

# **Adrift From Home and Neglected By International Law:**

**Searching for Obligations to Provide Climate Refugees with Social Services**

**Nathan Stopper**  
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## Introduction

There is indisputable evidence that anthropogenic climate change is causing the planet to warm and the oceans to rise.<sup>1</sup> Some of the myriad challenges presented by rising temperatures and waters have already begun to occur, while others may need more time to make themselves felt. Unfortunately, many of the states and people least responsible for the levels of climate changing greenhouse gas emissions will suffer the most severe consequences. Increased flooding and total inundation by seawater are likely to render some areas of the world uninhabitable,<sup>2</sup> and will require the complete evacuations of local populations. There are 22 Pacific Island nations that are home to around 7 million residents,<sup>3</sup> and states such as Kiribati, the Maldives, the Marshall Islands, Papua New Guinea, Tonga and Vanuatu (collectively known as Small Island Developing States or SIDS),<sup>4</sup> which typically are not more than three to four feet above the mean sea level,<sup>5</sup> may become uninhabitable if climate change continues to lead to a

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<sup>1</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2007: SUMMARY FOR POLICYMAKERS, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 5 (2007), available at [http://www.ipcc.ch/publications\\_and\\_data/publications\\_ipcc\\_fourth\\_assessment\\_report\\_wg1\\_report\\_the\\_physical\\_science\\_basis.htm](http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm) (last visited Feb. 23, 2011) [hereinafter PHYSICAL SCIENCE BASIS].

<sup>2</sup> See e.g. Report of the Global Conference on the Sustainable Development of Small Island Developing States, Global Conference on the Sustainable Development of Small Island Developing States, Annex I, part 1, sec. III, U.N. Doc. A/CONF.167/9 (Oct. 1994).

<sup>3</sup> *Climate Refugees in Pacific Flee Rising Sea*, WASH. TIMES, April 4, 2009, <http://www.washingtontimes.com/news/2009/apr/19/rising-sea-levels-in-pacific-create-wave-of-migran/> (last visited March 5, 2011) [hereinafter *Rising Sea*].

<sup>4</sup> Although this Note will typically refer to SIDS as a collective entity, they are not homogenous and do not face identical climate-induced challenges. The IPCC notes that “local conditions on widely varying island types (e.g., tectonic changes, shorelines with large sediment availability versus those with sediment deficits, highly fragmented versus single-island states) may increase or decrease climate change impacts, so the outcomes could be dramatically different in each small island setting. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2007: SMALL ISLAND STATES, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 870 (2007), available at [http://www.ipcc.ch/publications\\_and\\_data/ar4/wg2/en/contents.html](http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html) (last visited Feb. 23, 2011) [hereinafter SMALL ISLAND STATES]. For a full list of SIDS, see Saleemul Huq & Jessica Ayers, *Critical list: The 100 nations most vulnerable to climate change*, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT: SUSTAINABLE DEVELOPMENT OPINION 2 (Dec. 2007), <http://www.sidsnet.org/aosis/issues.html>.

<sup>5</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE AND BIODIVERSITY, IPCC TECHNICAL PAPER V 34 (2002), [www.ipcc.ch/pdf/technical-papers/climate-changes-biodiversity-en.pdf](http://www.ipcc.ch/pdf/technical-papers/climate-changes-biodiversity-en.pdf) (last visited Feb. 23, 2011) [hereinafter CLIMATE CHANGE AND BIODIVERSITY].

rise in sea level.<sup>6</sup>

The displacement of nationals from these states would create a host of novel issues for the international community to confront,<sup>7</sup> and authors have already begun to explore some of them. They have, for example, addressed whether these displaced persons would fit within the definition of refugee under the 1951 United Nations Convention Relating to the Status of Refugees Convention and the 1967 Protocol,<sup>8</sup> whether states should adopt new legal instruments to confront the issue of individuals displaced by climate change,<sup>9</sup> and how states should physically accommodate substantial groups of these individuals.<sup>10</sup> The international community must still address a host of other questions, such as whether the flooded states could survive in exile if their territory no longer existed, whether they could purchase or be given other territory to exercise sovereignty over, whether they would retain their statehood, and whether their international agreements would still be valid.<sup>11</sup>

Assuming that at least some of these individuals are granted permanent asylum by one or more states, an essential remaining question is whether they will have access to the social services necessary to allow them to survive in, and adapt to, life in their host state.

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<sup>6</sup> Alexander Gillespie, *Small Island States in the Face of Climate Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. Envtl. L. & Pol'y 107, 113 (2004).

<sup>7</sup> The impacts of climate change on human populations are not limited to SIDS. In Africa, for example, the IPCC predicts that by 2020, between 75 million and 250 million people will be exposed to increased water stress due to climate change, agricultural production will be severely compromised, and sea level rise will affect low-lying coastal areas with large populations. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS, CLIMATE CHANGE 2007: IMPACTS, ADAPTATIONS, AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 13 (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf> (last visited Feb. 23, 2011) [hereinafter CLIMATE CHANGE IMPACTS].

<sup>8</sup> See e.g. Jessica Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 NYU Envtl. L.J. 480 (1998); Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 Envtl. L. 365 (2007).

<sup>9</sup> Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 Harv. Envtl. L. Rev. 349 (2009).

<sup>10</sup> Leslie A. Stein, *Location and Housing of Climate Change Refugees: A Regulatory Model* (Jan. 1, 2011) (on file with author, publication expected shortly).

<sup>11</sup> Samuel Menefee, *Half Seas Over: The Impact of Sea Level Rise on International Law and Policy*, 9 UCLA J Envtl L & Pol'y 175, 181 (1991).

The governments of these refugees' original states might use their remaining resources to create structures to provide for social services in their nationals' new states. Or perhaps the host nations will charitably accept the burden of providing these services to the new residents. But do any provisions of international law mandate that the states accepting these individuals externally displaced by climate change offer them a basic level of social services? If such an obligation existed through either a binding treaty or customary international law, it would reduce some of the uncertainty that these individuals currently face, and provide them with at least some assurance that they will be cared for after fleeing the rising oceans.

This Note will thus explore whether any international refugee convention or other standard of international law would protect these individuals by requiring that potential host states also provide them with social services. Part I will provide a brief discussion of climate change and its effects on SIDS, paying particular attention to the likelihood of populations' eventual need to migrate to higher ground. Part II will describe some of the basic social services that the citizens of SIDS displaced by climate change would need to adapt to life in a new state. Part III will then examine various refugee conventions and customary international law to determine whether either would apply to persons displaced by climate change, and if so, whether they would create an obligation on the part of the states that receive climate refugees to provide social services for them.<sup>12</sup> The Note ultimately concludes that because these individuals do not meet the traditional definition of a refugee, and because customary international law does not yet encompass

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<sup>12</sup> As this Note will explore in later sections, individuals who are displaced from their countries by climate change do not fit within international law's traditional definition of "refugee." While it would therefore be more accurate to use a term such as "individuals externally displaced by climate change," this Note will use "climate refugees" for the sake of brevity.

norms that would require the provision of such services, no such requirement exists.

