

In Search of Coherency in Negotiating  
Post-2015 International Climate,  
Development, and Disaster Risk Reduction  
Agreements

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# IN SEARCH OF COHERENCY IN NEGOTIATING POST-2015 INTERNATIONAL CLIMATE, DEVELOPMENT, AND DISASTER RISK REDUCTION AGREEMENTS

*Teresa Thorp\**

## I. INTRODUCTION: THE ARGUMENT FOR NORMATIVE COHESION

Natural disasters have historically been a catalyst for human mobility.<sup>1</sup> A growing awareness of the intensity and frequency of “climate-related” disasters (floods, heat waves, prolonged drought, and desertification) should motivate momentum to understand the implications of displacement and conflict more fully. According to an Intergovernmental Panel on Climate Change study: “The United Nations Office for the Coordination of Humanitarian Affairs [OHCA] and the Internal Displacement Monitoring Centre [IDMC] has estimated that around 20 million people were displaced or evacuated in 2008 because of rapid onset climate-related disasters.”<sup>2</sup> A 2010 study by Frank Biermann and Ingrid Boas suggests that

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1. For the purposes of this Article “disasters” refer to “situations of calamity due to force majeure.” Peter Macalister-Smith, *The International Relief Union of 1932*, 5 *DISASTERS* 147, 148 (1981). A “natural disaster” refers to a disaster that has its proximate cause in an environmental event or physical phenomenon, such as an earthquake, flood, heat wave, or hurricane.

2. Omar-Dario Cardona et al., *Determinants of Risk: Exposure and Vulnerability*, in *MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION: A SPECIAL REPORT OF WORKING GROUPS I AND II OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 65, 80 (Christopher B. Field et al. eds., 2012).

“most estimates currently appear to expect an additional number of climate refugees of about 200–250 million by 2050.”<sup>3</sup> In 2013, Katrina M. Wyman heeded caution in pointing to “suggestions that climate change could generate hundreds of millions of human migrants by the middle of the century due principally to sea level rise, increased frequency and intensity of extreme weather events, drought, and desertification.”<sup>4</sup> These figures require qualification and further analysis. The numbers are often sensationalist and alarmist.<sup>5</sup> Chains of causation vary depending on the context; and then there is an inflammable, but not necessarily legally coherent, terminology that often flares contention.

Wyman refers to the “rights gap” being “the lack of a right in existing law to remain permanently in another country due to environmental conditions in the home country.”<sup>6</sup> Yet, “protection issues and risks are often as acute in natural disaster as in conflict situations.”<sup>7</sup> Instruments at national, regional, and international levels may offer some degree of protection for so-called “climate migrants.” However, neither the existing refugee protection framework,<sup>8</sup> nor the

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3. Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, GLOBAL ENVTL. POL., Feb. 2010, 60, 68 (2010) (“[M]ost estimates currently appear to expect an additional number of climate refugees of about 200–250 million by 2050.”).

4. Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167, 171 (2013).

5. Benoît Mayer, *Constructing “Climate Migration” as a Global Governance Issue: Essential Flaws in the Contemporary Literature*, 9 MCGILL INT’L J. SUSTAINABLE DEV. L. & POL’Y 87, 115 (2013).

6. Wyman, *supra* note 4, at 169.

7. See, e.g., the opening remarks of Hansjoerg Strohmeyer, Chief, Policy Development and Studies Branch, OCHA in Hansjoerg Strohmeyer, *Informal Summary Note ECOSOC Humanitarian Affairs Segment 2011 Side Event on Protection and Displacement in Natural Disaster Situations*, 1 (2011), [http://sinope.activeweb.fr/8025708F004BE3B1/\(httpInfoFiles\)/B3158BE21E1D2595C12578D800367D62/\\$file/ecosoc-side-event-protection-displacement-nds-report-20July2011.pdf](http://sinope.activeweb.fr/8025708F004BE3B1/(httpInfoFiles)/B3158BE21E1D2595C12578D800367D62/$file/ecosoc-side-event-protection-displacement-nds-report-20July2011.pdf).

8. Determinations under the United Nations Convention Relating to the Status of Refugees (Refugee Convention) do not seem to have considered climate migrants as refugees to date. See Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137. Climate migrants are unlikely to be able to invoke the non-refoulement principle (prohibition of expulsion or return) under the Refugee Convention or under existing international human rights law. See *id.* art.

United Nations Framework on Climate Change (UNFCCC) was specifically designed for these purposes.<sup>9</sup> No unified international treaty framework to govern environmentally or climate induced migrants exists. There are reasons for this. Forecasts generally predict that “climate migration” is expected to be mostly internal,<sup>10</sup> but this argument does not remove a legal duty to protect present and future generations.

Developing a universal process to govern a dynamic and continuously changing normative gap has its antagonists. The initiative lacks conviction. Anyone could be a climate migrant.<sup>11</sup> It impinges on sovereignty. Climate migrants could take scarce jobs. They may be difficult to integrate. Climate change is not necessarily the sole cause of loss or damage. Other factors intervene, such as the degree of preparedness and prevention; whether a state’s priorities are favorably inclined to protect vulnerable people; and the extent of respective political, social, and economic capabilities. The scope and scale of these antagonisms may require separate investigation in

33, ¶ 1 (“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

9. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

10. Khalid Koser, *Climate Change and Internal Displacement: Challenges to the Normative Framework*, in *MIGRATION AND CLIMATE CHANGE* 289, 289 (Étienne Piguet et al. eds., 2011) (“There is a general consensus that the majority of people likely to be displaced by the effects of climate change in the next century will be displaced inside their own countries, rather than across international borders.”); U.N. Secretary-General, *Climate Change and Its Possible Security Implications: Rep. of the Secretary-General*, ¶ 54, U.N. Doc. A/64/350 (Sept. 11, 2009) (noting that most displacement will occur within countries rather than across international borders, and that rural-urban movement will place enormous pressures on urban centers. Although the analysis is weak and at times inaccurate—especially relating to the law); Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, U.N. HIGH COMM’R FOR REFUGEES, LEGAL AND PROTECTION POLICY RESEARCH SERIES, U.N. Doc. PPLA/2011/03 (2011).

11. See Christine Gibb & James Ford, *Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?*, 7 *ENVTL. RES. LETTERS* 045601, at 1, 4 (2012); Jay Drydyk, *Development Ethics and the ‘Climate Migrants’*, 16 *ETHICS, POL’Y AND ENV’T* 43, 47 (2013) (questioning how to define a climate migrant).

consideration of the suggested key drivers that influence a weather event becoming a disaster. (In a traditional cost-benefit study, a 2013 World Bank report identified these key drivers as climate change, poorly planned development, poverty, and environmental degradation).<sup>12</sup> In response, more funding may be required, but something else may be required beforehand.

