee of the WIM, basic rules on procedure, and a two-year workplan.³⁵ The workplan put emphasis on spurring research and raising awareness on factors of vulnerability, risk management approaches, the impacts of slow-onset, non-economic loss, resilience, migration, as well as financial instruments and tools.³⁶ Recently, however, some developing states have taken a stronger position in favor of extending the mandate of the WIM (or that of a succeeding or additional institution), from its current role in, essentially, promoting a better understanding and greater awareness of loss and damage, to an operational mission supported by a financial instrument.³⁷

2.3. Migration in the UNFCCC Workstream on Loss and Damage

Migration has generally occupied a prominent place in the UNFCCC workstream on loss and damage. The fear of massive arrivals of ‘climate refugees’ in Western states (although scientifically unfounded)³⁸ contributed to forging widespread support for the initiation of negotiations of this workstream, as addressing loss and damage was related to the strongly perceived interest of all states to avoid large inflows of migrants.³⁹ The Doha Conference (COP

³⁴ Decision 2/CP.19, n. 7, para. 1.

³⁵ Decision 2/CP.20, ‘WIM for loss and damage associated with climate change impacts’ (2014), para. 5.

³⁶ Report of the Executive Committee of the WIM for Loss and Damage associated with Climate Change Impacts (2014), FCCC/SB/2014/4, Annex II; and Decision 2/CP.20, n. 35, para. 1.

³⁷ See for instance the informal note of the Co-Chairs, ‘Reflections on progress made at the fourth part of the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action’ (17 April 2014), at 12, reflecting the demand of some parties for the inclusion, in the Paris agreement, of ‘[a] specific commitment to provide support for financing and operationalization of the WIM for Loss and Damage.’ See also the submission of Nauru on behalf of AOSIS on its view on Loss and Damage in the 2015 Agreement (4 Nov. 2014), at 1, noting that ‘[i]mmediate financial, technical and capacity building support that is adequate, provided on a timely basis and truly accessible will be required to address loss and damage in SIDS. Financial flows from developed countries for addressing loss and damage in vulnerable developing countries should be new and additional to financing for mitigation and adaptation.’

³⁸ See generally the ‘Foresight report,’ n. 3.

³⁹ This is for instance apparently in the arguments framed in Submission of Nauru on behalf of AOSIS, ‘Views and information on elements to be included in the recommendations on loss

18) recognized the importance of migration to the workstream and emphasized the need for ‘enhancing the understanding of ... how impacts of climate change are affecting patterns of migration, displacement and human mobility.’⁴⁰ Likewise, the workplan of the WIM calls to ‘enhance the understanding of and expertise on how the impacts of climate change are affecting patterns of migration, displacement and human mobility; and the application of such understanding and expertise.’⁴¹ Technical papers prepared by the UNFCCC Secretariat put a strong emphasis on migration, notably in relation to slow-onset events,⁴² to non-economic losses,⁴³ and to approaches to address loss and damage.⁴⁴ Some of the most influential promoters of a workstream on loss and damage, such as Saleemal Huq and Koko Warner, have also flagged migration as one of the most pressing questions to address.⁴⁵

Yet, at an early stage at least, the inclusion of discussions on migration within the workstream on loss and damage did not appear to be actively supported by any strong coalition of states. Until recently, the few references to migration in the party submissions to the workstream were relatively anecdotal.⁴⁶ Strikingly, none of the party submissions regarding the drafting of the WIM’s workplan – including submissions by AOSIS, G77 and China, the Least Developed Countries group, and African Group of Negotiators – comprised any mention of migration. By contrast, discussions on migration within the loss and damage workstream have been actively

and damage in accordance with decision 1/CP.16’ (2012) FCCC/SBI/2012/MISC.14, at 9; and AOSIS’s 2008 submission, n. 22, para. 92.

⁴⁰ Decision 3/CP.18, n. 5, para. 7(a)(vi).

⁴¹ Report of the Executive Committee of the WIM for Loss and Damage associated with Climate Change Impacts (2014), FCCC/SB/2014/4, Annex II, at 11.

⁴² UNFCCC Secretariat technical paper, ‘Slow Onset Events’ (2012), FCCC/TP/2012/7.

⁴³ UNFCCC technical paper on non-economic losses, n. 16, paragraphs 82-6.

⁴⁴ UNFCCC’s literature review, n. 6, paras. 110 and 130. ‘Migration’ was one of the keywords selected by the Secretariat to conduct a literature review (*ibid.* para. 4).

⁴⁵ See S. Huq et al. ‘Loss and Damage’ (2013) 3(11) *Nature Climate Change*, pp. 947-9, at 948 (‘Developing countries need guidance and support to implement approaches to ... address those impacts that cannot be avoided with a broader set of tools that may include risk transfer and risk retention measures, as well as policies to promote migration and facilitate resettlement’); and Warner, n. 15.

⁴⁶ See the submission of Bolivia (on behalf of Ecuador, China, El Salvador, Guatemala, Thailand, Philippines, and Nicaragua) and Ghana (2012), FCCC/SBI/2012/MISC.14/Add.1, at 5 and 30.

promoted by non-parties, including some isolated non-governmental organizations⁴⁷ and a loose coalition of specialized international organizations, non-governmental organizations and academic institutions.⁴⁸

The negotiations within the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), in the run-up to COP 21, have however shown a new commitment of least-developed and then developing states in favor of ‘climate change displacement coordination facility.’⁴⁹ Developed states, which firmly opposed any mention of compensation or liability, showed some readiness to compromise on proposals for migration governance.⁵⁰ In the decision adopting the Paris Agreement (2015), the parties requested the creation of a ‘task force ... to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change,’⁵¹ while explicitly ‘agree[ing]’ that the mention of loss and damage in the Paris Agreement ‘does not involve or provide a basis for any liability or compensation.’⁵²

3. FRAMINGS MIGRATION IN RELATION TO LOSS AND DAMAGE

⁴⁷ E.g. Climate Action Network, ‘Submission on the Workplan of the WIM on Loss & Damage’ (2014), at 6; ACT Alliance, ‘Inputs and suggested actions’ (2014), at 5; Brot für die Welt, ‘Submission on Loss and Damage Associated with Climate Change’ (2012), at 2.