While this is reason for pessimism, because most SIDS will not become uninhabitable in the immediate future, it is not yet cause for despair. Many sources of law could increase the likelihood that refugees from SIDS will enjoy the necessary services to successfully adapt to life in a new country, and it is possible that through a future convention on climate displaced persons or the continued development of customary international law, host states may be compelled to provide climate refugees with these social services.<sup>13</sup>

## **Part I. Climate Change and Its Effects on SIDS**

### **A. The Basic Science of Climate Change**

Anthropogenic climate change refers to human activity that directly or indirectly alters “the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”<sup>14</sup> There is an overwhelming scientific consensus that the emission of greenhouse gases (GHGs), primarily carbon dioxide, methane, and nitrous dioxide,<sup>15</sup> has led to significant changes in the Earth’s climate.<sup>16</sup> Measurements of the concentration of these gases in the atmosphere show

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<sup>13</sup> The domestic laws of potential host states may also impose obligations to provide climate refugees with social services, however, almost all existing climate legislation is directed towards reducing GHG emissions, not towards providing solutions for climate refugees. The European Union, for example, has the most developed climate legislation, yet it does not address climate refugees. *See The EU Climate and Energy Package*, EUROPEAN COMMISSION CLIMATE ACTION, [http://ec.europa.eu/clima/policies/brief/eu/package\\_en.htm](http://ec.europa.eu/clima/policies/brief/eu/package_en.htm) (providing a summary of the core elements of the European Union’s climate legislation). The United States Congress, on the other hand, recently failed to pass significant climate legislation, and the prospects for the passage of any similar legislation in the short-term future are not bright. *See* Ryan Lizza, *As the World Burns*, THE NEW YORKER, Oct. 11, 2010. Other states beyond those discussed above may have different domestic laws, but a comprehensive review of the current domestic laws of every potential host state is beyond the scope of this Note, and given the potential for change in domestic law before the first climate refugees are displaced from SIDS, may not even be relevant at this point.

<sup>14</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107 [hereinafter UNFCCC].

<sup>15</sup> Gillespie, *supra* note 6, at 107.

<sup>16</sup> *See* UNFCCC, *supra* note 14, at art. 1(2) (Climate change is “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability.”).

levels that have not existed for millennia,<sup>17</sup> and they are already beginning to cause significant environmental changes.

Although the evidence of global warming “is consistent with, but does not yet provide definitive proof of the theories of climatic change,”<sup>18</sup> the Intergovernmental Panel on Climate Change (IPCC) reported that the “warming of the climate system is unequivocal.”<sup>19</sup> Among other effects, global warming has led to record-breaking worldwide temperatures, a retreat of glaciers, increased ocean salinity, acidity, and temperatures, and rising sea levels.<sup>20</sup> Continued greenhouse gas emissions at or above current rates will likely exacerbate the effects of climate change experienced in the past fifty years and “induce many changes in the global climate system during the 21st century that would very likely be larger than those observed during the 20th century.”<sup>21</sup> The predicted future effects of climate change include an increase in global temperature of between 1.1 and 6.4 degrees Celsius by the year 2100,<sup>22</sup> a rise in the world’s average sea level of 0.18 meters to 0.59 meters,<sup>23</sup> even greater ocean salinity in low latitudes waters,<sup>24</sup> and continued glacial retreat.<sup>25</sup>

Sea level rise poses one of the greatest threats of climate change. It could “inundate wetlands and lowlands; erode shorelines; exacerbate coastal flooding; increase the salinity of estuaries and aquifers and otherwise impair water quality; and change the

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<sup>17</sup> *Id.* at 108.

<sup>18</sup> *Id.* at 110.

<sup>19</sup> PHYSICAL SCIENCE BASIS, *supra* note 1, at 5.

<sup>20</sup> *Id.* at 5–7.

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *Id.* at 17.

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> *Id.* at 17.

heights, frequencies, and other characteristics of waves.”<sup>26</sup> Such effects would be disastrous for low lying areas.

In addition to environmental threats, climate change poses significant dangers to humans around the globe. Some adverse consequences include creating challenges in worldwide food production,<sup>27</sup> placing stress on fresh water resources,<sup>28</sup> and a possible increase in the exposure to diseases such as malaria.<sup>29</sup> Climate change also has the potential to cause widespread population displacement and a recent study estimated that approximately 162 million people worldwide face risks of sea-level rise around the world.<sup>30</sup> The United Nation’s Deputy High Commissioner for Human Rights recently stated:

By 2050, hundreds of millions more people may become permanently displaced due to rising sea levels, floods, droughts, famine and hurricanes. The melting or collapse of ice sheets alone threatens the homes of 1 in every 20 people. Increased desertification and the alteration of ecosystems, by endangering communities' livelihoods, are also likely to trigger large population displacements.<sup>31</sup>

Climate change thus poses substantial threats to the environment and human populations around worldwide. While a drastic alteration in GHG emissions could curb these pernicious trends, the international community has not yet taken the necessary steps to do so.<sup>32</sup> States must therefore begin planning to respond to internal migrations as their

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<sup>26</sup> Menefee, *supra* note 1, at 181.

<sup>27</sup> Gillespie, *supra* note 6, at 111 (Citing The Geneva Ministerial Declaration on Global Electronic Commerce, May 20, 1998 WT/MIN(98)/DEC/2; Report of the Second Session of the Conference of the Parties, UN Doc. FCCC/CP/1996/15/Add.1 at Annex para. 2 (Oct. 29, 1996).).

<sup>28</sup> CLIMATE CHANGE IMPACTS, *supra* note 7, at 11.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> Norman Myers with Jennifer Kent, Climate Inst., Environmental Exodus: An Emergent Crisis in the Global Arena 134 (1995), [http:// www.climate.org/PDF/Environmental%20Exodus.pdf](http://www.climate.org/PDF/Environmental%20Exodus.pdf) (last visited Feb. 23, 2011); Nicholas Stern, *The Economics of Climate Change: The Stern Review*, 56 (2006).

<sup>31</sup> Kyung-wha Kang, Deputy High Commissioner for Human Rights, Office of the United Nations High Commissioner for Human Rights, Climate Change, Migration and Human Rights, at the Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities 3-4 (Feb. 19, 2008) (citing Stern, *supra* note 30).

<sup>32</sup> Although the most recent United Nations Climate Change Conferences in Copenhagen and Cancún did not produce a binding roadmap that would limit GHG emissions enough to avoid all of the most drastic climate effects, they did have

own people leave areas that become uninhabitable, and as this Note will address in the next section, the international community must begin to prepare to accommodate external migrations as entire populations are forced to flee states that can no longer sustain them.

### **B. The Effects of Climate Change on SIDS**

Small island developing states generally are not very high above sea level.<sup>33</sup> The climate change induced sea level rise discussed above thus poses an existential threat to many of them.<sup>34</sup> While all island states face climate change-related risks, SIDS are especially vulnerable to elevated oceans because their populations, agricultural lands, and infrastructure all tend to be concentrated in coastal zones (in atoll states, coastal zones comprise the entire landmass),<sup>35</sup> and because their populations have significantly fewer resources at their disposal to adapt to rising seas.<sup>36</sup> Thus, any increase in sea level will have “significant and profound effects on their economies and living conditions, [and their] very survival ... will be threatened.”<sup>37</sup>

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some positive results. At the Copenhagen Conferences, the parties consented to list their national actions on climate change and subject them to some international scrutiny, quantified a long term goal of limiting global warming to a two degree Celsius increase in average worldwide temperature, and agreed to raise their commitments to funding climate-related activities. *See, e.g.*, Daniel Bodansky, *The Copenhagen Climate Change Conference: A Post-Mortem*, 104 *Am. J. Int'l L.* 230, 239-40. At the Cancún Conference, they built upon the steps taken at Copenhagen and codified some of the agreements made by states at Copenhagen. Many analysts qualified the Conference as a success. *See e.g.* Robert Stavins, *What Happened (and Why): An Assessment of the Cancun Agreements*, BELFER CENTER FOR SCIENCE AND INTERNATIONAL AFFAIRS, <http://belfercenter.ksg.harvard.edu/analysis/stavins/?p=876> (Dec. 13, 2010).

<sup>33</sup> CLIMATE CHANGE AND BIODIVERSITY, *supra* note 5, at 34.

<sup>34</sup> *See, e.g.*, Gillespie, *supra* note 6, at 113; Menefee *supra* note 11, at 178-79.

<sup>35</sup> BARBADOS PROGRAMME OF ACTION, Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barb., Apr. 26-May 6, 1994, A/CONF.167/9, 10 (Oct. 1994), *available at* <http://www.un.org/documents/ga/conf167/aconf167-9.htm> (last visited Feb. 23, 2011) [hereinafter BARBADOS PROGRAMME].