Before examining the funding questions, this Article considers the normative aspects of negotiating a collective response when key drivers link intrinsically, have no precise causal link and no legal chain of causation, and ought to be considered collectively. The vulnerable do not necessarily put climate harm, development, and disaster risk reduction into disconnected boxes. In 2013, the Head of the U.N. Office for Disaster Risk Reduction (UNISDR), Margareta Wahlström, hailed the Pacific approach to integrate climate and disaster risk management, and noted that “Fiji was already experiencing the ‘new normal’ of more intense and frequent disasters with two major floods and a severe cyclone in 2012 that devastated livelihoods and infrastructure, and was a significant blow to local development.”<sup>13</sup>

Negotiating disaster resilience provisions for post-2015 international climate agreements is already underway; but there is scope for a potential disconnect and disaster risk reduction agreements. It would make sense if negotiations in one forum were consistent and coherent with similar negotiations taking place in another forum. By extension, some form of universal and unified process may be beneficial. The UNFCCC Conference of the Parties’ (COP) Doha Decision of 2012 recognized as much when it acknowledged that further work is required to advance understanding and knowledge about loss and damage, including “enhancing the

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12. A 2013 World Bank study recognizes that a multitude of drivers (climate change, poorly-planned development, poverty, and environmental degradation) influence the risk of a weather event becoming a disaster, notes that “disasters trap people into poverty,” and concludes that “climate and disaster risk management need to be integrated much more closely with development planning and targeted poverty alleviation programs.” WORLD BANK, BUILDING RESILIENCE: INTEGRATING CLIMATE AND DISASTER RISK INTO DEVELOPMENT 7, 39, 40 (2013).

13. Press Release, UNISDR, UNISDR Chief: Integrated Action Will Help Billions and Save Trillions (July 8, 2013), *available at* [http://www.unisdr.org/files/33881\\_2013no24.pdf](http://www.unisdr.org/files/33881_2013no24.pdf).

understanding of how approaches to address loss and damage associated with the impacts of climate change may be integrated into climate-resilient development processes.”<sup>14</sup> A similar argument could be made for the treatment of negotiating potential provisions for climate migrants in post-2015 international climate, development, and disaster risk reduction agreements.

The global disconnect that emerges between climate change, development, and disaster risk reduction is not isolated to negotiating formalities or lawmaking itself. Disoriented informalities of “soft law” sometimes ripple through to local levels. Many people displaced due to extreme weather events are not interested in popular strands of academic thinking that pigeonhole them as “refugees.” Most Pacific Islanders are not seeking complementary refugee status. Climate change has affected movement in the Pacific but many people wish to remain in their homeland for as long as possible. Responses by other vulnerable communities are often comparable. Many prefer “adaptive migration” than extreme weather events forcing them to move during an emergency evacuation with little to no notice or time to gather their precious belongings.<sup>15</sup> “Crisis migration” may be topical and possibly helpful for surveying broader societal dynamics that contribute to mobility and funding generation.<sup>16</sup> In most other circumstances, disaster prevention and adaptive preparedness or transitory migration is better than calling on the military for intervention at the eleventh hour. The point is this: the creation of a

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14. United Nations Framework Convention on Climate Change, Conference of the Parties, 18th Sess., Doha, Qatar, Nov. 26–Dec. 8, 2012, *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*, ¶ 7(a)(v), U.N. Doc. FCCC/CP/2012/8/Add.1 (Feb. 28, 2013).

15. Koko Warner, *Migration: Climate Adaptation or Failure to Adapt? Findings from a Global Comparative Field Study*, 6 IOP CONF. SER.: EARTH ENVIRON. SCI. 562006 (2009) (“On the successful adaptation side, research has documented improvements of living conditions through migration. Adaptation to worsening environmental conditions can occur through improved financial or livelihoods security, such as remittances from rural-to-urban migrants.”).

16. Jane McAdam, *Conceptualizing ‘Crisis Migration’*, in *MIGRATION AND HUMANITARIAN CRISES: CAUSES, CONSEQUENCES AND RESPONSES* (Susan Martin & Sanjula Weerasinghe eds., forthcoming 2014).

unified, transparent, comprehensible, accessible, and responsive process matters.<sup>17</sup>

A unified process may draw on an emerging shared conscience to protect displaced persons or those likely to be displaced due to climate-related natural disasters.<sup>18</sup> The Nansen Initiative presents one example of recent endeavors in this area.<sup>19</sup> The work of the International Law Commission (ILC) on “protection of persons in the event of disasters” presents another.<sup>20</sup>

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17. Tim Cowen, “Justice Delayed Is Justice Denied”: *The Rule of Law, Economic Development and the Future of the European Community Courts*, 4 EUR. COMPETITION J. 1, 28 (2008).

18. There is, for instance, a recent and growing interest in research in the Pacific. See JON BARNETT & JOHN CAMPBELL, CLIMATE CHANGE AND SMALL ISLAND STATES: POWER, KNOWLEDGE AND THE SOUTH PACIFIC 165 (2010); Carol Farbotko & Heather Lazrus, *The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu*, 22 GLOBAL ENVTL. CHANGE 382, 384 (2012); Rachel Kendall, *Climate Change as a Security Threat to the Pacific Islands*, 16 N.Z. J. ENVTL. L. 83 (2012); Colette Mortreux & Jon Barnett, *Climate Change, Migration and Adaptation in Funafuti, Tuvalu*, 19 GLOBAL ENVTL. CHANGE 105, 111 (2009).

19. The Nansen Conference on Climate Change and Displacement in the 21st Century held June 5–7, 2011 in Oslo, Norway was convened by the Government of Norway together with the Center for International Climate and Environmental Research in Oslo and the Norwegian Refugee Council. At the concluding session of the conference, the chairperson, Margareta Wahlström, United Nations Special Representative of the Secretary-General for Disaster Risk Reduction, presented a summary of the key points and ten Nansen Principles, reflecting the discussions that had taken place. (“Building upon Nansen’s legacy, the [ten] principles were recommended to guide responses to some of the urgent and complex challenges raised by displacement in the context of climate change and other environmental hazards.”). *The Nansen Principles*, in THE NANSEN CONFERENCE: CLIMATE CHANGE AND DISPLACEMENT IN THE 21ST CENTURY 5 (2011), available at <http://www.unhcr.org/4ea969729.pdf>.