⁴⁸ See e.g. Joint submission from the Advisory Group on Climate Change and Human Mobility (International Organization for Migration, UNDP, UNHCR, United Nations University Institute for Environment and Human Security, the Norwegian Refugee Council, Internal Displacement Monitoring Centre, Sciences-Po CERI and Refugees International) (1 July 2014); Joint submission by UNHCR, United Nations University, Norwegian Refugee Council, Special Rapporteur on the Human Rights of Internally Displaced Persons, and the International Organization for Migration (19 Oct. 2012).

⁴⁹ See submission of Nepal on behalf of the least developed countries group, October 2014, at 4; ADP, Second session, part ten, working document E (3 September 2015 at 23:30), at 1. See generally J. Wentz & M. Burger, ‘Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21’ (Columbia Law School Sabin Center for Climate Change Law, September 2015).

⁵⁰ See C. Arenas, ‘A Climate Change Displacement Coordination Facility in the Paris Draft Agreement’ (Displacement Solutions, 2015).

⁵¹ Decision 1/CP.21, n. 5, para. 50.

⁵² Ibid. para. 52.

In order to go beyond a vague connection between migration and loss and damage, this section distinguishes and engages critically with alternative framings of human mobility in documents before the UNFCCC workstream, as respectively a way to reduce loss and damage or as a source of loss and damage, either for migrants themselves or for other concerned communities. These framings put emphasis on particular aspects of loss and damage in relation to particular migration scenarios. For instance, the framing of migration as a loss and damage for the migrants themselves applies most convincingly to forced migration, whereas voluntary migration is more often depicted as a way of reducing loss and damage. Likewise, the expenses met by host communities through programs to assist and protect incoming migrants can alternatively be framed as a way of addressing (mostly non-economic) loss and damage suffered by the migrants themselves, or as (mostly economic) loss and damage – mainly expenses – suffered by the host community as a consequence of migration. But even if these framings are not mutually exclusive in principle, they tend to suggest distinct responses to the growing momentum for actions on ‘climate migration.’

3.1. Migration as a Way of Reducing Loss and Damage

First of all, human mobility can be considered as a way of reducing loss and damage associated with climate change impacts. Migration has always been a practice of individuals, households, communities and societies, as part of strategies to improve, avoid a degradation of, or otherwise adjust to changes in perceived living conditions. Thus, migration may either anticipate physical events (e.g. populations fleeing a region in the anticipation of an extreme weather event), or immediately follow the occurrence of a physical event in attempting to avoid greater loss and damage caused, in particular, by the destruction of the most basic infrastructures. Historical evidence confirms that migration occurs in reaction to the deterioration of living conditions generated by the impacts of natural climatic changes.⁵³ Relevant public policies in this context

⁵³ See for instance A.N. Penna, *The Human Footprint: A Global Environmental History* (Wiley, 2010); W.J. Burroughs, *Climate Change in Prehistory: The End of the Reign of Chaos* (Cambridge University Press, 2005); Jin-Qi Fang & Guo Liu, ‘Relationship between Climatic Change and the Nomadic Southward Migrations in Eastern Asia during Historical Times’ (1992) 22(2) *Climatic Change*, pp. 151-68; N. Pederson et al, ‘Pluvials, Droughts, the Mongol Empire, and Modern Mongolia’ (2014) 111(12) *Proceedings of the National Academy of Sciences*, pp. 4375-9; G. Parker, *Global Crisis: War, Climate Change and Catastrophe in the Seventeenth Century* (Yale University Press, 2013).

seek either to protect migrants or to ‘manage’ migration through measures including for instance economic incentives, border surveillance, and forced resettlement.

It is therefore unsurprising that mobility has been reported as a coping or adaptation mechanism in the context of climate change, encouraging debates on appropriate policy responses. Very diverse dynamics have been discussed within the UNFCCC workstream on loss and damage. For instance, a submission by Gambia (on behalf of the Least Developed Countries Group) highlighted that some farmer households were increasingly turning to seasonal urban or cross-border mobility to cope with a drought affecting millet production.⁵⁴ Likewise, a note of the UNFCCC Secretariat reported a study on the contribution of migrant social networks in Mali, Mauritania and Senegal that ‘helped to build up social capital in order to increase social resilience in their communities of origin.’⁵⁵ The same note also documented the issuance of transhumance certificates to pastoralists within the Economic Community of West African States (ECOWAS) to provide ‘opportunities ... to cross borders for grazing and therefore to adapt to the challenges posed by climate change through seasonal mobility and migration.’⁵⁶

In terms of policy responses, however, the objective of *reducing* loss and damage cannot clearly be distinguished from existing efforts towards climate change adaptation.⁵⁷ Framing migration as a way of *reducing* the exposure or the vulnerability of populations to adverse climate change impacts only suggests that migration should be encouraged as a form of adaptation to climate change – a conclusion that had already been reached in the 2010 Cancún

⁵⁴ Submission by the Gambia on behalf of the Least Developed Countries Group on Loss and Damage (2013), at 2, referring to S. Yaffa, ‘Loss and damage from drought in the North Bank Region of The Gambia’ (United Nations University Institute for Environment and Human Security, 2013).

⁵⁵ UNFCCC’s literature review, n. 6, para. 110, referring to J. Scheffran et al., ‘Migration as a contribution to resilience and innovation in climate adaptation: Social networks and co-development in Northwest Africa’ (2012) 33 *Applied Geography*, pp. 119-27.

⁵⁶ UNFCCC’s literature review, n. 6, para. 130.

⁵⁷ See e.g. Submission of Norway, ‘Work programme on approaches to address loss and damage’ (2 Oct. 2012), FCCC/SBI/2012/MISC.14, at 14, noting the need to ‘reaffirm, rather than duplicate, efforts already undertaken to support activities that address loss and damage associated with climate change.’ See also ‘Warsaw Establishes International Mechanism for Loss and Damage’ (2013) 279/280 *Third World Resurgence*, pp. 15-8.