<sup>36</sup> The per capita Gross National Income (GNI) of most SIDS is substantially lower than the global average. In 2009, the worldwide GNI was approximately \$8,500, while the GNIs of individual SIDS were as follows: Kiribati - \$1,830; the Maldives - \$3,970; the Marshall Islands - \$3,060; Papua New Guinea - \$1,180; Tonga - \$3,260; and Vanuatu - \$2,620. *GNI per capita, Atlas method (current US\$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD> (last visited March 5, 2011).

<sup>37</sup> *Id.*

Indeed, certain SIDS have already begun to experience some of these effects.<sup>38</sup> Rising seas forced the entire population of the Carteret Islands, an atoll that belongs to Papua New Guinea, to move to a large town on a different island.<sup>39</sup> Similarly, inhabitants of low lying parts of Tuvalu have had to move to higher ground to escape the encroaching ocean.<sup>40</sup> Some developed states have begun to respond to this burgeoning crisis. New Zealand, for example, has agreed to accept climate refugees from Tuvalu, while Canada is funding the relocation of residents of Vanuatu.<sup>41</sup> While not related to climate change, legal aliens from the Marshall Islands, Micronesia, and Palau living in Hawai'i have long received medical benefits from the U.S. government, although a reduction in the benefits is the subject of a recently certified class action lawsuit.<sup>42</sup>

The future looks even less promising for most SIDS. They are “the most vulnerable of all locations to the potential adverse effects of climate change and sea-level rise,”<sup>43</sup> and the estimated rise of 0.18 meters to 0.59 meters discussed above could have disastrous effects.<sup>44</sup> Even if sea rise does not entirely flood SIDS, other

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<sup>38</sup> In 2005, 500,000 inhabitants of Bhola Island in Bangladesh became some of the world's first climate refugees when half of the island was permanently flooded. Another island in the Bay of Bengal, Kutubdia, has lost almost four of its ten square miles of land, leaving many of its residents homeless. While these islands are part of Bangladesh, and therefore do not qualify as SIDS, they demonstrate the extent of the threat sea level rise poses to SIDS. *Rising Sea*, *supra* note 3, at 2.

<sup>39</sup> *Id.* at 1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Until 1996, non-pregnant citizens of the Marshall Islands, Micronesia, and Palau aged 19 and older living in Hawai'i received medical benefits under Title XIX of the Social Security Act. From 1996 until 2010, they continued to receive medical benefits through Hawai'i's State Title XIX program. Hawai'i created a new program targeted specifically at these individuals in 2010. The plaintiffs allege that the program, Better Health Hawai'i (BHH), reduces their benefits and is not administered in an integrated setting. As such, they claim that BHH violates their rights under the Equal Protection Clause and the American Disabilities Act. *Korab et. al v. Koller, Stipulation and Order Regarding Class Certification*, CIVIL NO. 10-00483 JMS KSC (D.Haw. 2010).

<sup>43</sup> SMALL ISLAND STATES, *supra* note 4, at 845.

<sup>44</sup> PHYSICAL SCIENCE BASIS, *supra* note 1, at 13. Alexander Gillespie concisely catalogued the threats posed by sea level rise to some of the individual SIDS as follows: “A one-meter rise in sea level could result in an 80% land loss for the Majuro Atoll in the Marshall Islands. The Maldives consist of some 1300 tiny islands, with an average size of only one to two square kilometers in width and an average one to one and a half meters above mean sea level. Tuvalu consists of five atolls and four separate reef islands and has a total land mass of only twenty-three square kilometers, virtually all of which is under two meters above sea level. Kiribati consists of 700 square kilometers on thirty-three islands, most of which are also less than two meters high. All of these SIDS are directly at risk. Larger islands such as Tonga

effects of climate change may render them much less hospitable and cause significant economic damage. The IPCC has identified changes in “rainfall regimes, soil moisture budgets, and prevailing winds (speed and direction),” as among the most significant and immediate consequences that SIDS are likely to experience.<sup>45</sup> Agriculture production, already constrained by the limited arable land in most SIDS, will be further reduced by a combination of increased soil salinity and the effects described above by the IPCC.<sup>46</sup> A possible reduction in tourism could have profound economic consequences,<sup>47</sup> as could damages to the fisheries that sustain both subsistence/domestic consumption and commercial production.<sup>48</sup> The “inundation of outlying islands and loss of land above the high-tide mark [could also] result in loss of exclusive economic rights over extensive areas.”<sup>49</sup> Taken individually, these outcomes may not be sufficient to cause widespread human displacement, but when aggregated could lead to mass emigration from many SIDS.

Ultimately, the extent of the adverse effects that climate change will have upon SIDS is unclear.<sup>50</sup> Even if the international community somehow reached a global agreement to curb greenhouse gas emissions, climate change is still inevitable.<sup>51</sup> SIDS are already beginning to experience the effects of warmer temperatures and rising oceans, and these pernicious trends are poised to intensify. A significant rise in sea levels could inundate some of the most vulnerable SIDS and may make others less

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and Vanuatu are also threatened.” Gillespie, *supra* note 6, at 113.

<sup>45</sup> SMALL ISLAND STATES, *supra* note 4, at 849.

<sup>46</sup> *Id.*

<sup>47</sup> Gillespie, *supra* note 6, at 114.

<sup>48</sup> BARBADOS PROGRAMME, *supra* note 35, at 10.

<sup>49</sup> *Id.*

<sup>50</sup> SMALL ISLAND STATES, *supra* note 4, at 869 (“Although good progress has been made in understanding the vulnerability and adaptation potential of small island states to climate change, the foregoing discussion highlights critical information gaps and uncertainties that still exist.”).

<sup>51</sup> *Id.*

habitable. The economies of these states will also suffer greatly if agriculture, fishing and tourism are all damaged. If such a scenario occurs, the nationals of the affected states may be forced to seek new homes in foreign lands. Other states will have to adopt and expand the programs initiated by New Zealand and Canada if the international community wants to avoid seeing the lives and livelihoods of these individuals literally swallowed up by the ocean. As the next section of this Note will explore, if the objective of host states is not only to avoid a humanitarian disaster, but to assure a basic quality of life for the individuals displaced from SIDS, the provision of social services will be a vital element of any resettlement effort.

## **Part II. Social Services Climate Refugees Will Need to Adapt and Survive in a New State**

Individuals displaced by climate change will avoid many of the struggles that refugees fleeing internal strife typically face. First, many refugees do not enjoy the protective authority of their state's government.<sup>52</sup> SIDS, however, will likely endorse the resettlement of their nationals to host states, although they are unlikely to have the political power or economic resources to provide their citizens with anything beyond nominal support. Second, unlike refugees whose family units are destroyed by violence,<sup>53</sup> there is no reason to believe that the evacuation of SIDS would have a similar effect. Because the asylum policies of some potential host states seek to preserve

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<sup>52</sup> Maureen Fox, *Finding a Way Through: From Mindlessness to Minding, in THERAPEUTIC CARE FOR REFUGEES: NO PLACE LIKE HOME* 103, 103-04 (Renos K. Papadopoulos ed., 2003).

<sup>53</sup> JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 533 (Cambridge University Press, 2005) ("... the very crises that that force refugees to flee often shatter the unity of their families.").

families,<sup>54</sup> any resettlement will likely permit family units to remain intact. This practice should greatly ease the transition of climate refugees, as the presence of family is an important factor that affects the ability to “settle in the country of durable asylum.”<sup>55</sup>

Third, climate refugees will not have to deal with the same psychological problems that many refugees face. Shock, fear, Post-traumatic Stress Disorder, disassociation, gender based violence, and victimization are all psychological issues that many refugees struggle to overcome,<sup>56</sup> but because climate refugees will most likely not be fleeing violence, they will not experience many of the situations normally associated with these issues. Finally, assuming that either the SIDS themselves or host states provide some sort of orderly evacuation of climate refugees,<sup>57</sup> they will not endure one of the most difficult trials that most refugees experience – the journey to refugee camps.<sup>58</sup>

Despite the relatively less traumatizing circumstances of climate refugees, they will nonetheless require substantial social services to adapt to life in host states. First, like all refugees, individuals displaced by climate change will need substantial medical services. Many refugees arrive in their host state in desperate conditions and frequently

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<sup>54</sup> See e.g. Eur. Council on Refugees and Exiles, Position on Refugee Family Reunification, 5 (2000) available at <http://www.ecre.org/files/family.pdf>. (stating that “members of the same family should have the right to be together during the asylum procedure”).

