

**Sinking States**  
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**I. Introduction**

In May 2009 the Sunday *New York Times Magazine* published a story about the efforts of the president of the Maldives to deal with the threats that climate change represents to his country (Schmidle 2009). These threats are serious. Like other small island states around the world, the Maldives may disappear due to climate change-induced sea level rise.<sup>2</sup> Facing the possible submergence of most of the country's land mass, the president is not only trying to encourage leading greenhouse gas emitters such as the United States to reduce their emissions, but he also is beginning to plan for the possibility that the residents of his country may have to relocate. The magazine reported

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<sup>1</sup> I thank Ira Klein, J.D. 2010, NYU School of Law, for bringing to my attention the statements of the president of the Maldives about re-settling the citizens of his country, and for triggering my interest in the rights of the citizens of the Maldives and other vulnerable small island states. Thank you to Stephen Holmes for putting this essay in context for me; Benedict Kingsbury for suggesting I revisit debates from the period of western colonization; Dennis Klimchuk for conversations about Grotius and Pufendorf; Tally Kritzman-Amir for sharing her J.S.D. thesis and her comments; Liam Murphy for many enlightening conversations on possible rationales for the right and the duty to rescue; Peter Schuck for helping me to better understand refugee law and his reform proposals; and Richard Stewart for pushing me on the scope of the right and its institutional dimensions. Mark LeBel provided superb research assistance, including the preparation of the tables on the allocation of responsibility for 300,000 persons. Earlier drafts of this essay were presented at the Environmental and Land Use Research Workshop at Georgetown Law School; the NYU Faculty Workshop; and the Lincoln Institute's conference on the Evolution of Property Rights Related to Land and Natural Resources, where Richard Barnes provided comments.

<sup>2</sup> Schmidle (2009) states that "The Maldives is an archipelago of 1,190 islands in the Indian Ocean, with an average elevation of four feet. Even a slight rise in global sea levels, which many scientists predict will occur by the end of the century, could submerge most of the Maldives." Docherty and Giannini (2009, 356) explain that "The Maldives, for example, could see portions of its capital flooded by 2025. Other states, including Kiribati, Tuvalu, the Marshall Islands, and several Caribbean islands, are also considered threatened." According to Guler (2009), the president of Kiribati, Anote Tong, "told the UN he expected his country to become uninhabitable in 50 years, arguing: 'Our very lives are at stake.'" Bierman and Boas (2009, 356) note that "If sea levels rise by 1 meter, storm surges could make island nations such as the Maldives, the Marshall Islands, Kiribati, or Tuvalu largely uninhabitable." MacFarquhar (2009) says that "locals believe" that "the Carteret Islands northeast of the Papua New Guinea mainland" "could well be uninhabitable by 2015."

that President Mohamed Nasheed has “proposed moving all 300,000 Maldivians to safer territory,” identified “India, Sri Lanka and Australia as possible destinations and described a plan that would use tourism revenues from the present to establish a sovereign wealth fund with which he could buy a new country—or at least part of one—in the future” (Schmidle 2009). At least one and possibly two other small island states are also seeking ways to resettle their residents because they similarly fear losing their territory to sea level rise.<sup>3</sup>

Imagine that instead of seeking to buy land to resettle residents of the Maldives, the president claimed that his country’s citizens have a right—for which they would not have to pay—to resettle on the land of one or more existing countries. This essay considers whether the citizens of the Maldives and other states that may be submerged because of climate change-induced sea level rise should have a legal right to resettle elsewhere.

At first glance, a claim by the Maldives or any other island state threatened by climate change of a right to resettle sounds highly fanciful. Even the president of the Maldives has only announced plans to buy land for his citizens in other countries, and he has not suggested that the citizens of the Maldives have any right to resettle in the territory of another country. But the claim may not be as far-fetched as it initially

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<sup>3</sup> “Three months after [President Nasheed’s] ... announcement, the president of Kiribati, an archipelagic nation in the Pacific, confessed that he, too, was searching for ways to relocate his countrymen” (Schmidle 2009, 2). “Tuvalu, an island state in the western Pacific, is expected to become uninhabitable by 2050” and it “has considered the option of buying an island or piece of land from another country, but possible sellers, such as New Zealand, have not been overly positive” (Kolmannskog 2008, 27). See also Loughry and McAdam 2008.