Agreements (COP 16).⁵⁸ In order to make a useful contribution to climate governance, the workstream on loss and damage needs to look beyond ways of *reducing* loss and damage and beyond adaptation. In this sense, the preamble of the decision establishing the WIM (COP 19) acknowledged that ‘loss and damage associated with the adverse effects of climate change *includes, and in some cases involves more than,* that which can be reduced by adaptation.’⁵⁹ The explicit inclusions of both what can and cannot be reduced through adaptation implies that the loss and damage workstream is meant to suggest new types of responses, possibly at a different level of governance. Such new responses are perhaps most persuasively conceived in relation to mechanisms that *transfer* un-avoided loss and damage, including through a financial mechanism based on causal responsibility.

3.2. Migration as a Source of Loss and Damage for the Migrants

Second of all, human mobility can also be considered as a source of loss and damage suffered by the migrants themselves. Loss and damage can be suffered by migrants through any forms of migration: uprooted populations are generally more vulnerable to human rights abuses such as systematic discriminations and economic exploitation. Such harms can be substantial when and where the human rights of migrants are not effectively protected. States have not generally shown great enthusiasm for the protection of the rights of international migrants, in particular undocumented ones, and the protection of non-citizens (who generally do not vote) remains a challenge for democracies.⁶⁰ Great loss and damage can also result from unprepared mass migration, where protection capacities are exceeded, and when vulnerable populations (e.g. on account of gender, age, minority status, Indigenousness, or disabilities) are displaced.

⁵⁸ See n. 4.

⁵⁹ Decision 2/CP.19, n. 7, recital 5 (emphasis added).

⁶⁰ See e.g. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 10th recital (‘the situation of vulnerability in which migrant workers and members of their families frequently-find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment’); D. Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008) at 241; F. Crépeau, ‘Dealing with Migration: A Test for Democracies’ (2010) 35 *Refugee Watch*, pp. 37-50.

A brief review of international practice points at noteworthy precedents where migration was recognized as a source of harms whose wrongful infliction entails international responsibility. For long, measures of compensation have been indicated for expulsions of foreign citizens in infraction of international standards of protection.⁶¹ On this basis, Poland and Czechoslovakia addressed mutual claims for reparation of the expulsion of foreign nationals in the context of post-Second World border disputes.⁶² Similarly, the UN Compensation Commission, established by the Security Council to address claims related to ‘any direct loss, damage ... or injury’⁶³ arising from Iraq’s invasion of Kuwait, provided compensation to those forced to leave, or unable to return, to these two countries during the conflict.⁶⁴ In each case, compensation for displacement *per se* was recognized as additional to compensation for any other loss or damage, for instance loss of property, suffered as a result of displacement.

In the same vein, some documents produced before the UNFCCC workstream on loss and damage construed migration as a source of harm for the migrants – in particular in scenarios of forced migration such as disaster-induced displacements⁶⁵ and resettlement induced by response measures such as the construction of dams⁶⁶ – and called for efforts to reduce such harm. A submission from the Climate Action Network, a coalition of 550 NGOs, described resettlement and migration as ‘extreme responses for affected communities.’⁶⁷ Overall, a technical paper produced by the UNFCCC secretariat included a relatively extensive analysis of the non-economic loss and damage caused by ‘displacement,’ approached as forced mobility, as comprising in particular ‘a loss of security (including legal rights) and agency (the ability to control one’s location and livelihood).’⁶⁸ This paper highlighted that, ‘[i]n the same

⁶¹ See for instance the multiple cases gathered in M. Whiteman, *Damages in International Law I* (US Government, 1937), at 418-483.

⁶² *Agreement between the Polish People’s Republic and the Czechoslovak Republic Concerning the Settlement of Outstanding Property Matters*, 29 March 1958 / 9 Jan. 1959, art. 5(1).

⁶³ UN Security Council res. 687 (1991), para. 16.

⁶⁴ Decision taken by the Governing Council of the UN Compensation Commission during its third session, ‘Criteria for additional categories of claims’ (1992), para. 6(b).

⁶⁵ UNFCCC’s literature review, n. 6, para. 195

⁶⁶ *Ibid.* paras. 139 and 162(b)

⁶⁷ Submission by Climate Action Network, ‘Submission on the Work Programme on Loss and Damage’ (2011), at 2.

⁶⁸ UNFCCC technical paper on non-economic losses, n. 16, para. 83.

way that a loss of health is a type of loss and damage because health is important to well-being, displacement is a type of loss and damage because security and agency, which are lost due to displacement, are important to well-being.⁶⁹ Beside displacement ‘as a (non-economic) type of loss and damage *in itself*,’ the technical paper acknowledged the existence of ‘losses *from* displacement’ consisting in ‘economic losses of displacement, such as the loss of possession, and indirect non-economic losses, such as loss of health and social networks.’⁷⁰

This possible framing of (forced) migration as a source of loss and damage for the migrants themselves should not refute the possible benefits of migration as a normal process of social adjustment. Loss and damage arise mostly, not from migration in and of itself, but from the circumstances where it occurs. Thus, their treatment *en route* and at destination plays a great role in exacerbating or mitigating the ‘plight’ of migrants. Loss and damage are likely to arise because of inadequate legal or institutional frameworks that either fail to offer effective protection to migrants, or try to oppose migration through illiberal measures.⁷¹ In this sense, it is noteworthy that the Paris Agreement explicitly acknowledged states’ obligations to respect and protect the human rights of migrants.⁷² Going further, it must be kept in mind that what is regrettable in forced migration is not migration in itself, but the factor forcing individuals to flee (e.g. war, persecution, or adverse environmental events or conditions).

3.3. Migration as a Source of Loss and Damage for other Concerned Communities

Third of all, human mobility can sometimes be considered as inflicting loss and damage to other stakeholders, in particular host states or communities. It must be kept in mind that certainly most migration scenarios unfold to the net benefit of host communities, given the contribution of migrants to the economic, social and cultural life of these communities.⁷³ Yet, the sudden arrival of large numbers of individuals may induce loss and damage that are suffered

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* (emphasis added).

⁷¹ This violence inherent in migration control was elegantly in J. Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49(2) *The Review of Politics*, pp. 251-73, at 251: ‘Borders have guards and the guards have guns.’

⁷² Paris Agreement (2015), recital 11.