20. At its 61st session in 2009, the International Law Commission, at the 3029th meeting, on July 31, 2009, took note of Draft Articles 1 to 5, as provisionally adopted by the Drafting Committee. See Int’l Law Comm’n, Drafting Comm., 61st Sess., May 4–June 5, July 6–Aug. 7, 2009, *Protection of Persons in the Event of Disasters: Texts of Draft Articles 1, 2, 3, 4 and 5 as Provisionally Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.758 (July 24, 2009). The Commission, at its 3067th meeting, on July 20, 2010, took note of Draft Articles 6 to 9, as provisionally adopted by the Drafting Committee. See Int’l Law Comm’n, Drafting Comm., 62d Sess., May 3–June 4, July 5–Aug. 6, 2010, *Protection of Persons in the Event of Disasters: Texts and Titles of Draft Articles 6, 7, 8 and 9*

Disaster preparedness, prevention, and protection are essential for managing the adverse effects of climate change and environmental degradation at all levels (national, regional, and international). Multi-level governance does not necessarily equate to like governance. Government intervention to compensate loss and damage from climate-related disasters varies from one country to the next; and at times, it overlaps. At other times, it is non-existent. Compensation, insurance schemes, and state aid may even diverge and clash.<sup>21</sup> Governments may only intervene due to public pressure manifested as political pressure. They may intervene when civil society and private sector initiatives are thought to be insufficient, but they should not intervene haphazardly just because “more funding is required.” More funding for what? Who is it for, and who is supposed to request this funding?

In line with the ILC’s draft articles on protection of persons in the event of disasters, “the provision of external assistance requires the consent of the affected state and consent to external assistance shall not be withheld arbitrarily.”<sup>22</sup> Publishing offers to assist will be helpful but raising awareness does not self-execute well-coordinated interventions. Interventions should be normatively cohesive too.

In this regard, legitimizing a process that facilitates reaching normative consensus on fundamental legal principles and consequential norms could give governance decisions credibility. For instance, with respect to the UNFCCC, normative provisions to

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*Provisionally Adopted by the Drafting Committee on 6, 7 and 8 July 2010, U.N. Doc. A/CN.4/L.776 (July 14, 2010); see also Rep. of the Int’l Law Comm’n 66th Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/66/10 and Add.1 (2011). The International Law Commission adopted the report of the Drafting Committee on Draft Articles 10 and 11 at the 3116th meeting on August 2, 2011. Following submission of the 2013 revised version of this article, the Commission at its 3180th meeting, on July 16, 2013, referred Draft Article 5, which extends the general duty to cooperate to the pre-disaster phase, and Draft Article 16, which relates to responsibilities and accountability mechanisms and institutional arrangements, to the Drafting Committee.*

21. *Green Paper on the Insurance of Natural and Man-Made Disasters*, at 2, COM (2013) 213 final (July 11, 2013). For more on contemporary insurance related issues, see Daniel-Stefan Paraschiv, *Insurance against Losses from Natural Disasters*, 3 CONTEMP. READINGS L. & SOC. JUST. 224, 224 (2011).

22. Rep. of the Int’l Law Comm’n, 64th Sess., May 7–June 1, July 2–Aug. 3, 2012, at 92, U.N. Doc. A/67/10; GAOR, 67th Sess., Supp. No. 10 (2012).



protect humankind “ought to” be based on equity and in accordance with common but differentiated responsibilities and respective capabilities.<sup>23</sup> Equity is not isolated to the UNFCCC. It is relevant to the formation of all three post-2015 agreements under examination: the post-2015 Disaster Risk Reduction Agreement<sup>24</sup> (the Hyogo Framework for Action 2);<sup>25</sup> the post-2015 Development Agenda;<sup>26</sup> and the post-2015 Climate Accord.<sup>27</sup>

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23. See Teresa Thorp, *Climate Justice: A Constitutional Approach to Unify the Lex Specialis Principles of International Climate Law*, UTRECHT L. REV., Nov. 2012, at 7, 20. Article 3, paragraph 1 of the UNFCCC stipulates, “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” UNFCCC, *supra* note 9, art. 3, ¶ 1.

24. U.N. OFFICE FOR DISASTER RISK REDUCTION, TOWARDS THE POST-2015 FRAMEWORK FOR DISASTER RISK REDUCTION: CONSIDERATIONS ON ITS POSSIBLE ELEMENTS AND CHARACTERISTICS 1 (2013), [http://www.unisdr.org/files/35706\\_chapeau.pdf](http://www.unisdr.org/files/35706_chapeau.pdf) (“There is a clear call for the post-2015 frameworks and agreements on sustainable development, climate change and disaster risk reduction to allow for an integrated development of future policies, plans, and programs—including financing—at international, national and local levels.”); U.N. OFFICE FOR DISASTER RISK REDUCTION, TOWARDS A POST-2015 FRAMEWORK FOR DISASTER RISK REDUCTION 4 (2012), [http://www.unisdr.org/files/25129\\_towardsapost2015frameworkfordisaste.pdf](http://www.unisdr.org/files/25129_towardsapost2015frameworkfordisaste.pdf); U.N. OFFICE FOR DISASTER RISK REDUCTION, GLOBAL ASSESSMENT REPORT ON DISASTER RISK REDUCTION (2011), <http://www.preventionweb.net/english/hyogo/gar/2011/en/home/download.html>; Tom Mitchell & Emily Wilkinson, *Disaster Risk Management in Post-2015 Policy Frameworks: Forging a More Resilient Future*, 75 ODI BRIEFINGS (2012).

25. U.N. OFFICE FOR DISASTER RISK REDUCTION, INFORMATION NOTE: CONSULTATIONS IN SUPPORT OF A POST-2015 FRAMEWORK FOR DISASTER RISK REDUCTION AND RESILIENCE (2013), [http://www.preventionweb.net/files/25129\\_informationnoteonhfaiijan2013update.pdf](http://www.preventionweb.net/files/25129_informationnoteonhfaiijan2013update.pdf); see also World Conference on Disaster Reduction, Kobe, Japan, Jan. 18–22, 2005, *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters*, ¶ 11, U.N. Doc. A/CONF.206/6 (Mar. 16, 2005) (the Hyogo Framework for Action was adopted by 168 nations in 2005 and aims to achieve a “substantial reduction of disaster losses, in lives and in the social, economic, and environmental assets of communities and countries” by 2015) [hereinafter *Hyogo Framework for Action*].