Building floating is another option sinking states are considering. In March 2010, the government of the Maldives and the Netherlands’ Dutch Docklands signed an agreement under which the Dutch company would develop “floating facilities for the islands, including a convention center and golf courses.” The Maldives indicated that it would try to develop “floating housing units” with the company in the future (President’s Office 2010).

appears. Climate change is already affecting coastlines in the Maldives and elsewhere. There are already predictions that climate change will require millions of persons to relocate as warming continues, which is expected regardless of whether the major greenhouse gas-emitting countries agree to reduce their emissions in the near future.<sup>4</sup>

Moreover, there are historical precedents for countries claiming the right to establish settlements in another people's or country's territory. Think back to western colonization of North and South America, Asia, and Africa from the late 1400s to the 1800s. These expeditions prompted scholarly debates precisely about whether, and if so under what circumstances, there is a right to establish settlements on another people's or state's land. While there is a widespread perception that the westerners who considered the legitimacy of colonization universally rationalized settlement, this was not the case. In the late eighteenth century in particular well-known scholars criticized western imperialism.<sup>5</sup> The threatened disappearance of the Maldives and other small island states raises once again the question of whether there is a right to resettle in another people's or state's territory, and if so under what circumstances. In a historical irony, the peoples that might seek to claim a right to establish settlements in our time are often the descendants of peoples colonized by the old European powers. The Maldives illustrates the point. The Maldives were a British protected area and then a protectorate from 1796 until they gained independence in 1965, and earlier were under the influence of the Portuguese and the Dutch (Metz 1994). Adding to the irony, the claimants this time

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<sup>4</sup> On the estimates of the number of persons who may be forced to relocate due to climate change, see note 13. On the prospects for continued warming, see IPCC 2007a, 45.

<sup>5</sup> Georg Cavallar explains that "The late eighteenth century produced a row of 'enlightened critics of empire' (Pugden) and colonialism, among them Davenant, Raynal, Diderot, Gibbon, Condorcet and Herder" (2002, 257). See also Muthu (2003, 1).

theoretically might attempt to claim part of the land or territory of their ancestors' colonizers, although as mentioned above President Nasheed seems more interested in resettling closer to home, in India, Sri Lanka, or Australia.

I argue that the citizens of small island states such as the Maldives that are threatened by climate change should have a legal right under international law to resettle in other countries. To be clear, I start from the premise that persons forced to resettle due to climate change are unlikely to have a legal right to resettle elsewhere under existing international law because they are unlikely to be considered refugees under the Convention Relating to the Status of Refugees<sup>6</sup> or to be able to claim the benefits of international human rights law.<sup>7</sup> In addition, I am arguing that the citizens of sinking states qua citizens should have an individual legal right to resettle. I set to the side the fascinating but extremely difficult question of whether sinking states qua states or peoples should have a collective legal right to reconstitute themselves as states or peoples elsewhere. In doing so, I recognize that for small island states threatened by climate change the possibility that their countries may disappear is a highly fraught issue, to

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<sup>6</sup> Under the Refugee Convention, a refugee is defined as a person with a “well-founded fear of being persecuted” on at least one of five delimited grounds that reflect the World War II experience against which the Convention was drafted: “race, religion, nationality, membership of a particular social group or political opinion.” Climate refugees are unlikely to be able to meet the requirement for a fear of persecution on any of the listed grounds. For more comprehensive legal analyses of the obstacles to bringing most climate refugees within the definition of refugee under the Refugee Convention see for example McAdam (2009, 12-14), Docherty and Giannini 2009, 358; Representative of the Secretary General 2008, 5; Guterres 2008, 7; and Office of the United Nations High Commissioner for Refugees et al. 2009, 10.

<sup>7</sup> For example, it is unlikely that climate refugees could rely on the non-refoulement principle, which is included or has been held to be provided in various human rights instruments (the European Convention on Human Rights and Fundamental Freedoms, article 3; International Covenant on Civil and Political Rights, article 7; Convention Against Torture, article 3) (Kolmannskog 2008, 28). The non-refoulement principle is insufficient to meet the needs of most climate refugees because it does not provide for the right to enter and only provides a right not to be returned, not the right to permanently settle (Office of UNHCR 2009, 11; see also Docherty and Giannini 2009, 358, note 50).

which the recognition of an individual right to resettle is at most a second best response. As the Ambassador to the U.N. from Nauru, H. E. Ms. Moses, explained in October 2009, “I think I speak for most Pacific Islanders when I say that I am quite happy where I am and have no desire to leave my island” (Mohrs 2009).