⁷³ See e.g. M. Clemens, ‘Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?’ (2011) 25(3) *Journal of Economic Perspectives*, pp. 83-106.

by host communities and other stakeholders. Assistance and protection measures generate expenses and divert resources, possibly straining public services and environmental resources, especially within poor countries or communities. In extreme cases, mass arrivals may affect the availability of basic commodities and threaten public order or political institutions.⁷⁴ Despite some amount of international humanitarian assistance, most of the economic and non-economic burden of hosting large populations of migrants – refugees, in particular – has generally been sustained by host communities themselves.

International practice has sometimes recognized loss and damage suffered by host communities. For instance, the 1951 Convention relating to the status of refugees recognizes that ‘the grant of asylum may place unduly heavy burdens on certain countries.’⁷⁵ States have made efforts – although by and large unsuccessful – to define ways to share the ‘burden’ or ‘responsibility’ for the protection of refugees.⁷⁶ Instead, large migrations have sometimes been constructed as a threat for the security of the states of destination. Thus, since the end of the Cold War, the UN Security Council has repeatedly considered that a ‘massive flow of refugees towards and across international frontiers’ could constitute a threat to international peace and security.⁷⁷ In the same perspective, NATO’s Secretary General tried to justify armed intervention in Kosovo by presenting refugees from Kosovo as a threat to regional stability.⁷⁸ More fundamentally, Western states’ prevailing objective of containing migrants in the developing world, in particular through a non-entrée strategy, supported by border surveillance

⁷⁴ See for instance M. Czaika, ‘A Refugee Burden Index: Methodology and its Application’ (2005) 2(2) *Migration Letters*, pp. 101-25; M. Barutciski & A. Suhrke, ‘Lessons from the Kosovo Refugee Crisis’ *Innovations in Protection and Burden-Sharing*’ (2001) 14(2) *Journal of Refugee Studies*, pp. 95-134; J. Alix-Garcian & D. Saah, ‘The Effect of Refugee Inflows on Host Communities: Evidence from Tanzania’ (2010) 24(1) *The World Bank Economic Review*, pp. 148-70.

⁷⁵ Convention relating to the Status of Refugees, 28 July 1951, recital 5.

⁷⁶ See generally M. Gottwald, ‘Burden Sharing and Refugee protection’, in E. Fiddian-Qasmiyed et al. (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014), pp. 525-37. See also the Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, art. 2(4).

⁷⁷ UN Security Council res. 688 (1991), regarding Iraq. See generally E. Mogire, *Victims as Security Threats: Refugee Impact on Host State Security in Africa* (Ashgate, 2013), at 24-6.

⁷⁸ Lord Robertson, ‘Kosovo One Year On: Achievement and Challenge’ (NATO, 2000), at 5 *et passim*.

derives from the prevalent (although highly questionable) framing of migration as a burden, rather than an opportunity, for the host states.⁷⁹

There is not always a clear distinction between claims for compensation for the loss and damage suffered by the migrants themselves or by the host communities. In a treaty of 1953, the Federal Republic of Germany accepted to make recompense to Israel for ‘the heavy burden of resettling so great a number of uprooted and destitute Jewish refugees from Germany and from territories formerly under German rule.’⁸⁰ Diplomatic protection could not be invoked as a basis for compensation as Israel, which was created in 1948, had no personal jurisdiction during the flight of many Jews from Europe. A reference to the ‘burden of resettling’ refugees was an alternative way of justifying a similar scheme of reparation, not directly in relation to the loss and damage suffered by Jewish refugees, but to the costs encountered by the state of Israel in resettling them. Academic arguments of the same vein have recently been made in relation to states that wrongfully cause large movements of populations, either from their own territory⁸¹ or from overseas territory on which they intervene militarily or otherwise.⁸²

Within the UNFCCC workstream on loss and damage, the interests of host communities and other stakeholders have also been mentioned at some occasions. In particular, a technical paper of the UNFCCC secretariat, which AOSIS cited with approbation, highlighted the harms that developed countries would incur, including through an increase in South-North migration, if they failed to support mitigation or adaptation in the most vulnerable states.⁸³ Likewise, in the run-up of the 2015 Paris conference (COP 21), several NGOs called the parties to the UNFCCC ‘to ensure each affected country share equitably the consequences of populations’ displacements.’⁸⁴ This argumentative utilization of the specter of international migration could

⁷⁹ See in particular B.S. Chimni, ‘The Birth of a “Discipline”: From Refugee to Forced Migration Studies’ (2009) 22(1) *Journal of Refugee Studies*, pp. 11-29.

⁸⁰ Luxembourg Agreement between Germany and Israel, 1 June 1962, recital 3.

⁸¹ See for instance F. Giustiniani, ‘The Obligations of the State of Origin of Refugees: An Appraisal of a Traditionally Neglected Issue’ (2015) 30 *Connecticut Journal of International Law*, pp. 171-208, at 173-6.

⁸² See references cited in n. 131 and 132, below, and accompanying text.

⁸³ See references cited in n. 39.

⁸⁴ See the open letter to L. Fabius and Ban Ki Moon, signed by Care International and other NGOs (Sept. 2015).

raise awareness and support for mitigation and adaptation, but it also entails significant political risks. Excessively insisting on the adverse impacts of (international) migration for the host communities tends to reinforce a lurking suspicion, if not a frank hostility, toward migration. This diffuse xenophobia tends to foster support for strategies of ‘migration management’ which, by trying to contain migrants away from powerful states, could, among others, hinder migration as a form of adaptation and thus exacerbate loss and damage.⁸⁵

These political risks are illustrated by the role played by the International Organization for Migration (IOM). By contrast to the UNHCR, IOM is not a United Nations agency and it does not have a clear protection mandate.⁸⁶ IOM’s mission is to ‘enhance the humane and orderly management of migration’⁸⁷ by assisting states on a project-by-project basis.⁸⁸ IOM has actively contributed to the workstream on loss and damage,⁸⁹ where it advocated for ‘assisting and protecting vulnerable mobile populations’ and for ‘promoting migration as an adaptation and livelihood strategy.’⁹⁰ Yet, IOM’s actions on the ground have remained contingent to the priorities of its parties and funders. Beyond an important role in providing operational assistance in response to sudden displacements,⁹¹ IOM’s operations in the states most vulnerable to climate change impacts tend to put a strong emphasis on *in situ* adaptation and ‘resilience,’ rather than on promoting migration or protecting migrants.⁹²

The same priorities seem to be favored by the decision of the Paris climate change conference to establish a task force that will promote ‘approaches to *avert, minimize and address*

⁸⁵ See generally the review in Mayer, n. 13.