26. *Millennium Development Goals and Post-2015 Development Agenda*, UN.ORG, <http://www.un.org/en/ecosoc/about/mdg.shtml> (last visited Apr. 10, 2014); Mac Darrow, *The Millennium Development Goals: Milestones or*

Solidarity may consolidate another “first principle” of international climate law.<sup>28</sup> The process of legal interpretation that unfolds mirrors the process applied to interpreting Article 3(1) of the UNFCCC.<sup>29</sup> Interpreting UNFCCC’s Article 3(2) text, context, object, and purpose, and supplementary interpretation (assessment of preparatory treaty work), suggests a fundamental principle of fairness, but its construction differs from that of Article 3(1).<sup>30</sup> UNFCCC Article 3(2) stipulates: “[t]he specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.”<sup>31</sup> The principle of solidarity guides parties to the UNFCCC to give full consideration to special factors like vulnerability. This direction may take the debate away from spurious definitions of “climate migrants,” as though only developing countries suffer from extreme weather events, towards a more holistic definition of vulnerability and a more definite interpretation of proportionality.<sup>32</sup> Giving full consideration to actual

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*Millstones? Human Rights Priorities for the Post-2015 Development Agenda*, 15 *YALE HUM. RTS. & DEV. L.J.* 55 (2012).

27. United Nations Framework Convention on Climate Change, Conference of the Parties, 19th sess., Warsaw, Pol., Nov. 11–23, 2013, *Further Advancing the Durban Platform*, pmbi., ¶ 2, U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014) (In 2013, at the Warsaw Climate Change Conference, the parties to the Convention decided to intensify domestic preparation by preparing clear and transparent plans by the first quarter of 2015, to do more technical work and to engage Ministers more frequently. The COP reiterated that the Ad Hoc Working Group on the Durban Platform for Enhanced Action “shall be guided by the principles of the Convention,” and “decide[d], in the context of its determination to adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties at its twenty-first session (December 2015) and for it to come into effect and be implemented from 2020.”) [hereinafter *Further Advancing the Durban Platform*].

28. Thorp, *supra* note 23, at 24.

29. *Id.* at 23.

30. *Id.*

31. UNFCCC, *supra* note 9, art. 3, ¶ 2.

32. As an alternative response to protecting vulnerable migrants by legitimizing normative process, Alexander Betts suggests protecting vulnerable irregular migrants through “soft law” (but then in concluding he seems to interpret “soft

or potential vulnerable migrants or actual or potentially displaced people, or those people who would have to bear a disproportionate or abnormal burden, alters the discourse of the debate. This interpretation may flag the benefit of weighing proportional responses against respective capabilities. “Respective capabilities” then requires clarity to encapsulate factors such as the willingness of parties to the UNFCCC to protect humankind, including their own citizens, and legal ability to pay for recovery.

Solidarity may facilitate giving full consideration to the specific needs and special circumstances of developing countries, especially those that are particularly vulnerable to the adverse effects of climate change, and of others, especially developing countries, that would have to bear a disproportionate or abnormal burden under existing climate, development, and disaster risk frameworks. In this sense, legitimizing “first principles” unites fundamental norms and facilitates tailoring specificities for consequential normative interactivity.

Highlighting how climate-related disasters affect the poor remains important. Advocacy has its role. There is a need to strengthen

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law” as normative guidelines, which would be consistent with the UNFCCC). See Alexander Betts, *Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants*, 22 INT’L J. REFUGEE L. 209, 235 (2010). On vulnerability and climate change, see also Xiangbai He, *Integrating Climate Change Factors within China’s Environmental Impact Assessment Legislation: New Challenges and Developments*, 9 L. ENV’T & DEV. J. 50, 60 (2013); see also Elizabeth Malone & Antoinette Brenkert, *Vulnerability, Sensitivity and Coping/Adapting Capacity Worldwide*, in DISTRIBUTIONAL IMPACTS OF CLIMATE CHANGE AND DISASTERS: CONCEPTS AND CASES 8 (Matthias Ruth & María E. Ibarrarán eds., 2009). Hans-Martin Füssel’s independent policy analysis refers to a double inequity between responsibility and capability on the one hand and vulnerability on the other, which this Article suggests is consistent with the UNFCCC’s preparatory work leading to a distinction between Article 3, paragraph 1 of the UNFCCC and Article 3, paragraph 2 of the UNFCCC. See Hans-Martin Füssel, *How Inequitable Is the Global Distribution of Responsibility, Capability, and Vulnerability to Climate Change: A Comprehensive Indicator-Based Assessment*, 20 GLOBAL ENVTL. CHANGE 597, 599 (2010). Although the Stern Review was not analyzed or framed in consideration of the UNFCCC’s treaty language, Stern also seemed to struggle with this finding of a “double inequity.” See NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* 29 (2007).

community resilience on disaster risk reduction,<sup>33</sup> development, and climate change by improving dialog between public and private sectors, civil society organizations, and climate constituencies.<sup>34</sup> However, the post-2015 agreements should go beyond simply talking about a new order. They “ought to” embody effective instruments to realize fundamental legal principles and consequential norms. A cohesive approach to the insurability of disaster risk is an example.

This introductory section presented the background and rationale for normative cohesion. It laid down a challenge to work towards legitimizing and realizing a normatively coherent principled approach, which is just as essential for outcome responsibility as it is for input responsibility. “Conduct” may condition best endeavor. The “result” of the endeavor may condition legal outcome. The next section examines appropriate inputs to developing a cohesive approach. It does this by assessing potential mechanisms to deal with loss and damage arising from migration due to “natural” climate-related disasters.

## II. AN OVERVIEW OF RELEVANT ENDEAVORS

For the purposes of analysis rather than application, which requires a systematic account of how norms interact, this section presents a more or less static overview of relevant endeavors. It assesses the Nansen Initiative, the Hyogo Framework for Action 2, the post-2015 Development Agenda, and progress on the post-2015 Climate Agreement. It provides a preliminary examination about how these endeavors may inform the launch of a unified legal process; and how that process may systematically materialize and give effect to legal norms that govern interconnection at the normative nexus between

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33. Lia Helena Monteiro de Lima Demange, *The Principle of Resilience*, 30 *PACE ENVTL. L. REV.* 695, 695 (2013).

34. Deepak Nayyar, *The Millennium Development Goals beyond 2015: Old Frameworks and New Constructs*, 14 *J. HUM. DEV. & CAPABILITIES* 371 (2013); Gemma Burford et al., *Bringing the “Missing Pillar” into Sustainable Development Goals: Towards Intersubjective Values-Based Indicators*, 5 *SUSTAINABILITY* 3035 (2013); R. Archana & Sitanshu Sekhar Kar, *Are Sustainable Development Goals a Replacement for the Millennium Development Goals Post-2015?* 26 *NAT’L MED. J. INDIA* 59 (2013); Andy Sumner & Meera Tiwari, *Global Poverty Reduction to 2015 and Beyond*, 2 *GLOBAL POL’Y* 138 (2010).

climate, development and disaster law. It concludes by asking whether negotiating parties may benefit from mobilizing a unified first principles approach to develop outcomes with legal force, which may include both outcomes of “conduct” and “result” as consequences of a legal “ought.”