<sup>55</sup> *Id.*

<sup>56</sup> See INGER AGGER GRIFFITHS: THE BLUE ROOM: TRAUMA AND TESTIMONY AMONG REFUGEE WOMEN: A PSYCHO-SOCIAL EXPLORATION (Mary Bille trans., Zed Books 1994).

<sup>57</sup> Orderly evacuations are most likely to occur in response to slow-onset events such as sustained drought and sea-level rise, and are less likely to occur with rapid-onset events such as severe flooding and widespread epidemics. See generally THE UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS AND THE INTERNAL DISPLACEMENT MONITORING CENTRE, MONITORING DISASTER DISPLACEMENT IN THE CONTEXT OF CLIMATE CHANGE (2009).

<sup>58</sup> When asked what the main difficulty facing them was, all participants in a study of Kurdish refugees listed the journey to refugee camps as one of the difficulties. Pamela Griffiths, *Two Phases of the Refugee Experience: Interviews with Refugees and Support Organizations*, in THERAPEUTIC CARE FOR REFUGEES: NO PLACE LIKE HOME 189, 197 (Renos K. Papadopoulos ed., 2003).

suffer from shock, hypothermia, and other medical problems.<sup>59</sup> While climate refugees will likely be fortunate enough to avoid enduring an arduous journey to a host state, refugees tend to have a much greater risk of mortality than members of the general population in their host states.<sup>60</sup> Indeed, an increasing amount of evidence demonstrates that refugee camps constitute a threat to the health of the individuals forced to inhabit them,<sup>61</sup> and if host states intern climate refugees in such circumstances, comprehensive medical services will be necessary to diminish this elevated risk. Thus, at least during the initial phases of resettlement, climate refugees will require a level of medical attention equivalent to, and optimally surpassing, the care provided to the general population of the host state.

Second, the permanent destruction of their homes may cause climate refugees to experience unique psychological problems. Humans rely to a great degree on their sense of home,<sup>62</sup> and climate refugees will have to deal with the flooding of both their physical homes and their sense of home. Furthermore, a wide array of factors place all migrants at risk for “reduced personal competence, less than optimal functioning, reduced well-being, emotional disturbance, deviant conduct and even frank mental illness.”<sup>63</sup> In order to facilitate the healthy integration of refugees from SIDS into their host states, and allow them to construct new personal identities, a basic level of psychological treatment may therefore be necessary for those individuals most deeply effected by displacement.

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<sup>59</sup>*Migrants, Refugees and Asylum Seekers: Vulnerable People at Europe's Doorstep*, MEDECINES SANS FRONTIERES (July 6, 2009), [http://www.doctorswithoutborders.org/publications/article\\_print.cfm?id=3693](http://www.doctorswithoutborders.org/publications/article_print.cfm?id=3693).

<sup>60</sup> Even in recent years, “the mortality rates in refugee populations during the acute phase of displacement has been extremely high, sometimes up to 60 times the expected rate.” Giovanni de Girolamo, *Primary Health Care of Refugees*, in *AMIDST PERIL AND PAIN: THE MENTAL HEALTH AND WELL-BEING OF THE WORLD'S REFUGEES* 265 (Anthony J. Marsella et. al eds. 1998).

<sup>61</sup> *Id.*

<sup>62</sup> Renos K. Papadopoulos, *Refugees Home and Trauma*, in *THERAPEUTIC CARE FOR REFUGEES: NO PLACE LIKE HOME* 9, 10 (Renos K. Papadopoulos ed., 2003).

<sup>63</sup> Eugene Brody, *The Mental Health and Well-being of Refugees: Issues and Directions*, in *AMIDST PERIL AND PAIN: THE MENTAL HEALTH AND WELL-BEING OF THE WORLD'S REFUGEES* 65 (Anthony J. Marsella et. al eds. 1998).

In addition to the psychological and medical needs discussed above, all refugees, including climate refugees, have financial, educational, social and numerous other specific needs that they must overcome to ensure that they have a chance to adapt to their new surroundings.<sup>64</sup> Vocational education for adults and schooling for children is a particularly important issue, as is language training for refugees who do not speak the local language.<sup>65</sup> Education is an essential method of integrating individuals into a new culture, enabling them to become productive members of society and reducing the separation of refugee communities.<sup>66</sup> Closely related to education and vocational training is the right to work. Although not literally a social service, it is nonetheless a precursor to successful adaptation,<sup>67</sup> and this Note will therefore consider whether climate refugees will enjoy such a right. Finally, the provision of adequate housing is another service necessary to allow individuals to flourish.<sup>68</sup> Although other authors have explored this topic in more depth,<sup>69</sup> because it is a prerequisite to any serious attempt to facilitate adaption, this Note will address it as well. While other social services may arguably be necessary for climate refugees to adapt to life in a host state,

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<sup>64</sup> See e.g. Papadopolous, *supra* note 62, at 35; Claire Fyvie, Alastair Ager, Gavan Curley & Maja Korac, (2003) *Integration Mapping the Field Volume II: Distilling Policy Lessons from the 'Mapping the Field' Exercise*, THE HOME OFFICE, <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr2903.pdf> (last visited March 5, 2011) (the authors identify education, access to the labor market, health and housing as the basic requirements for the process of refugee integration to begin.).

<sup>65</sup> Jenny Phillimore & Lisa Goodson, *Making a Place in the Global City: The Relevance of Indicators of Integration*, 21 J. Refugee Stud. 305, 317 (2008). The only potential obligations regarding education all pertain to primary school education for children, and not to vocational or language training for adults. Despite their importance, this Note will therefore only examine education obligations as they pertain to the provision of primary school education.

<sup>66</sup> Charles J. Russo, *Reflections on Education as a Fundamental Human Right*, 20 Educ. & L.J. 87, 103 (2010).

<sup>67</sup> Eve Lester, *Work, the Right to Work, and Durable Solutions: A Study on Sierra Leonean Refugees in the Gambia*, 17 Int'l J. Refugee L. 331, 333-34 (2005) (“[D]espite the statistical existence of unemployment in every country in the world, work continues to be an essential part of the human condition. This is, necessarily, as true of refugees and other forced migrants as it is of nationals. Like anyone, refugees and other forced migrants work. They need to. To deny it or to ignore it is to disregard a fundamental reality.”).

<sup>68</sup> See e.g. *Shantstar Builders v. Narayan Khimali Tatome et al.*, (1) SC 106, Civil Appeal No. 2598 of 1989 (JT 1990) (stating that “[f]or a human being [the right to shelter] has to be a suitable accommodation which would allow him to grow in every aspect-physical, mental and intellectual. . . . A reasonable residence is an indispensable necessity for fulfilling the constitutional goal in the matter of development of man.”).

<sup>69</sup> See e.g. Stein, *supra* note 10.

this Note will focus primarily upon psychological and medical treatment, education, the right to work, and adequate housing, and will discuss whether treaties and customary international law create obligations to provide them.