⁸⁶ Council of the International Organization for Migration, res. 1150 (XCIII), ‘IOM Strategy’, MC/INF/287, in Annex (‘IOM Strategy Document’), part 1, para. 9, note.

⁸⁷ *Ibid.*, in Annex (‘IOM Strategy Document’), at part 1, para. 3.

⁸⁸ *Ibid.* para. 3.

⁸⁹ See for instance the references listed n. 48.

⁹⁰ Input of the International Organization for Migration to a review of existing institutional arrangements and measures in addressing loss and damage conducted by the UNFCCC secretariat (2013), at 2.

⁹¹ See e.g. ‘IOM Migration Crisis Operational Framework’ adopted by the Council of the International Organization for Migration at its 101st session (2012), MC/2355.

⁹² See generally IOM Migration Initiatives 2015, ‘Regional Strategies, Migrants and Cities’ (2014), e.g. at 63 (Namibia) and 187 (Marshall Islands).

displacement related to the adverse impacts of climate change.’⁹³ This provision was apparently drafted in parallel to article 8 of the Paris Agreement, whereby states ‘recognize the importance of *averting, minimizing* and *addressing* loss and damage associated with the adverse effects of climate change.’⁹⁴ Yet, the construction of displacement as a form of loss and damage deprives the populations affected by adverse environmental conditions from an essential form of adaptation if the causes of (forced) displacement are not addressed. Approaches are needed to protect populations from the adverse impacts of climate change, not to prevent them from seeking shelter elsewhere.

4. APPROACHES TO ADDRESS MIGRATION ASPECTS OF LOSS AND DAMAGE

Framing human mobility in relation to loss and damage associated with climate change impacts has important implications. The political utilization of fears of ‘climate refugees,’ perceived as a source of harms for host communities, has serious drawbacks. A conscious balance of the three framings detailed above – as a way to reduce loss and damage and a possible source of loss and damage for either migrants themselves and for the surrounding communities – could help in devising more adequate approaches to address loss and damage. Building on these bases, this section explores possible approaches to address migration aspects of loss and damage beyond the current mandate of the WIM (research and advocacy), either through top-down governance responses, or through diverse forms of remedial obligations.

4.1. Governing ‘Climate Migration’

Diverse proposals for norms, policies or programs have been submitted to the UNFCCC workstream on loss and damage in relation to human mobility. A general distinction can be drawn between proposals that put emphasis on ‘managing’ migration, and those which put a clearer stress on the need to protect migrants. The proposals that aim at ‘managing’ migration are generally fuelled by the perception of migration as a potential source of loss and damage for the migrants themselves or for other stakeholders. For instance, ‘provisions for establishing a climate change displacement coordination facility’ were proposed for inclusion, among other ‘institutional arrangements’ to address loss and damage, within some negotiation instruments

⁹³ Decision 1/CP.21, n. 5, para. 50 (emphasis added).

⁹⁴ Paris Agreement, art. 8.1 (emphasis added).

of the second session of the Ad hoc Working Group on the Durban Planform for Enhanced Action (ADP) (2014-2015).⁹⁵ This facility would in particular seek to ‘assist ... in providing organized migration and planned relocation.’⁹⁶ Such proposals, as mentioned above, are not clearly distinct from adaptation projects: they fundamentally aim at reducing loss and damage through migration as adaptation.

By contrast, proposals developed to protect the rights or otherwise address the needs of migrants themselves built on an understanding of migration as a normal social phenomenon through which individuals, households and communities respond to the changes they encounter, including as the consequence of various impacts of climate change. Emphasis is accordingly put on the need for adequate legal and institutional frameworks to ensure that migration occurs in the best possible conditions, especially in the perspective of migrants themselves, taking particular factors of vulnerability into account. Thus, a submission of the International Federation of the Red Cross and Red Crescent Societies (IFRC) notes the importance of taking climate change into consideration, within a holistic approach of humanitarian and development actions, in order to ‘tackle migrants’ vulnerabilities.’⁹⁷ In its broader strategy to which its submission refers, the IFRC highlights the need for ‘providing help to vulnerable migrants who are in need of assistance and protection, reducing the risks that they face along their migration routes, empowering them in their search for long-lasting and appropriate solutions, and promoting wider understanding of migrants’ rights and their social inclusion within host communities.’⁹⁸

Proposals have also been made, generally outside of the UNFCCC, for the adoption of a specific international instrument for the protection of individuals displaced within or across international borders as a consequence of climate change impacts.⁹⁹ Since 2012, the ‘Nansen

⁹⁵ Decision 1/CP.20, ‘Lima Call for Climate Action’ (2014), para. 33.3.

⁹⁶ *Ibid.*

⁹⁷ Input of the IFRC to a review of existing institutional arrangements and measures in addressing loss and damage conducted by the UNFCCC secretariat (2013).

⁹⁸ IFRC, ‘Strategy 2020’ (2010), at 19. A similar approach was developed in the Report by the United Nations Special Rapporteur on the Human Rights of Migrants, François Crépeau, to the General Assembly (2012), A/67/299.