#### A. *The Nansen Initiative*

The governments of Switzerland and Norway launched the Nansen Initiative on Disaster-Induced Cross-Border Displacement in October 2012.<sup>35</sup> The Nansen Initiative is a state-led, bottom-up consultative process,<sup>36</sup> which intends to reach consensus on the development of a protection agenda to address the needs of people displaced across international borders by natural disasters, including the effects of climate change. The:

[G]lobal protection agenda” is expected to consist of three core pillars: (1) international cooperation and solidarity; (2) standards for the treatment of people displaced across borders; and (3) operational responses.<sup>37</sup> The non-binding Global Protection Agenda that may result from the consultative process “is meant to serve as a framework for further normative, institutional and operational development at different levels.”<sup>38</sup>

As such, the Nansen Initiative could have a role to play in building consensus on *first principles* and consequential norms regarding the protection of persons displaced across borders in the event of natural disasters.

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35. *About Us*, THE NANSEN INITIATIVE, <http://www.nanseninitiative.org> (last visited Apr. 29, 2014).

36. Nansen Initiative Secretariat, *Towards a Protection Agenda for Disaster-Induced Cross-Border Displacement*, NANSEN INITIATIVE INFO. NOTE, Apr. 25 2013, [http://www.nanseninitiative.org/sites/default/files/Nansen%20Initiative%20Information%20Note%2025.4.2013\\_2.pdf](http://www.nanseninitiative.org/sites/default/files/Nansen%20Initiative%20Information%20Note%2025.4.2013_2.pdf).

37. *FAQs*, THE NANSEN INITIATIVE, <http://www.nanseninitiative.org/faqs> (last visited Apr. 29, 2014).

38. Nansen Initiative Secretariat, *supra* note 36.

There is potential for sub-regional consultations conducted throughout 2013, and continuing into 2014, to feed into the 2015 agreements and contribute to future action at local, regional, and international levels.<sup>39</sup> Sub-regional consultations are focusing on the various phases of displacement: preparedness prior to displacement, protection and assistance during displacement, and recovery. The first consultation (The Pacific Consultation: Human Mobility, Natural Disasters and Climate Change in the Pacific) was held in Rarotonga, Cook Islands, May 21 through May 24, 2013.<sup>40</sup> Some Pacific leaders voiced the belief during the consultation that the time had arrived to prepare for future population movements so that people can move with dignity.<sup>41</sup>

While the Nansen Initiative places a substantive focus on disaster-induced cross-border displacement, the initiative also connects to other systems of law. The UNFCCC is particularly relevant. The UNFCCC focuses on a respective capability to protect humankind rather than a remote historical event per se. Operationalizing respective capabilities into outcome obligations should be a pertinent part of developing ex-ante and ex-post provisions related to both sudden-onset disasters and slow-onset disasters. Concerning the latter, the question about when the threat of disaster is sufficient to provide for anticipatory movement as a protection response requires attention. Another legal challenge will be to negotiate not only the spatial specificity of consequential legal norms but also temporal specificity to ensure that people displaced due to slow-onset disasters receive timely protection. A test that balances necessity and proportionality may help in this regard.

### *B. Hyogo Framework for Action*

In January 2005, 168 governments adopted the voluntary *Hyogo Framework for Action (HFA1) 2005–2015: Building the Resilience of*

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39. *Consultations*, THE NANSEN INITIATIVE, <http://www.nanseninitiative.org/consultations> (last visited Apr. 29, 2014).

40. *Id.*

41. Nansen Initiative Secretariat, *Human Mobility, Natural Disasters and Climate Change in the Pacific* (2013), PACIFIC CONSULTATION BACKGROUND PAPER, [http://www.nanseninitiative.org/sites/default/files/Background%20Paper%20Pacific%20Consultation\\_0.pdf](http://www.nanseninitiative.org/sites/default/files/Background%20Paper%20Pacific%20Consultation_0.pdf).

*Nations and Communities to Disasters*, at the second World Conference on Disaster Reduction (A/RES/60/195).<sup>42</sup> The Hyogo Framework promotes the International Strategy for Disaster Reduction (ISDR). It also provides for a set of agreed principles and priorities to strengthen disaster resilience. Pursuant to General Assembly Resolution 66/199, the UNISDR is facilitating the development of a post-2015 framework for disaster risk reduction, a Hyogo 2 or HFA2 initiative.<sup>43</sup>

In examining how HFA1 has fared so far, Jason Enia refers to its “spotty record” and a subsidiarity mismatch in achieving all that the Hyogo Framework set out to achieve.<sup>44</sup> In part, the underlying incentives associated with cooperation and coordination explains these findings. Marcus C. Oxley takes a similar position: “The main shortcomings of the HFA lies in the challenge of converting national policy into local action, together with an inability to address the proximate and underlying causes of vulnerability and exposure.”<sup>45</sup> Oxley suggests determining whether the existing framework is fit for purpose and whether strategic goals, objectives, and priority actions are being implemented effectively.<sup>46</sup> “Accordingly, a people-centered post-Hyogo DRM (Disaster Risk Management) framework should be framed around the principles of community resilience, informed by an understanding of how vulnerable people respond, recover and adapt to extreme shocks and stresses of natural and human-derived origins.”<sup>47</sup>

Principles of community resilience are not necessarily agreed *first principles*. Insofar that they may not have entered the legal system, residual principles may be ethical principles in need of transposition. This is not so much an indicator of a failure of HFA1, but perhaps more so that not all appropriate principles have been brought into the

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42. *Hyogo Framework for Action*, *supra* note 25.

43. U.N. OFFICE FOR DISASTER RISK REDUCTION, *supra* note 25.

44. Jason Enia, *The Spotty Record of the Hyogo Framework for Action: Understanding the Incentives of Natural Disaster Politics and Policy Making*, 50 SOC. SCI. J. 213 (2013).

45. M. C. Oxley, *A “People-Centred Principles-Based” Post-Hyogo Framework to Strengthen the Resilience of Nations and Communities*, INT’L J. DISASTER RISK REDUCTION, June 2013, at 1, 2 (2013).