### **Part III. Possible Sources of Obligations to Provide Social Services In International Law**

#### **A. Refugee Treaties**

The past sixty years have witnessed the creation of a substantial body of treaty law addressing refugee issues. Although the primary intent of most refugee treaties is to protect traditional types of refugees (those who are persecuted because of immutable characteristics or political opinion), they nonetheless present the most likely grounds for finding binding obligations on states to provide climate refugees with social services. A treaty must contain three essential elements to create such a requirement. First, it must include articles regarding social services. Second, it must be applicable not only to traditional refugees, but also to individuals externally displaced by climate change. Finally, the treaty must be binding on its signatories instead of merely presenting aspirational objectives.

This Note will proceed by examining the treaties that would seem most likely to create relevant obligations. It will begin by studying the seminal 1951 United Nations Convention relating to the Status of Refugees (the Convention)<sup>70</sup> and the subsequent 1967 Protocol to the Convention (the Protocol),<sup>71</sup> and then move on to more limited treaties such as the 1969 OAU Convention Governing the Specific Aspects of Refugee

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<sup>70</sup> United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

<sup>71</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6225, 606 U.N.T.S. 268 [hereinafter 1967 Protocol].

Problems in Africa (the OAU Convention)<sup>72</sup> and the 1984 Cartagena Declaration (the Cartagena Declaration).<sup>73</sup> Ultimately, finding obligations in refugee treaties to provide individuals externally displaced by climate change with social services is a difficult task because “there is no global migration agreement, or even any known bi-national agreements that cover voluntary or forced migration due to environmental disasters.”<sup>74</sup>

The Note will not extensively discuss the principal documents of international climate change law: the United Nations Framework Convention on Climate Change (UNFCCC)<sup>75</sup> and the Kyoto Protocols to the UNFCCC.<sup>76</sup> Although these treaties are the foundation of international climate change law, they primarily concern “state-to-state relations and do not discuss duties that states have to individuals or communities.”<sup>77</sup> Their ultimate objective is to stabilize the concentrations of greenhouse gas in the atmosphere at a level that would prevent “dangerous interferences with the climate system.”<sup>78</sup> While certain articles within the treaties might be relevant to climate refugees, given the intent of the signatories, it is highly unlikely that these articles create a binding obligation to provide them with social services. It is possible that in the future the parties will build upon the UNFCCC to provide relevant duties, but as the Framework currently stands, no such obligations exist.

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<sup>72</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, 1001 U.N.T.S. 45 [hereinafter OAU Convention].

<sup>73</sup> Cartagena Declaration on Refugees (Cartagena de Indias, 22 November 1984) OAS/Ser.L./V/II.66, doc. 10, rev. 1, pp. 190-93 [hereinafter Cartagena Declaration].

<sup>74</sup> Michelle Leighton, *Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons*, THE GERMAN MARSHALL FUND OF THE UNITED STATES: STUDY TEAM ON CLIMATE INDUCED MIGRATION, 2010, at 6.

<sup>75</sup> UNFCCC, *supra* note 14.

<sup>76</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998).

<sup>77</sup> Docherty & Giannini, *supra* note 8, at 385.

<sup>78</sup> UNFCCC, *supra* note 14, at art. 2.

## 1. The 1951 Convention and the 1967 Protocol

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol continue to provide the functional core of international refugee jurisprudence.<sup>79</sup> They establish significant binding duties and obligations on the signatories, and vest refugees with substantial rights.<sup>80</sup> They also address many of the social services that states must provide to climate refugees to increase the possibility that they will successfully adapt to life in their host states. Articles 17, 18, and 19 of the Convention compel states to offer refugees favorable working conditions, Article 21 ensures that refugees will enjoy a minimum standard of housing, and Article 22 guarantees the right to “the same treatment accorded nationals with respect to elementary education.”<sup>81</sup> The Convention’s final consideration of social services is to guarantee the right to public relief and social security payments.<sup>82</sup>

The Convention and Protocol, therefore, do require host states to provide refugees with a broad menu of social services, but they almost undoubtedly do not apply to climate refugees.<sup>83</sup> International law protecting refugees “was written with a discrete group of people in mind: the survivors of World War II atrocities who were scattered throughout Europe at the end of the war,”<sup>84</sup> and the Convention’s definition of a

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<sup>79</sup> Cooper, *supra* note 7, at 480.

<sup>80</sup> As of October 1, 2008, 147 states were party to either the 1951 Convention, the 1967 Protocol, or both. *United Nations High Commissioner for Refugees: States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

<sup>81</sup> 1951 Convention, *supra* note 70, at art. 1(A)(2).

<sup>82</sup> *Id.* at arts. 23-24 (social security payments are subject to the following limitations: (i) appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension.).

<sup>83</sup> See e.g. Cooper, *supra* note 7.

<sup>84</sup> Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 Am. U. L. Rev. 337, 352 (2009).

refugee<sup>85</sup> confines the qualifying persons to a very narrow class.<sup>86</sup> There are two primary requirements for an individual to be classified as a refugee under the Convention. First, the person must have a “well-founded fear of persecution.”<sup>87</sup> One could argue that the environmental changes caused by anthropogenic climate change will persecute those who are most vulnerable to its impacts.<sup>88</sup> However, while there is no universally recognized definition of ‘persecution,’<sup>89</sup> it most likely entails an act or acts taken by governments against an individual or a group of individuals.<sup>90</sup> Such a definition would necessarily exclude climate refugees, who likely will not face government-sponsored attacks, and may even continue to look to their home governments for protection in ways that individuals fleeing persecution cannot.<sup>91</sup>

Second, the persecution that refugees fear must be on the basis of “race, religion, nationality, membership of a particular social group or political opinion.”<sup>92</sup> These specific and limited groups demonstrate that the drafters of the Convention were indeed attempting to address Europe’s post-war refugee crisis and did not concern themselves with offering protection to all peoples forced to leave their homes. Climate refugees cannot plausibly maintain that they have a fear of persecution based upon the

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<sup>85</sup> The Convention defines a refugee as 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” 1951 Convention, *supra* note 70, art. 1(A)(2), at 152.

<sup>86</sup> Cooper, *supra* note 7, at 480.

<sup>87</sup> 1951 Convention, *supra* note 70, at art. 1(A)(2).

<sup>88</sup> See e.g. Lopez, *supra* note 7, at 378.

<sup>89</sup> United Nations High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ch. II.B.(2)(b), U.N. Doc. HCR/1P/4/Eng. Rev. 1 (1979) (reedited Jan. 1992), available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> (last visited Feb. 23, 2011).

<sup>90</sup> Cooper, *supra* note 7, at 428 (citing Astri Suhrke, *Global Refugee Movements and Strategies of Response*, in U.S. IMMIGRATION POLICY: GLOBAL AND DOMESTIC ISSUES 157, 159 (Mary M. Kritz ed., 1983).

<sup>91</sup> Docherty & Giannini, *supra* note 8, at 358.

<sup>92</sup> 1951 Convention, *supra* note 70, at art. 1(A)(2).

membership in one of the enumerated groups,<sup>93</sup> and therefore do not fall within the Convention and Protocol's definition of a refugee.<sup>94</sup> It is possible, however, that individuals may have to flee serious conflicts that erupt in the aftermath of climate change impacts such as food scarcity or draught.<sup>95</sup> Although climate change would be an underlying cause of this type of refugee situation, the individuals may well fall within the Convention and Protocol's definition, and could thus be entitled to enjoy the protections they guarantee.<sup>96</sup>

Some organizations have attempted to supplement the definition of a refugee to include individuals displaced because of environmental and climate events,<sup>97</sup> but the Convention and Protocol continue to exclude them. Thus, despite the very real prospect that anthropogenic climate change will force many people to abandon their homes and states,<sup>98</sup> they are currently unable to benefit from the rights guaranteed by the guiding documents of international refugee law.

## **2. Regional Accords: The OAU Convention and the Cartagena Declaration**

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<sup>93</sup> Shaina Stahl, *Unprotected Ground: The Plight of Vanishing Island Nations*, 23 N.Y. Int'l L. Rev. 1, 24 (2010).