⁹⁹ See e.g. F. Biermann & I. Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10(1) *Global Environmental Politics*,

Initiative’ of the governments of Norway and Switzerland conveyed a series of global and regional consultations for the development of ‘a protection agenda for people displaced across borders in the context of disasters and the effects of climate change.’¹⁰⁰ In the same trend, the ‘Peninsula Principles on Climate Displacement within States’ elaborated by the NGO Displacement Solutions in 2013 suggest that ‘States should develop appropriate laws and policies for loss suffered and damage incurred in the context of climate displacement.’¹⁰¹ These proposals face a strong opposition of states when they involve or may give fuel to advocacy for a duty of Western states to host some international migrants.¹⁰² They also raise vexing questions of definition related to the difficulty of attributing individual migrants to weather or climate events (let alone the more general difficulty of attributing such events to climate change), given the strong consensus among migration scholars that environmental factors cannot be understood in isolation of other circumstances.¹⁰³

Overall, it might appear inopportune and possibly counterproductive to define additional obligations borne by the states most affected to climate change, rather than defining rights that these states hold against industrial nations. On the perspective of protecting migrants within the states concerned, there is no clear reason to distinguish ‘climate migrants’ from other

pp. 60-88; CRIDEAU, ‘Draft Convention on the International Status of Environmentally-Displaced Persons’ (2008) 39 *Revue de Droit de l’Université de Sherbrooke*, pp. 451-505; D. Hodgkinson et al., ‘The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change’ (2010) 36 *Monash University Law Review*, pp. 69-120; B. Docherty & T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review*, pp. 349-403.

¹⁰⁰ See the official website of the Nansen Initiative: <https://www.nanseninitiative.org/>. See also W. Kälin, ‘From the Nansen Principles to the Nansen Initiative’ (2012) 41 *Forced Migration Review*, pp. 48-9.

¹⁰¹ Displacement Solutions, ‘The Peninsula Principles on Climate Displacement within States’ (2013), available at <http://displacementsolutions.org/wp-content/uploads/2014/12/Peninsula-Principles.pdf>, principle 12.

¹⁰² The proposal for a ‘climate change migration coordination facility’ was, for instance, strongly opposed by the government of Australia. See Oliver Milman, ‘UN drops plan to help move climate-change affected people’ *The Guardian* (7 October 2015).

¹⁰³ See ‘Foresight report,’ n. 3, at 9 (executive summary), noting that ‘the range and complexity of the interactions between these drivers means that it will rarely be possible to distinguish individuals for whom environmental factors are the sole driver (“environmental migrants”).’

migrants who encounter similar needs for protection.¹⁰⁴ The cause of migration – i.e. the loss and damage that migration attempts to avoid – is distinct from the cause of the vulnerability of migrants – i.e. the loss and damage suffered as a result of migration. The perception of the impacts of climate change on migration could serve as a wake-up call for a better protection of migrants across the world, and one may hope that it will spur some reforms towards stronger protection policies, but the climate regime is probably not the right forum to address the general protection needs of migrants.¹⁰⁵

Other proposals for a better management of migration or a better protection of migrants as part of approaches to address loss and damage raise comparable issues. Here again, defining the scope of ‘climate migration’ remains difficult because of the indirect causality at play. Therefore, it is not clear how a ‘climate change displacement coordination facility’ could adopt a workable definition of its scope of action. On the other hand, putting greater emphasis on some scenarios of ‘climate migration’ rather than on other migration scenarios featuring analogous human vulnerabilities could result in imposing arbitrary priorities on national authorities and other stakeholders in the allocation of scarce protection resources among different populations.¹⁰⁶ For these reasons, the IFCR’s preference for mainstreaming considerations for climate change impacts within a broader, holistic approach of humanitarian and development actions is certainly commendable.¹⁰⁷ The occurrence of climate change impacts affecting migration highlights and exacerbates the need for general reforms in international migration governance – both with regard to the management of migration and the protection of migrants, in order to promote migration as a mutually-beneficial process – but it does not justify particular policies that would isolate and try to address ‘climate migration’ as if it was a distinct phenomenon.

¹⁰⁴ See A. Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press, 2013) at 17: ‘[w]hether someone’s displacement is predominantly attributable to environmental change, state fragility, or livelihoods collapse is unimportant from a human rights perspective.’

¹⁰⁵ For alternative forms, see e.g. *ibid.*; Draft Articles on the protection of persons in the events of disasters adopted on first reading by the International Law Commission at its sixty-sixth session in 2014.

¹⁰⁶ See generally B. Mayer, ‘Environmental Migration in the Asia-Pacific Region: Could We Hang Out Sometime?’ (2013) 3 *Asian Journal of International Law* pp. 101-135.

¹⁰⁷ See n. 97.

4.2. Remedial Obligations

Rather than the imposition of particular responses to loss and damage, some vulnerable states¹⁰⁸ and non-governmental organisations¹⁰⁹ have long and actively advocated, despite the strong opposition of industrial states, for approaches to address loss and damage in terms of causal responsibility. As is well known, most historical greenhouse gas emissions originate from industrial states, whose per capita emissions remain significantly higher than those of most developing nations.¹¹⁰ In this sense, the principle of ‘common but differentiated responsibilities’ hints at a recognition of *causal* responsibility by industrial states.¹¹¹ The 2010 Cancún Agreements (COP 16) recognized explicitly the ‘historical responsibilities’ of developed states as a ground for differentiation.¹¹²

It has been argued elsewhere that a state’s excessive greenhouse gas emissions could entail its responsibility under international law on the basis of a breach of the no-harm principle.¹¹³ Whether or not one accepts this argument, at least a loose analogy can be drawn between climate change responsibility and the customary international law of state responsibility, as a reflection

¹⁰⁸ AOSIS’s 2014 submission, n. 37. See also Huq, n. 45, at 948, noting that ‘for many developing countries – especially for small island developing states – [compensation] is an important element of the agenda.’

¹⁰⁹ CAN’s 2011 Submission, n. 67, at 2, calling for ‘a mandate to explore compensation options for loss and damage caused by climate change.’

¹¹⁰ Data on greenhouse gas emissions per country can be accessed from the World Resources Institute’s Climate Data Explorer, available at <http://cait2.wri.org>.

¹¹¹ See however the statement of the United States on Principle 7 of the Rio Declaration on Environment and Development, in: UNCED Report: Proceedings of the Conference, A/CONF.151/26/Rev.1(Vol. II) (1992), at 17: ‘The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.’

¹¹² Decision 1/CP.16, n. 4, recital 2 above para. 36. See also UN Framework Convention on Climate Change, recital 4.