46. *Id.*

47. *Id.* at 8.

legal system. Negotiating a post-2015 development framework and a post-2015 climate framework may benefit from reviewing existing recommendations rather than starting entirely anew. HFA reviews frequently mention the need for stronger procedural equity, but the distinction between procedural and substantive equity is often unclear. Procedural equity may have a substantive meaning in the sense of objective equity, i.e., a guaranteed informational or accountability measure. The legal norm will also have a subjective meaning, which is a type of “behavioral equity” that gives effect to those guarantees. There is also room for greater emphasis on ex-ante measures, including education and raising public awareness to strengthen prevention and preparedness to disasters, especially for the most vulnerable. An emphasis on subsidiarity and strengthening the resilience of local communities features in virtually all reviews. The UNFCCC already provides a facilitative framework for giving these principles legal force. This idea of a legal system of networked legal norms having a facilitative function rather than being confined to institutional or coercive process is important for reaching normative consensus.

### *C. Post-Millennium Development*

In adopting the United Nations Millennium Declaration in 2000, the U.N. General Assembly recognized that:

[I]n addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world’s people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.<sup>48</sup>

The General Assembly declared that it “consider[s] certain fundamental values to be essential to international relations in the twenty-first century.”<sup>49</sup> Freedom, equality, solidarity, tolerance,

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48. United Nations Millennium Declaration, G.A. Res 55/2, ¶ 2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

49. *Id.* ¶ 6.



respect for nature, and shared responsibility are fundamental values.<sup>50</sup> Adopted by 147 Heads of State and Government and other world leaders meeting at the U.N. Headquarters in September 2000, the Millennium Declaration sets goals in the areas of: (i) peace, security, and disarmament; (ii) development; (iii) protecting the environment; (iv) human rights, democracy, and good governance; (v) protecting the vulnerable; (vi) meeting the special needs of Africa; and (vii) strengthening the United Nations.<sup>51</sup> Work is required to determine how these values and goals interact with a law of obligations and how they ought to interact.

The proposed endeavor elicits at least three other interrelated questions. First, how should society's agent negotiators develop a legal process that will facilitate unified outcome responsibility? Second, how will that process balance "shared responsibility" to find a just equilibrium between (a) preference values and goals; and (b) compensatory and distributive opportunity cost? Third, what mechanisms should be in place to vet whether such endeavors get closer to an optimal efficiency frontier? In other words, how does law as a normative facilitative process attain a successful outcome, one of legal justice?

In its normative response, the Millennium Declaration rooted in the U.N. Charter enshrined a quest for human dignity, human security, and collective human rights. Communities around the world have made significant progress to tackle poverty and advance human development since the adoption of the Millennium Development Goals (MDGs). U.N. Secretary-General Ban Ki-moon's 2013 annual report on the United Nations' development agenda entitled *A Life of Dignity for All: Accelerating Progress towards the MDGs and Advancing the UN Development Agenda beyond 2015* sets out some of those achievements; it also stresses the need for a new vision and

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50. *Id.*

51. Laura Horn, *Rio+20 United Nations Conference on Sustainable Development: Is This the Future We Want?*, 9 *MACQUARIE J. INT'L & COMP. ENVTL. L.* 18, 39 (2013) ("In *The Future We Want*, national governments agreed to remain committed to the achievement of the Millennium Development Goals and appreciated that the development of a new set of goals could be useful for consistent action on sustainable development.").

responsive framework for the post-2015 era.<sup>52</sup> “In 2013, the Report of High-Level Panel of Eminent Persons on the post-2015 Development Agenda suggests that new goals should build upon the Millennium Development Goals so that there is an end to poverty and making sustainable development part of the development agenda.”<sup>53</sup>

Successes have occurred in several areas (“[A]t the global level, poverty and hunger have been reduced significantly. In developing regions, the proportion of people living on less than \$1.25 a day fell by more than half, from [forty-seven percent] in 1990 to [twenty-two percent] in 2010, with the majority living in rural areas.”)<sup>54</sup> However, the United Nations’ annual report notes a significant risk in achieving Goal 7 on environmental sustainability due to the “profound and urgent challenges posed by climate change.”<sup>55</sup> “Carbon dioxide emissions are more than [forty-six percent] higher than in 1990. The atmospheric concentration of carbon dioxide has exceeded 400 parts per million, a level not seen in millions of years and threatening the existence of the planet.”<sup>56</sup> To bring the post-2015 development agenda to life, the report calls for bolder transformative and mutually reinforcing actions that are applicable to all. “Sustainable development—enabled by the integration of economic growth, social justice and environmental stewardship—must become our global guiding principle and operational standard.”<sup>57</sup>

Addressing climate change through a renewed global partnership is likely to be an essential action for attaining the essence of these goals.<sup>58</sup> Reaching a successful outcome with legal force by the end of 2015, as decided by the UNFCCC COP in Durban, South Africa in

52. U.N. Secretary-General, *A Life of Dignity for All: Accelerating Progress towards the Millennium Development Goals and Advancing the United Nations Development Agenda beyond 2015: Rep. of the Secretary-General*, U.N. Doc. A/68/202 (July 26, 2013) [hereinafter *A Life of Dignity for All*].

53. HIGH-LEVEL PANEL OF EMINENT PERSONS ON THE POST-2015 DEVELOPMENT AGENDA, *A NEW GLOBAL PARTNERSHIP: ERADICATE POVERTY AND TRANSFORM ECONOMIES THROUGH SUSTAINABLE DEVELOPMENT* (2013), <http://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=893&menu=35>.

54. *A Life of Dignity for All*, *supra* note 52, ¶ 23.

55. *Id.* ¶ 30.

56. *Id.*

57. *Id.* ¶ 9.

58. *Id.* ¶ 96.

2011, is critical to achieving agreed goals but it requires a “greatly stepped-up response in keeping with the principle of common but differentiated responsibilities and respective capabilities.”<sup>59</sup> It also requires a broader comprehension of an agreed process applicable to all.

Concerning the MDG, akin to the Hyogo Framework for Action, there seems to be a top priority to fulfill existing commitments. Building on effective partnerships between the public and private sectors and civil society as well as using mechanisms like the MDG Acceleration Framework (MAF) may help to tackle those goals that are most off track. Environmental sustainability and governing the adverse effects of climate change (poverty and displacement) are some of the most pressing issues. The future challenge is not only about bilateral choice and preference; it urges constitutional transformation and a normative coherent process *applicable to all*.

#### D. United Nations Framework on Climate Change

At the time of writing, the UNFCCC is the principal international legal instrument for protecting humankind from the adverse effects of climate change. While the substantive text of the Convention does not directly mention displacement and migration as possible consequences of climate change, paragraph 14(f) of the Cancun Outcome Agreement, adopted by the Conference of the Parties (COP) 16, recognizes climate change will trigger human mobility.<sup>60</sup> The UNFCCC COP invited enhanced action (conduct outcomes) on “measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and

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59. *Id.* ¶ 88.