<sup>94</sup> Even the United Nations High Commissioner for Refugees has taken the position that individuals fleeing environmental harm do not qualify as refugees under this definition. United Nations High Commissioner for Refugees, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective* 8 (23 October 2008), <http://www.unhcr.org/refworld/docid/492bb6b92.html> (last visited March 5, 2011).

<sup>95</sup> Michelle Leighton, *Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons*, German Marshall Fund of the United States 4 (2010), [http://www.gmfus.org/galleries/default-file/Leighton\\_MAH\\_EditsV2.pdf](http://www.gmfus.org/galleries/default-file/Leighton_MAH_EditsV2.pdf).

<sup>96</sup> For example, climate change induced drought, water scarcity, and food insecurity are contributing to conflict and mass displacement in Horn of Africa. *Id.* (The author states that such individuals would be designated "refugees" and host governments would therefore be obliged to provide them with shelter, food, and security.)

<sup>97</sup> The most prominent of these attempts was the United Nations Environmental Programme's definition of "environmental refugees" as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption that jeopardized their existence and/or seriously affected the quality of their life." Essam El-Hinnawi, *Environmental Refugees* 4.

<sup>98</sup> The United Nations University's Institute for Environment and Human Security predicted that in 2005 that there would be 50 million environmental refugees in the world by 2010. Oli Brown, *Migration and Climate Change* 9 (Int'l Org. for Migration, Research Series Paper No. 31, 2008), available at [http://www.iisd.org/pdf/2008/migration\\_climate.pdf](http://www.iisd.org/pdf/2008/migration_climate.pdf).

The Convention and Protocol are not the only sources of interstate agreements guiding the treatment of refugees. In response to previously unaddressed needs, regional accords have emerged, expanding the definition of the term refugee and the scope of commitments owed to them.<sup>99</sup> Building upon the traditional sources of refugee law, these agreements are indicative of some, though not all, of the changes necessary to confer official refugee status upon climate refugees.

The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa is the most promising of the regional accords. Binding upon all member states of the OAU, it is founded upon the idea that “all the problems of [Africa] must be solved in the spirit of the Charter of the Organization of African Unity and in the African context.”<sup>100</sup> It contains the definition of a refugee found in the Convention and the Protocol,<sup>101</sup> but also includes a broader secondary definition that would encompass climate refugees. It states:

The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality.<sup>102</sup>

Although arguments might be made to the contrary, the flooding of SIDS would most likely constitute an event that “seriously disturbs public order,” and climate refugees should therefore fall within the OAU Convention’s purview.

Despite its broader definitional scope, however, the OAU Convention presents a number of challenges for climate refugees. First, qualifying under this definition, would

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<sup>99</sup> See e.g. Emmanuel Opoku Awuku, *Refugee Movements in Africa and the OAU Convention on Refugees*, 39 J. of Afr. L. 79, 80 (1995); Cooper, *supra* note 7, at 496.

<sup>100</sup> OAU Convention, *supra* note 72, at pmbl.(8).

<sup>101</sup> *Id.* art. I(1).

<sup>102</sup> *Id.* art. I(2).

not necessarily guarantee that they would receive asylum, nor would it entitle them to the provision of social services. The treaty states that “Member States of the OAU shall use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.”<sup>103</sup> The provision of asylum is therefore subject to the political attitudes of the respective African nations.<sup>104</sup> Additionally, the treaty lacks any provision relating to medical treatment, food, education, housing, or any other social service that a refugee would need to adapt to life in a host state. Thus, although climate refugees would meet the definition of refugees under the OAU Convention, the benefits accorded to them under the treaty would be entirely dependent upon the domestic politics of the nation they sought refuge in. Furthermore, given the relative poverty of most African states, and the close relationships that exist between many SIDS and more wealthy states,<sup>105</sup> Africa is not the most likely destination for refugees from SIDS.<sup>106</sup>

Inspired by the OAU Convention,<sup>107</sup> the Organization of American States’ Cartagena Declaration emerged from a 1984 colloquium held in Colombia.<sup>108</sup> It intended to address the “massive flows of refugees” in Central America by “enlarging the concept

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<sup>103</sup> *Id.* art. II(1).

<sup>104</sup> Awuku, *supra* note 99, at 83.

<sup>105</sup> Micronesia, the Marshall Islands, and Palau, for example, are all members of the Compact of Free Association, which makes them associated states of the United States. Among other benefits, the Compact provides for U.S. economic assistance, eligibility for certain U.S. federal programs, and defense, in exchange for U.S. military and certain other operating rights, denial of access to the territory of these states by other nations, and other agreements. *Compact of Free Association*, LEGAL INFORMATION SYSTEM OF THE FEDERATED STATES OF MICRONESIA, <http://www.fsmlaw.org/compact/index.htm> (last visited March 5, 2011).

<sup>106</sup> As noted above, African states will also face many of their own problems arising from climate change and climate refugees, which may make them even less inclined to help provide homes for the refugees from SIDS. *See supra* note 7.

<sup>107</sup> Jennifer A. Klinck, *Recognizing Socio-Economic Refugees in South Africa: A Principled And Rights-Based Approach to Section 3(B) of the Refugees Act*, 21 Int’l J. Refugee L. 653, 677 (2009).

<sup>108</sup> Cartagena Declaration, *supra* note 73, at Pmb1.

of a refugee” in accord with the precedent set by the OAU Convention.<sup>109</sup> The Cartagena Declaration purports to guide behavior among its member states, and while it is only aspirational in nature,<sup>110</sup> some of the parties have incorporated its provisions into domestic law. The Cartagena Declaration provides a similar expansion of the definition of refugees, which should include climate refugees.<sup>111</sup> Ultimately, however, because the Cartagena Declaration is non-binding<sup>112</sup> and because it includes no articles relating to the provisions of social services, it will not assure climate refugees of receiving them.

## B. Customary International Law

Customary international law (CIL) consists of the general practice of states accepted as law.<sup>113</sup> It is not necessary, however, that “general state practice be in absolutely rigorous conformity with the [customary law] – it is sufficient that the conduct of States should, in general, be consistent with the rule, and that instances of conduct inconsistent with a rule be treated as breaches.”<sup>114</sup> Thus, for a rule of CIL to emerge, states must act consistently over a period of time and must do so out of a sense of legal obligation.<sup>115</sup> The necessity of the sense of legal obligation merits extra emphasis – mere consistent practice, such as rolling out a red carpet to greet a visiting

<sup>109</sup> *Id.*, at art. III(3).

<sup>110</sup> Carlos Ortiz Miranda, *Toward a Broader Definition of Refugee: 20<sup>th</sup> Century Development Trends*, 20 Cal. W. Int'l L.J. 315, 324 (1989).

<sup>111</sup> *Id.* The Cartagena Declaration states: “[T]he definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Cartagena Declaration, *supra* note 73, at art. III(3).

<sup>112</sup> Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications For International Law*, 27 Wis. Int'l L.J. 607, 617 (2000).

<sup>113</sup> See e.g. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=>.

<sup>114</sup> *Military and Paramilitary Activities In and Against Nicaragua*, (Nicar. v. U.S.), 1986 I.C.J. 14, (June 27).

<sup>115</sup> See e.g. Yann-huei Song, *The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean*, 9 Chinese J. Int'l L. 663, 678 (2010).

head of state, is insufficient to create a customary law if it is unaccompanied by the understanding that states are legally required to do so.

CIL plays an essential role in international law and adjudication for at least three reasons. First, it is a source of international law independent of treaties, and provides the legal authority for some well established rules of international law that exist outside of any treaty regime.<sup>116</sup> Second, it may also regulate gaps within treaties, as well as the conduct of states who are not party to a treaty.<sup>117</sup> Finally, newly emerging issues will often lack a treaty regime for a time, but may nonetheless be regulated by norms of CIL.<sup>118</sup> It could thus mandate an obligation to provide social services for individuals displaced by climate change, even if such an obligation does not exist in a treaty.