In arguing that the citizens of sinking states should have a legal right to resettle, I start by returning to the scholarly discussions from the “Age of Discovery” about when there is a right to settle areas already belonging to other peoples or states. I argue that these scholarly discussions of what I describe as the right to safe haven<sup>8</sup> provide a basis for thinking about a right to resettle that could be invoked by citizens of sinking states. Since the right to a safe haven was discussed as a right (or a privilege) that displaced foreigners enjoyed against states generally, and not just the states that had displaced them, it is distinct from the often heard argument that the victims of climate change have rights against the countries that have historically emitted large quantities of greenhouse gases as a matter of corrective justice (Farber 2008, 387-403). The right is also more favorable from the point of view of citizens of sinking states than claims rooted in corrective justice because it recognizes claims against many more countries and does not require claimants to prove their current needs were caused by specific countries.<sup>9</sup>

After using the discussions from the “Age of Discovery” to distill a right that the citizens of sinking states might invoke, I turn to several possible rationales for recognizing such a right in the twentieth-first century. I first discuss the option of

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<sup>8</sup> I borrow the phrase “right to safe haven” to describe the right that emerges from the work of Kant and others from Pauline Kleingeld (1998, 76) who uses the term in reference to Kant.

<sup>9</sup> Mathias Risse (2009, 282) also distinguishes his recent effort to craft a right to relocate drawing on Grotius from efforts on behalf of climate victims based on who caused climate change. Posner and Sunstein (2008) discuss the difficulties of invoking corrective justice in the climate change context in general.

grounding the right in a general moral theory that imposes obligations across national borders, such as utilitarianism or a cosmopolitan variant of liberal egalitarianism. Then I explore whether there might be a narrower, independent argument for the right that does not require us to accept a general cosmopolitan moral theory. I suggest that there is such an argument for the right, a rationale rooted in the natural law tradition recently secularized by Mathias Risse (2009) in an article in which he attempts, as I do in this essay, to craft a right to relocate that could be invoked by islands that disappear due to climate change.<sup>10</sup>

Finally, I briefly discuss how a right to safe haven for persons dislocated by climate change might be implemented. In general, the right likely could be implemented similar to international refugee rights, which arguably reflect the concerns animating the right to safe haven articulated during the “Age of Discovery.”<sup>11</sup> For example, as with refugee rights, individuals would be able to claim the right. I depart from international refugee law in a key respect, however. While it does not allocate responsibility for refugees among countries (Schuck 1997, 253), I propose a way of allocating responsibility among countries for individuals claiming the right to safe haven due to climate change.

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<sup>10</sup> I have benefited considerably from Risse’s paper, which was brought to my attention by my colleague Benedict Kingsbury after I started thinking about the rights of the citizens of sinking states to resettle. I also have benefited from an unpublished J.S.D thesis by Tally Kritzman-Amir (2008), which Kritzman-Amir sent me after learning of my research. The thesis argues that a category of socio-economic migrants warrants legal protection. To motivate her analysis, Kritzman-Amir uses the hypothetical example of the island State of Elbonia, which is about to become inhabitable because of rising water levels.

There also is a helpful emerging policy literature proposing mechanisms to assist persons dislocated by climate change. See, e.g., Byravan and Rajan 2006; Byravan and Rajan 2010; Docherty and Giannini 2009; Biermann and Boas 2008; Hodgkinson and Burton 2010.

<sup>11</sup> For the idea that modern refugee rights reflect Kant’s concept of the right to safe haven, see, e.g., Kleingeld 1998, 76; Benhabib 2004, 35.

In suggesting that the right to safe haven could assist claims by citizens of states threatened by climate change to resettle in other countries, this essay hints that what is sauce for the goose could be sauce for the descendants of the gander. Centuries after the end of the “Age of Discovery,” the descendants of peoples who were colonized may have grounds for claiming rights elaborated in the west during the era of imperialism.

## **II. Sea level rise**

To motivate the current discussion, it is helpful to have a sense of existing scientific thinking about the potential effects of climate change-induced sea level rise.