60. In encouraging the “Parties to enhance action on implementing adaptation actions,” the Cancun Adaptation Framework invites the Parties to undertake “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation.” United Nations Framework Convention on Climate Change, Conference of the Parties, 16th Sess., Cancun, Mex., Nov. 29–Dec. 10, 2010, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*, ¶ 14(f), U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

international levels . . . .”<sup>61</sup> In adopting the Cancun Agreements at COP 16, the UNFCCC Conference of the Parties demonstrated a degree of initiative that may lead to acknowledge an attribution of liability for conduct, and not only result, in the future.

The finding has important ramifications for work on loss and damage. The Subsidiary Body for Implementation (SBI) is one of two permanent subsidiary bodies to the UNFCCC that supports the work of the COP through the assessment and review of the effective implementation of the Convention. Human mobility, displacement, and migration are also recognized within the SBI’s Work Programme on Loss and Damage. The SBI recognizes the need to understand issues, such as “social resilience, food security, livelihoods and human mobility and migration and displacement, to enable development of comprehensive approaches to address loss and damage associated with the adverse effects of climate change.”<sup>62</sup> “Understanding issues” is not necessarily an obligation of result.

The UNFCCC COP meeting in Durban in 2011:

[D]ecide[d] to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties . . . [2015 agreement] through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action . . . [ADP].<sup>63</sup>

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61. *Id.*; see also Population Division, Ninth Coordination Meeting on International Migration, *Climate and Environmental Change, Human Migration and Displacement: Recent Policy Developments and Research Gaps*, U.N. Univ. Inst. for Env’t & Human Sec., U.N. Doc. UN/POP/MIG-9CM/2011/10 (Feb. 12, 2011) (by Koko Warner).

62. United Nations Framework Convention on Climate Change, Subsidiary Body for Implementation, 37th Sess., Doha, Qatar, Nov. 26–Dec. 1, 2012, *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*, U.N. Doc. FCCC/SBI/2012/L.44 (Dec. 1, 2012).

63. United Nations Framework Convention on Climate Change, Conference of the Parties, 17th Sess., Durban, S. Afr., Nov. 28–Dec. 11, 2011, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, ¶ 1, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012) (Decision 1/CP.17, ¶ 2).

The UNFCCC COP also “decide[d] that the [ADP] shall complete its work as early as possible but no later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020.”<sup>64</sup> There is no indication in this wording that the UNFCCC COP decided to impose a specific outcome result on national legislators of developed countries. The decision was to launch a process applicable to all before adopting a legal agreement (a certain endeavor was to precede the result). A normative facilitative approach should precede an institutional or coercive one.

At UNFCCC COP 18 in Doha, 2012, the parties reinforced their commitment to the Durban Platform. They decided to “advance the understanding of and expertise on loss and damage;” but they also decided to establish “institutional arrangements, such as an international mechanism to address loss and damage” at UNFCCC COP 19.<sup>65</sup> By virtue of Doha Decision 3/CP.18, the parties agreed to strengthen dialog, coordination, coherence, and synergies among relevant stakeholders.<sup>66</sup> Decision 3/CP.18 also highlighted additional areas, including the need to enhance understanding about addressing loss and damage associated with climate harm, including slow-onset impacts;<sup>67</sup> and enhancing financial support, technology, and capacity building.<sup>68</sup> Of foremost interest to migration and human mobility was that the UNFCCC COP, by virtue of decision 3/CP18, “acknowledge[d] the further work to advance the understanding of and expertise on loss and damage, which includes, *inter alia*, the following: (a) enhancing the understanding of: (vi) how impacts of

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64. *Id.* (Decision 1/CP.17, ¶ 4).

65. U.N. Framework Convention on Climate Change, Conference of the Parties, 18th Sess., Doha, Qatar, Nov. 26–Dec. 8, 2012, *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*, ¶¶ 7, 9, U.N. Doc. FCCC/CP/2012/8/Add.1 (Feb. 28, 2013).

66. *Id.* ¶ 5(b).

67. *Id.* ¶ 5(a).

68. *Id.* ¶ 5(c).

climate change are affecting patterns of migration, displacement and human mobility.”<sup>69</sup>

It was not until UNFCCC COP 19, held in Warsaw, Poland in November 2013 that it was:

[F]urther decide[d] that the Warsaw international mechanism shall fulfill the role under the Convention of promoting the implementation of approaches to address loss and damage associated with the adverse effects of climate change, pursuant to decision 3/CP.18, in a comprehensive, integrated and coherent manner by undertaking, *inter alia*, the following functions: (a) enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow-onset impacts, by facilitating and promoting: (i) action to address gaps in the understanding of and expertise in approaches to address loss and damage associated with the adverse effects of climate change, including, *inter alia*, the areas outlined in decision 3/CP.18, paragraph 7(a) . . . .<sup>70</sup>

which, thereby, includes “patterns of migration, displacement and human mobility.”<sup>71</sup>

### *E. Summing Up*

Despite strong interdependencies, the preceding survey shows that governments often manage disaster risk reduction, development and climate change in silos. Whereas the introduction showed a dynamic relationship between disaster risk reduction, sustainable development, and climate change, which ought to be taken into consideration in negotiating post-2015 agreements. Each work stream requires careful consideration of normative interaction at both static and dynamic levels. The approach to constructing a post-2015 process for climate change should also build on the experience and

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69. *Id.* ¶ 7(a)(vi).

70. *Further Advancing the Durban Platform*, *supra* note 27, ¶ 5.

71. *Id.*

principles enshrined in other legal systems, namely systems for disaster risk reduction and development. This is one way to rationalize funding across systems. It may not be necessary for a constant repetition of the approach to system design if international law reorients by reaching consensus on common principles and consequential obligations of outcome.

Oxfam concurred in 2013 that HFA2 should not be considered in isolation from the post-2015 Development Agenda.<sup>72</sup> According to Oxfam, an integrated process offers a key way of addressing the lack of mainstreaming disaster risk reduction within other sectors.<sup>73</sup> Henry Shue points out that “the worry now is, not damage done in the past, but damage to be done in the future unless currently unquestioned policies change.”<sup>74</sup> These issues are important but a fundamental question remains. What are these unquestioned policies? One of them may concern the absence of coherency in negotiating arenas.