Unlike treaties, which despite being negotiated, detailed, and documented in writing, allow states to unilaterally withdraw, CIL typically does not grant states such a right.<sup>119</sup> Indeed, the prevailing view among international law scholars is that once a rule of CIL becomes established, states never have the right to unilaterally withdraw from it.<sup>120</sup> Thus, if CIL requires states to provide social services to climate refugees, such an obligation would be much more difficult to circumvent than one found in a treaty.

CIL developed through myriad decisions made in substantial and diverse international and domestic arenas.<sup>121</sup> It can be difficult, however, to ascertain exactly when a new law has arisen, because it does not always emanate from any single, easily

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<sup>116</sup> *Id.*

<sup>117</sup> See e.g. Curtis A. Bradley & Mitu Gulati, *Withdrawing From International Custom*, 120 YLJ 202, 209 (2010); Patrick Dumberry, *Are BITs Representing the “New” Customary International Investment Law?*, 28 Penn St. Int'l L. Rev. 675, 700 (2010).

<sup>118</sup> Bradley & Gulati, *supra* note 117, at 210.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Although all states are generally bound to meet the obligations of customary laws, a state may not have to comply with a certain law if it has consistently voiced its objection to the establishment of the law. See e.g. Marjoleine Zieck, *UNHCR and Turkey, and Beyond: Of Parallel Tracks and Symptomatic Cracks*, 22 Intl J. Ref. L. 593, 615 (2010).

<sup>121</sup> *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003).

cognizable event, and because the relevant evidence of CIL is widely dispersed.<sup>122</sup> Courts have found CIL to exist in areas as diverse as the protection of civilian fishing vessels during wartime,<sup>123</sup> the prohibition on torture,<sup>124</sup> and the classification of various activities as joint criminal enterprises.<sup>125</sup> On the other hand, when examining issues such as the legality of the use of nuclear weapons<sup>126</sup> and drilling rights on a continental shelf,<sup>127</sup> courts have either found that state practice was insufficient or that no sense of legal obligation was attached to the practice, concluding that no law existed. Because the elements of CIL are not always clear until a court has given them effect, its entire scope may not always be apparent. This uncertainty can create an especially ambiguous situation when a practice evolves around an issue not previously regulated by custom, and states or individuals claim that a customary law has emerged.

As the next sections of this Note will explore, this ambiguity exists with respect to the regulation of the provision of social services to climate refugees. International human rights law may indeed have reached a point where it obliges states to ensure the enjoyment of economic, cultural and social rights by all peoples. No court, however, has endorsed such a claim, and as such the actions of states and the discourse of interested parties are the only clues to guide our speculation.

## 1. Customary Human Rights Law

The foundational document of international human rights law is the 1948

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<sup>122</sup> *Id.* at 247.

<sup>123</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

<sup>124</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>125</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A Judgment, PP287 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

<sup>126</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

<sup>127</sup> *North Sea Continental (Ger./Den.; Ger./Neth.)*, 1969 I.C.J. 3 (Feb. 20).

Universal Declaration of Human Rights (The Declaration).<sup>128</sup> The Declaration contains specific articles that, if binding, would create an obligation to provide social services to individuals displaced by climate change. Article 22 states that all people are entitled to realize the economic, social and cultural rights indispensable for their dignity and the free development of their personalities.<sup>129</sup> Article 23 guarantees the right to work.<sup>130</sup> Article 25 states that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>131</sup>

Finally, Article 26 guarantees the right to education.<sup>132</sup>

Like all United Nations General Assembly resolutions, the Declaration is non-binding; its articles may therefore only be obligatory if they have become part of CIL.<sup>133</sup> Although the U.S. Supreme Court has held that the Declaration should not be given the same binding power as a treaty,<sup>134</sup> courts have nonetheless found that it does impose certain obligations through customary law.<sup>135</sup> The Restatement (Third) notes:

Few states would agree that any action by a state contrary to any provision of the Declaration is, for that reason alone, a violation of the [United Nations] Charter or of customary international law. On the other hand, almost all states would agree that some infringements of human rights enumerated in the Declaration are violations of the [United Nations] Charter or of customary international law.<sup>136</sup>

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<sup>128</sup> Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948). Raj Bhala, *Philosophical, Religious, and Legalistic Perspectives on Equal Human Dignity and U.S. Free Trade Agreements*, 28 St. Louis U. Pub. L. Rev. 9, 53 (2008).

<sup>129</sup> Universal Declaration of Human Rights, *supra* note 128, art. 22.

<sup>130</sup> *Id.* art. 23.

<sup>131</sup> *Id.* art. 25.

<sup>132</sup> *Id.* art. 26.

<sup>133</sup> See e.g. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287, 290 (1995-96) (explaining how although the document is not binding, it is the primary source of human rights standards).

<sup>134</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (“[T]he Declaration does not of its own force impose obligations as a matter of international law.”).

<sup>135</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

<sup>136</sup> Restatement (Third) of the Foreign Relations Law of the United States, Part VII, Introductory Note.

As the non-treaty basis of customary human rights law, any customary obligation to provide social services to climate refugees is likely to arise out of these articles or subsequent accords based upon them.

The status of the relevant articles as CIL is much more equivocal than that of rights regarding life and liberty.<sup>137</sup> As one author has written “[F]reedom from torture and arbitrary imprisonment are more readily accepted as fundamental human rights [by the judiciary] than are the rights to subsistence benefits, shelter, healthcare or education.”<sup>138</sup> Similarly, after extensively reviewing the status of the Declaration in customary law, another author concluded that although economic, social and cultural rights “may enjoy wider international support than some of the civil and political rights traditionally emphasized in U.S. jurisprudence ... they are rarely referred [to] by either commentators or courts in discussions of the content of customary international human rights law.”<sup>139</sup> In one of the few cases where an American court reviewed the weight of an article of the Declaration, the court held that “the right to education, while it represents an important international goal, has not acquired the status of customary international law.”<sup>140</sup> The court did note, however, that because “international law traditionally comprehends a nation's treatment of aliens ... aliens may have a better claim to the observance of the right to education than citizens.”<sup>141</sup>

While it therefore appears that these rights were not a part of CIL in the past century, it is possible that through changes in general state practice, CIL has evolved to

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<sup>137</sup> Articles 3-7 of the Universal Declaration of Human Rights guarantee the rights of life, liberty, non-discrimination, and torture. Universal Declaration of Human Rights, *supra* note 128, arts. 3-7.

<sup>138</sup> Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. Rev. 1195, 1242 (1987).

<sup>139</sup> Hannum, *supra* note 133, at 348-49.

<sup>140</sup> *In re Alien Children Education Litigation*, 501 F. Supp. 544, 596 (S.D. Tex. 1980) *aff'd*, 457 U.S. 202, *reh'g denied*, 458 U.S. 1311 (1982).

<sup>141</sup> *Id.*

include them. Some authors have argued that the right to free choice of employment, the right to form and join trade unions, and the right to free primary education were “at least potential candidates for rights recognized under customary law,”<sup>142</sup> and their candidacy may still be progressing. A 2004 survey revealed that of the 165 countries with written constitutions, 116 referenced a right to education while only 73 referenced a right to health care.<sup>143</sup> Others may, however, recognize such rights without enshrining them in their constitutions.

Although this statistic is probably insufficient to establish general state practice, it may provide evidence of an emerging customary law when taken into account with the adoption of other treaties and non-binding documents. Some authors have claimed that the General Assembly’s acceptance of an individual complaints mechanism for the International Covenant on Economic, Social and Cultural Rights (the Covenant), and the universal endorsement of the United Nation’s Millennium Development Goals (Development Goals) strongly support the conclusion that these additional rights have become part of customary international law.<sup>144</sup> The Covenant recognizes that individuals are entitled to an adequate standard of living, medical services, education, and an enjoyment of cultural life,<sup>145</sup> while the Development Goals aim to end hunger and poverty, guarantee universal education and improve health services.<sup>146</sup>

Despite the increasing citations of the Declaration’s provisions of social,

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<sup>142</sup> Hannum, *supra* note 133, 349.