Sea level rise is one of the most frequently mentioned signs that the climate is warming (IPCC 2007a, 30). According to the 2007 Synthesis Report of the Intergovernmental Panel on Climate Change, “global average sea level rose at an average rate of 1.8 [1.3 to 2.3] mm per year over 1961 to 2003 and at an average rate of about 3.1 [2.4 to 3.8] mm per year from 1993 and 2003,” although the report cautions that it “is unclear” whether this “faster rate for 1993 to 2003 reflects decadal variability or an increase in the longer-term trend” (IPCC 2007a, 30; see also IPCC 2007b, 5). According to the Synthesis Report, “sea level rise would continue for centuries due to the time scales associated with climate processes and feedbacks, even if GHG concentrations were to be stabilized” (IPCC 2007a, 46).

Increases in sea levels are projected to have significant impacts. One recent scientific article on sea level rise describes it as “one of the major socio-economic hazards associated with global warming,” given that “about 200 million liv[e] ... within coastal floodplains, and ... two million square kilometers of land and one trillion dollars worth of assets [lie] ... less than 1 m above current sea

level” (Milne et al. 2009, 471). The Synthesis Report warns that “[b]y the 2080s, many millions more people than today are projected to experience floods every year due to sea level rise. The numbers affected will be largest in the densely populated and low-lying megadeltas of Asia and Africa, while small islands are especially vulnerable” (IPCC 2007a, 48).

It is important to recognize the uncertainties plaguing scientific work about sea level rise. As an initial matter there is considerable uncertainty about “global average sea-level rise,” (Milne et al. 2009, 471) the amount that the seas will rise on average around the world. Complicating estimates is uncertainty about “[f]uture changes in the Greenland and Antarctic ice sheet mass,” which could lead to greater sea level rise, and “uncertainty in the penetration of the heat into the oceans” (IPCC 2007a, 73; see also Milne et al. 2009, 472). Reflecting these sources of uncertainty, the 2007 Synthesis Report “does not assess the likelihood, nor provide a best estimate or an upper bound for sea level rise,” opting instead for “[m]odel-based projections of global average sea level rise at the end of the 21<sup>st</sup> century (2090-2099)” (IPCC 2007a, 45).

If global sea level rise is difficult to estimate, predicting localized changes in sea levels is even more complicated (Milne et al. 2009, 476). Noticeably absent from the Synthesis Report is any prediction that one or more specific small island states will disappear due to sea level rise. As one recent scientific article on sea level rise explained, “[m]any different physical processes contribute to sea-level change ... and none of these produce a spatially uniform signal. Indeed one of the statements that can be made with certainty is that future sea-level change will not be the same everywhere” (Milne et al. 2009, 471). Satellite measurements of changes in sea level rise since the 1990s provide

evidence for this statement. The same scientific article explains that “over more than 14 years .... the average is around 3 mm yr, [but] there are regions showing trends of over 10 mm yr and larger areas (notably the northeastern Pacific) where sea level has fallen over this period” (Milne et al. 2009, 471). Indeed, notwithstanding the dire predictions about the fate of the Maldives, there are scientists who doubt that the Maldives will disappear.<sup>12</sup>

Still, the inability of scientists to predict whether the Maldives or other identifiable small island states will be submerged does not detract from the broader point that the impacts of climate change currently include and will continue to include sea level rise and that increases in sea levels will have an impact on human “[i]ndustry, settlement and society” (IPCC 2007a, 53 Table 5.2). According to one estimate, potentially “tens of millions of people” could be affected by rising sea levels caused by global warming (Representative of the Secretary General 2008, 1). Most of the people who will be required to relocate because of climate change will probably relocate within their home countries, and the same is presumably true of the subset of individuals who will have to move because of rising sea levels caused by climate change.<sup>13</sup> I focus on whether the victims of sea level rise in countries that disappear due to climate change should have a

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<sup>12</sup> Schmidle quotes Paul Kench, a coastal geomorphologist at the University of Auckland, who states that “the notion that the Maldives are going to disappear is a gross overexaggeration” (2009).

<sup>13</sup> Guler explains that “[p]rojections on climate refugees vary widely. According to an UNHCR estimate, climate or environmental refugees totaled roughly 25 million in 1995. Professor Norman Myers of Green College, Oxford University, has put forth other often-cited estimates. By 2010, Professor Myers forecasts the 25 million figure to double to 50 million....By 2050, most observers project climate refugees to swell into the range of 150 to 200 million” (2009, p. #). The Office of the UNHCR states that “The majority of those displaced by the effects of climate change ... remain within the borders of their country of origin. In the foreseeable future, much of the climate change-related displacement is expected to remain internal” (2009, 4).