Rather than systemic institutional and coercive responses to bring unwilling stakeholders to the table to negotiate more than they are capable of agreeing to, this Article argues for a tangible effort to integrate framework commitments for disaster risk reduction, development, and climate change policies at all levels. The effort requires a degree of order: order facilitates unity. An a priori *first principles* approach may help to advance this process and at the same time address challenging questions like those related to “vulnerable migrants.”

### III. USING A *FIRST PRINCIPLES* APPROACH TO ORIENT TOWARDS RESULTS

The international community has framed a certain number of shared values as goals. The Post-Hyogo Framework, a successor agreement to the MDGs, and a new climate agreement are all expected in 2015. At the same time, there is an unparalleled opportunity to go beyond today’s ad-hoc processes and “unquestioned policies” to deliver robust instruments for

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72. OXFAM, THE POST HYOGO FRAMEWORK: WHAT’S NEXT FOR DISASTER RISK REDUCTION? 3 (2013).

73. *Id.* at 4.

74. Henry Shue, *Climate Hope: Implementing the Exit Strategy*, 13 CHI. J. INT’L L. 381, 401 (2013).

marginalized people all around the world. Perhaps a main weakness of the Hyogo framework is that it has not been owned by climate justice movements or by the development sector. A similar weakness may relate to climate funding insofar that there is insufficient integration with development funding. Working together to develop cohesive post-2015 agreements that will reduce loss and damage through enhanced result-oriented action on both mitigation and adaptation may also be of merit.

Existing umbrella treaties already provide a general framework of *first principles* and consequential norms. Any new agreement ought to leverage these legal principles to derive more specific rules and outcome obligations that reflect changing dynamics. To do so there may be a need to address the dichotomy in planning and policy between negotiating post-2015 accords for disaster risk reduction, Millennium Development Goals, and climate change. Rather than the more radical ideas of going it alone,<sup>75</sup> or merging the three instruments, or considering that the vagaries of informal law or “non-law” suffice, best endeavors should be made to ensure that related and overlapping provisions are coherent and consistent. Agreeing *first principles* that operate at the nexus of these three arenas opens the door to specifying consequential norms as outcome norms.

By a *first principles* approach, I mean a type of process methodology or doctrine that underscores an approach to constitutionalize international climate law and to “realize” that it is *applicable to all parties*. For our purposes, a constitution refers to the arrangement of *elements* that constitute the normative framework of international climate law as a law of the global commons. A *first principles* approach facilitates specification and application of transcendental and consequential legal norms within that system. “Constitutionalism” of the analytical framework that informs this Article comprises a normative topology that repositions “transcendental” legal principles as the essence of international climate law. It then proceeds to derive outcome obligations (legal

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75. Elaine Unterhalter & Andrew R. Dorward, *New MDGs, Development Concepts, Principles and Challenges in a Post-2015 World*, 113 SOC. INDICATORS RES. 609 (2013) (putting forward five provisional principles for post-2015 goals and indicators: holism, equity, sustainability, ownership, and global obligation).



rules and standards) that set the boundaries and parameters needed to protect present and future generations of humankind.

There is obviously not sufficient space in this Article to give precision to the proposed kaleidoscopic normative theory of the global commons.<sup>76</sup> Notwithstanding, assume equity, solidarity, precaution, sustainability, and the good neighbor principle emerge as potential *first principles* of the UNFCCC; and assume each *first principle* has certain derivative norms. Assume also that a 2015 agreement should distribute these derivative norms (legal principles, rules, and standards) inter alia in accordance with common but differentiated responsibilities and respective capabilities. A window of opportunity now opens for other post-2015 agreements to preserve the integrity of *first principles*. Thus, by extension, HFA2 should preserve the *first principles* of climate change and their auxiliary principles, which may lead to objective and subjective applications of equity (substantive and procedural fairness), solidarity (compensation and distributive fairness), precaution (mitigation and adaptation), sustainability (appropriate measures and integration at the local level), and good neighbor (no harm and cooperation).

Going to the next level, one relevant example concerns the principle of “procedural fairness.” For our purposes, the subjective dimension concerns a certain type of behavioral equity, perhaps embodied in giving effect to substantive rights to information, participation, and access to justice. The right to information may extend to accountability and reporting, perhaps through an integrated index.

A second example concerns the principle of solidarity, which underscores the need for HFA2 to reduce risk for the most vulnerable. How vulnerable a population is to the deaths, economic losses, and social upheaval of a disaster will depend, according to the Hyogo philosophy, on the population’s resilience: namely, in the words of the framework, “its capacity to adapt, by resisting or changing in order to reach and maintain an acceptable level of functioning and structure.” Responsibility for capacity to adapt ought to be placed on all parties. It is no longer acceptable for those developing countries rich in resources and mineral wealth to ignore the well being of their citizens or to rely on the international

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76. Thorp, *supra* note 23.

community to intervene when they receive preempted notice of pending harm. It is equally inappropriate for developed countries to delay justice to such an extent that their armies must intervene to save flood victims from weather-related, i.e., climate-related disasters. Post-2015 agreements ought to be *applicable to all* according to their common but differentiated responsibilities.

A third example concerns precaution. As to prudential risk management, policy development should not be limited to the receiving country or destination country due to demand driven aid, which frequently suffers from fragmentation, poor coordination, and may even be funding the same projects several times over (three or four times by national donors, again by regional donors, and again at an international level by various international organizations and philanthropists). Further work is required to develop coherent result-oriented outcome obligations. An outstanding requirement remains for carefully thought through plans for realizing adaptation at both destination and source ends.

The principle of integration, as an auxiliary of sustainability, indicates that the HFA2 ought to consider the dynamics of mobilization at all levels (national, regional, and international). As to cooperation, a high-level panel could ensure policy coherence and consistency by adopting a *first principles* approach in all its works and consultations. The panel should have regard to concurrent consultations on the Millennium Development Goals, the post-2015 Framework for Disaster Risk Reduction, and the post-2015 Climate Agreement. A common language would help to facilitate a common accord.

#### IV. CONCLUSION

The main point of this Article is that before we reach for new legal mechanisms or policy interventions, we should first assess how far existing policy may apply or be adjusted to meet the challenges ahead. Unlike a bilateral or international relation, a constitutional relationship within the global commons should be *applicable to all* people. Tailored constitutional commitments may specify the legal outcome of special bilateral relationships or plurilateral agreements in accordance with agreed *first principles* and normative consequences of both best endeavor and result. While certain elements of an emerging framework agreement may provide for a

common responsibility, others may differentiate according to respective capabilities. Harmonization pathways between obligations of endeavor and result will exist somewhere along this spectrum of dynamic normative relations.