<sup>143</sup> See e.g. Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 Am. J. Int’l L. 446, 470 (2009).  
July, 2009. *The Pillar of Glass: Human Rights in the Development Operations of the United Nations (Citing Varun Gauri, Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 World Dev. 465, 465 (2004).).

<sup>144</sup> See e.g. *Id.*; Thomas Buergenthal, *The World Bank and Human Rights*, in THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW 95, 96 (Edith Brown Weiss et al. eds., 1999).

<sup>145</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3, at arts. 11-13, 15.

<sup>146</sup> United Nations Millennium Development Goals, at arts. 1-2, 4-5, available at [www.un.org/millenniumgoals/](http://www.un.org/millenniumgoals/) (last visited Feb. 23, 201).

economic and cultural rights as a source of customary international law<sup>147</sup> and the acceptance of additional accords recognizing these rights, it will be difficult for climate refugees to assert that a host state must recognize these rights until there is clear evidence that they have assumed the status of customary law. All is not lost, however. Because customary law is a dynamic process, a consensus regarding these rights could very well emerge by the time sea level rise renders SIDS uninhabitable.

## 2. Customary Laws Specific to Refugees

The number of widely accepted customary laws is not very extensive and it is unlikely that customary law imposes any obligations on states to provide social services to refugees.<sup>148</sup> Because most customary obligations developed primarily in response to situations where individuals were displaced because of armed conflict, they likely do not afford any protection to climate refugees. They also presume a situation where refugees will eventually be able to return to their state of origin, rendering their application to climate refugees even less certain.

The most important customary rule affecting refugees is the principle of non-refoulement.<sup>149</sup> It is the “most basic protection for a refugee, ensuring that a person

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<sup>147</sup> See e.g. Andrea A. Curcio, *Civil Claims For Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 Hastings Race & Poverty L. J. 45, 118-19 (2006); Angela Avis Holland, *Resolving the Dissonance of Rodriguez and the Right to Education: International Human Rights Instruments As A Source of Repose for the United States*, 41 Vand. J. Transnat'l L. 229, 247 (2008) (noting that one approach to the Declaration is to find that it is binding in its entirety); Katherine Hughes, Note, *Operation "Drive Out the Trash": The Case for Imposing Targeted United Nations Sanctions Against Zimbabwean Officials*, 76 Fordham L. Rev. 323 (2007); Emily H. Wood, *Economic, Social, and Cultural Rights and the Right to Education in American Jurisprudence: Barriers and Approaches to Implementation*, 19 Hastings Women's L.J. 303, 311-12 (2008).

<sup>148</sup> Some principles found within the Convention may also be customary laws, but their status is controversial. As such, this Note addresses them as obligations of treaty law and not as customary obligations.

<sup>149</sup> Non-refoulement is also a principle tenant of the 1951 Convention. 1951 Convention, *supra* note 66, at art. 1(A)(2). While the Convention either codified or generated the principle as a customary rule, its status as customary law is clear, thereby broadening the rule's applicability beyond the states that are party to the Convention. See e.g. Elizabeth E. Ruddick, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally*

fleeing to another state because of a well-founded fear of persecution in his or her home state for religious, political, racial, or other reason[s], will not be returned to the home state by the receiving country.”<sup>150</sup> While climate refugees will have well-founded fears of rising waters, the customary law emerged after consistent state practice in response to the persecution of traditional refugees, not in response to individual fleeing dangerous environmental events. States frequently accept refugees from neighboring states in the aftermath of an environmental disaster, but there is no evidence that a sense of legal obligation prevents them from forcing the refugees to return until conditions have improved. The classic interpretation of non-refoulement, therefore, is inapplicable to the flooding of SIDS.

In other contexts, it is possible that non-refoulement may even create a duty on the part of host states to provide sufficient benefits so that states avoid imposing *de facto* refoulement.<sup>151</sup> However, the inundation of SIDS will render them permanently uninhabitable, so even the threat of *de facto* non-refoulement is inapplicable to climate refugees, and will not create an obligation to provide them with social services.

In addition to non-refoulement, customary law likely also includes more explicit obligations to provide refugees with certain services. The International Committee of the Red Cross recently attempted to compile the rules of customary international

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*Displaced*, 77 BULR 429, 448 n. 94 (stating that the Convention generated the rule); Rita Bettis, *The Iraqi Refugee Crisis: Whose Problem Is It? Existing Obligations Under International Law, Proposal to Create a New Protocol to the 1967 Refugee Convention, & U.S. Foreign Policy Recommendations to the Obama Administration*, 19, *Transnat'l L. & Contemp. Probs.* 261 273 (2010) (stating that the Convention codified the rule). As such, this Note addresses it in the customary law section and not in the discussion of the Convention.

<sup>150</sup> Jamieson L. Greer, *A Critique of the ICRC's Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity*, 192 *Mil. L. Rev.* 116, 124 (2007).

<sup>151</sup> Cecile Zwiebach, Note, *Iraqi Refugees and UNHCR: The Challenges of Administering Humanitarian Assistance Under Overlapping Refugee Laws*, 22 *Geo. Immigr. L.J.* 767, 791.

humanitarian law,<sup>152</sup> and while the rules may contain some flaws, they are generally accepted as indicative of current customary law and provide a standardization of the sometimes unclear customary laws.<sup>153</sup> Rule 131 of the compilation states that “in case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated.”<sup>154</sup> The rule, if actually representative of contemporary customary law, does create an obligation to provide some social services, but the compilation specifies that it only applies to the “forced displacement of civilians for reasons related to an armed conflict.”<sup>155</sup> Climate refugees, therefore, would not benefit from its protections.

## Conclusion

Adrift from their states, climate refugees will be equally adrift in international law. They will not fear any state-sponsored persecution based upon an immutable characteristic or political opinion, just the rising sea water that will eventually inundate their states or render them otherwise uninhabitable. These individuals will therefore not meet the traditional definition of a refugee and will not benefit from many of the protections and rights offered by refugee law. Nonetheless they will have been forced from their homes with no prospect of return, and they will depend upon the goodwill of other states to find firm ground.

As this Note has demonstrated, once refugees from SIDS find a new home, they

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<sup>152</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 299-306 (2005).

<sup>153</sup> *See e.g.* Greer, *supra* note 150, at 124.

<sup>154</sup> *Id.* at 463.

<sup>155</sup> *Id.* at 457.

will again require charity, as international law currently offers them no guarantees of the social services necessary to survive in and adapt to a host state. As of now, they face a future of uncertainty, with no guarantees of medical and psychological attention, education, food, housing, or the right to work. The international community, however, has demonstrated in the past that it is capable of rapidly responding to difficult environmental issues,<sup>156</sup> and there is sufficient time to craft binding obligations ensuring that climate refugees will have the tools and services necessary to rebuild their lives. While it may be difficult to establish a universally accepted customary international law requiring states to provide for climate refugees, creating a treaty that addresses their needs need not be so complex. The international community, and especially those states most responsible for climate change, must confront their obligation to these people, and before rising sea levels force climate refugees from their states, create a treaty to guarantee that while the oceans may flood SIDS, their people will not be left adrift when they reach dry land.

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<sup>156</sup> Only thirteen years after the publishing of the first article suggesting that the emission of chlorofluorocarbons was depleting the ozone layer, 24 states signed the Montreal Protocol to limit their use. *A Success in the Making: The Montreal Protocol on Substances That Deplete the Ozone Layer*, UNITED NATIONS OZONE SECRETARIAT, [http://ozone.unep.org/Publications/MP\\_A\\_Success\\_in\\_the\\_making-E.pdf](http://ozone.unep.org/Publications/MP_A_Success_in_the_making-E.pdf) 1, 4 (2007).