¹¹³ See e.g. B. Mayer, ‘State Responsibility and Climate Change Governance: A Light through the Storm’ (2014) 13 *Chinese Journal of International Law*, pp. 539-75; C. Voigt, ‘State Responsibility for Climate Change Damages’ (2008) 77 *Nordic Journal of International Law*, pp. 1-22.

of the relevance of a general moral principle of responsibility to the conduct of international relations. Under the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in second reading in 2001, a responsible state is under an obligation to make full reparation for the injury caused by its fault.¹¹⁴ Reparation should accordingly be made through restitution, compensation and satisfaction.¹¹⁵

With regard to migration, this perspective of loss and damage as a reflection of international responsibility raises difficult questions relating to the characterization of the ‘injury’ and the possible forms of ‘reparations.’ At first sight, the ‘injury’ could presumably include any loss and damage inasmuch as a sufficient causal link can be established with excessive greenhouse gas emissions. As discussed above, migration can reduce loss and damage, while loss and damage can also result from migration, whether suffered by migrants or by other stakeholders. The expenses met by public authorities when trying to reduce loss and damage, either by promoting migration or by protecting potential or actual migrants and other stakeholders, are also likely candidates for reparation.¹¹⁶

Yet, causal attribution is an important source of difficulty in drawing an analogy between loss and damage and the principle of responsibility. The ILC’s authoritative analysis of the law of state responsibility concluded that, if an ‘injury caused by the international wrongful act’ does not need to be the ‘direct’ or ‘proximate’ consequence of this act, it needs at least not be too ‘remote’ or ‘consequential.’¹¹⁷ This condition is obviously more demanding than the vague reference to loss and damage ‘associated with’ climate change impacts. Discussions on loss and damage have not generally put much emphasis on the distinction between ‘human-caused’ and ‘tough-luck’ physical events.¹¹⁸ A probabilistic event attribution framework, which is being developed, could soon make it possible to assess to which extent particular physical events are ‘caused by’ anthropogenic climate change.¹¹⁹ Even then, however, difficulties would

¹¹⁴ Draft Articles on the Responsibility of States for internationally wrongful acts adopted by the ILC at its 55th session (2001), art. 31.

¹¹⁵ *Ibid.*, art 34.

¹¹⁶ See *ibid.*, commentary under art. 36, para. 5.

¹¹⁷ See *ibid.* commentary under art. 31, para. 10.

¹¹⁸ See discussion in Hulme, n. 8, at 507.

¹¹⁹ See e.g. Pall et al., n. 8.

remain in attributing particular social responses to the physical events in question. Migration, it needs to be rehearsed, can rarely be convincingly attributed to a physical event in isolation from a broader social, economic, political and cultural context: the importance of contextual elements make loss and damage suffered in relation to migration a rather ‘remote’ and ‘consequential’ form of ‘injury.’

Proposals have nevertheless been made for approaches to address migration as a matter of international responsibility.¹²⁰ In the law of state responsibility, by analogy, reparation must be made through restitution, compensation or satisfaction, either singly or in combination.¹²¹ Compensation is the most common form of reparation, and examples discussed above led to compensation for the loss and damage suffered by individuals¹²² or by host states¹²³ in the context of mostly forced migration. Because they result from diplomatic negotiations rather than adjudication, these examples give however little indication about the possible basis for the economic valuation necessary for the compensation of non-economic loss and damage. Concerning loss and damage associated with climate change impacts, in particular those related to migration, contributing factors should certainly be taken into account, and, accordingly, compensation would only represent a tiny fraction of actual loss and damage.

Alternative proposals were directed toward more original mechanisms through which in-kind assistance would be provided as a form of reparation. Support for such proposals can be found in a reference, in the Cancún Agreement (2010), to ‘measures to enhance ... coordination and cooperation with regard to climate change induced displacement, migration and planned relocation.’¹²⁴ Saleemal Huq, an influential advocate of the loss and damage agenda, has thus called for ‘institutional arrangements to address loss and damage’ through providing ‘guidance and support’ to developing states, including in devising ‘risk transfer and risk retention

¹²⁰ See for instance the informal note by the Co-Chairs, ‘Scenario note on the tenth part of the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action’ (24 July 2015) at 32, for a proposal for the creation of a mechanism to ‘establish procedures for coordinating compensation measures.’

¹²¹ Draft articles on state responsibility, n. 114, art. 34.

¹²² See references cited in n. 61 to 64.

¹²³ See n. 80.

¹²⁴ Decision 1/CP.16, n. 4, para. 14(f).

measures, as well as policies to promote migration and facilitate resettlement.¹²⁵ Others have argued that a loss and damage mechanism covering some of the ‘costs of relocating climate-change-displaced communities has the potential to ... support longer-term risk reduction strategies.’¹²⁶ In this sense, the original proposal of the least-developed countries for a Climate Change Coordination Facility called for ‘support for emergency relieve, assistance [and] compensation measures.’¹²⁷

Scholars have imagined yet more ambitious (but also, generally, less realistic) forms of assistance in lieu of reparation. One such proposal is that industrial states commit to host international migrants from the states most severely affected by climate change, possibly on the basis of a quota reflective of responsibility criteria (e.g. historical and present greenhouse-gas emissions).¹²⁸ A status of ‘climate refugee’ could alternatively be made applicable to internal as well as international migrants, with an obligation for industrial states to contribute, logistically or financially, to the protection of those populations remaining in developing states.¹²⁹ Lastly, territories could be ceded or made available to populations in need of resettlement, in particular in responses to the total loss of inhabitable territory that some low-lying small-island developing states could suffer in the coming decades.¹³⁰ These proposals are not entirely isolated from broader reflections on global migration governance. Some migration scholars have suggested a justification for the resettlement of refugees more generally on the basis of the responsibility of states – in particular Western states – that cause forced migrations

¹²⁵ Huq, n. 45, at 948.

¹²⁶ I. Millar et al., ‘Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process’, in M. Gerrard & G. Wannier (eds.), *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), pp. 433-72, at 435.

¹²⁷ Submission of Nepal, n. 49, at 4.

¹²⁸ See e.g. K. Wyman, ‘Responses to Climate Migration’ (2013) 37(1) *Harvard Environmental Law Review*, pp. 167-216.

¹²⁹ See references listed in note 99.

¹³⁰ See e.g. the discussions gathered in S. Leckie (ed.), *Land Solutions for Climate Displacement* (Routledge, 2014).

abroad, either through military intervention¹³¹ or more generally through ‘enforcing an international economic and political order that causes underdevelopment and conflict.’¹³²

The provision of visas, status, or territory to ‘climate migrants’ has arguably something in common with restitution, as it aims essentially at the restoration of decent conditions of life for individuals affected by climate change impacts.¹³³ However, such forms of assistance involve a much greater degree of political interference than restitution (defined as efforts to re-establish the *status quo ante*)¹³⁴ or through compensation (the transfer of fungible value, usually money, of which the injured state can dispose as is seen fit).¹³⁵ The provision of in-kind assistance, support, or *a fortiori* guidance would certainly affect the ability of the populations and states in question to determine, through their regular political processes, the course of action that they wish to take. Replicating the experience of colonialism, this hindrance to the development of functional political institutions would be used as an excuse for further foreign political interference. Such interference is particularly problematic when it concerns the highly politicized field of migration governance, which involves complex trade-offs between collective identity and individual opportunities, and more generally very ‘intimate’ decisions about individual and collective projects. Within the margin allowed by international human rights standards, domestic and local responses to loss and damage – including, decisions as to whether and how to migrate – need to be decided by the populations concerned, not by international organizations or foreign donors.

¹³¹ Thus, the United States accepted to resettle numerous Vietnamese refugees following the Vietnam war, yet without explicitly recognizing a specific responsibility. See J. Carens, ‘Who Should Get in? The Ethics of Immigration Admissions’ (2003) 17(1) *Ethics and International Affairs*, pp. 95-110, at 100.

¹³² S. Castles, ‘Towards a Sociology of Forced Migration and Social Transformation’ (2003) 37(13) *Sociology*, pp. 13-34, at 18. See also J. Souter, ‘Towards a Theory of Asylum as Reparation for Past Injustice’ (2014) 62(2) *Political Studies*, pp. 326-42; J. Souter, ‘Durable Solutions as Reparation for the Unjust Harms of Displacement: Who Owes What to Refugees?’ (2014) 27(2) *Journal of Refugee Studies*, pp. 171-90.

¹³³ Comp. Souter, ‘Durable Solutions as Reparation’, n. 132, at 175.

¹³⁴ Draft articles on state responsibility, n. 114, art 35.

¹³⁵ *Ibid.*, art. 36 and commentary under art 36, para. 4. Comp. Souter, ‘Durable Solutions as Reparation’, n. 132, at 176.

In these circumstances, in-kind assistance provided by international or foreign institutions in response to the influence of climate change on migration would likely betray the interests of their recipients. Top-down normative responses to ‘climate migration,’ in particular, risk to ignore the great diversity of climate change-related migration scenarios and the need for responses that take local circumstances into account.¹³⁶ More specifically, advocacy for the protection of so-called ‘climate migrants’ could push for an arbitrary allocation of scarce protection resources (especially within states whose protection resources will increasingly be strained by the adverse impacts of climate change), thus doing a disservice to the populations ‘trapped in place’ (who lack the resources necessary to migrate)¹³⁷ and to those, not necessarily any less vulnerable, who migrate for reasons unrelated to climate change impacts. Above all, allowing international or foreign institutions to coordinate, support or guide migration policies in developing states would create one more opportunity for Western states to impose their own agendas, in a field of governance intrinsically connected to the determination of national development priorities. The strongest emphasis would likely not be placed on the promotion of mutually-beneficial migration or on the protection of the rights of migrants, but rather on the protection of the most powerful states against the perceived threats of massive ‘flows’ of ‘climate refugees.’ Alternative approaches to address loss and damage, in particular as a state-to-state process of compensation to facilitate capacity building, were suggested elsewhere.¹³⁸

5. CONCLUSION

Human mobility is often a fruitful social process through which individuals, households and communities adapt to changes of circumstances. It can also be a source of harm, either for the migrants themselves – most obviously in the case of resettled or evacuated populations – or sometimes for other stakeholders, in particular the host communities in cases of mass arrivals. Above all, however, human mobility is part of the processes through which individual and

¹³⁶ R. Hil, ‘Climate Change, Population Movements and Governance: Case Studies in Response Mechanisms’, in T. Cadman (ed.), *Climate Change and Global Policy Regimes: Towards Institutional Legitimacy* (Palgrave Macmillan, 2013), pp. 187-201, at 189.

¹³⁷ For a similar argument against an instrument for the protection of internally-displaced persons, see the remarks of J. Hathway in ‘Discussion’ (1996) 90 *Proceedings of the Annual Meeting of the American Society of International Law*, pp. 558-84, at 562

¹³⁸ B. Mayer, ‘Whose “Loss and Damage”? Promoting the Agency of Beneficiary States’ (2014) 4 *Climate Law* 267.

collective identities are constructed. Governments are obligated, under international human rights law, to protect populations within their jurisdiction and to cooperate in the protection of populations abroad – including migrants, who are often more vulnerable than other populations. The UNFCCC workstream on loss and damage is likely to unveil many shortcomings in global migration governance, and it could play an important role in raising awareness on the need for more genuine international cooperation for the protection of the human rights of all.

Yet, this article questioned the opportunity of allowing the UNFCCC workstream on loss and damage to define responses to climate change impacts, in particular with regard to human mobility. Migration decisions taken at all levels (e.g. individuals, households, communities or states) relate to highly ‘intimate’ preferences. Such choices as between adaptation *in situ* and migration are closely connected to development strategies, the determination of which has long been advocated as the fundamental preserve of national governments.¹³⁹ Those developing states most vulnerable to the adverse impacts of climate change need financial support and capacity building at least as urgently as policy support: these states ought to be able (like any other state) to define, through their own political processes informed by an open transnational debate, the best way to pursue their own interests, as they view them. Approaches to address loss and damage, which should convey financial support and promote capacity building, should as far as possible refrain from interfering with the domestic political processes of these states, especially in the very politically-sensitive area of migration governance.

¹³⁹ See generally the UN General Assembly res. 41/128, ‘Declaration on the Right to Development’ (1986).