There is a large degree of uncertainty about the number of persons who may be forced to relocate due to climate change (Biermann and Boas 2008, text accompanying note 3). See also Hulme 2008, 50; Docherty and Giannini 2008, 353-356.

legal right in international law to a safe haven. I do so because the plight of citizens of sinking states starkly raises the obligations of other countries to climate victims since the victims of sea level rise in disappearing states would be unable to relocate within their national borders. Indeed, a recent document from the UN High Commissioner for Refugees describes “the sinking island scenario whereby the inhabitants of island states such as the Maldives, Tuvalu and Vanuatu may eventually be obliged to leave their own country as a result of rising sea levels and the flooding of low-lying areas” as “the potentially most dramatic manifestation of climate change” (Guterres 2008).

### **III. The right to a safe haven in context**

Should the residents of islands that sink due to climate change-induced sea level rise have a legal right to settle in other countries? In answering this question I start by returning to writings on the rights of foreigners from the period of western imperialism. Authored by westerners who took divergent positions on the morality of western imperialism, these writings are centrally concerned with the rights of powerful nations and individuals against weaker parties. By contrast, in drawing on these writings I am attempting to distill a right that would likely be claimed by the weak against the strong.

Western “discovery” of foreign lands from the late 1400s to the 1800s raised the question of when it would be just for citizens of western countries to visit or settle in the foreign lands (Pagden 1987, 81). Hospitality rights were an important rubric under which these issues were considered. Immanuel Kant’s doctrine of cosmopolitan right (or law), which consists solely of hospitality rights, is probably the most well-known discussion today of the rights of foreigners to hospitality from the era of western imperialism

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(Kleingeld 1998, 75).<sup>14</sup> But hospitality rights predate Kant (1724-1804). Duties to provide “travelers with shelter and hospitality” were already recognized in many sources before the late 1400s, including Plato.<sup>15</sup> Indeed, Georg Cavallar (2002, 367) suggests that there is little that is original in Kant’s conception of the content of hospitality rights in light of the work of earlier scholars such as Samuel Pufendorf (1632-94).<sup>16</sup>

The discussions of hospitality rights in Kant and earlier works tend to address different types of situations in which foreigners might present themselves to a state or a people other than their own, without usually clearly distinguishing these situations. I analyze discussions from the “Age of Discovery” of the rights of foreigners and the obligations of states in three types of situations: when foreigners attempt to interact with citizens of other states for trade or non-economic reasons; when foreigners seek to permanently settle in another country, but not because they are imperiled; and when foreigners require a safe haven because they are imperiled, the most relevant of the situations to the victims of warming-induced sea level rise and the situation I address at greatest length.

### **1. Right to interact**

One situation considered during the period of colonization concerned the efforts of foreigners to interact with other countries or their citizens, although not to establish permanent settlements. The visitors might be attempting to initiate trade, or simply to

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<sup>14</sup> For examples of contemporary discussions of Kant’s cosmopolitan right, see, e.g., Kleingeld 1998; Benhabib 2004, 25-48; and Waldron 2000, 236-243.

<sup>15</sup> I am relying on Pufendorf’s enumeration of examples of discussions of duties of hospitality in *On the Law of Nature and Nations*, III.III.9, where the sources Pufendorf lists include “Plato, Laws, Book XII, where he lists the duties owed to strangers.”

<sup>16</sup> See also Cavallar 2002, 206. Cavallar argues that “Kant offers a new justification of hospitality rights,” by “[r]evising the traditional argument from original ownership” (2002, 368).

visit. Some writers, such as the Thomist theologian Francisco de Vitoria (1486-1546) take positions friendly to the western powers, insisting that hospitality rights include “unconditional” rights to travel (or visit) and trade (Cavallar 2002, 157-158, 108; Vitoria 1934, Appendix A, xxxvii; see also Padgen 1987, 86). Pufendorf takes a more moderate and nuanced position that arguably sets the stage for Kant’s position. In contrast to Vitoria, Pufendorf insists that countries have the right to deny admission to foreign travelers (1710, III.III.9) and the right to refuse to trade (III.III.11). But Pufendorf warns that it might be “imprudent” to deny foreigners the right to visit if countries want their citizens to be welcome abroad (III.III.9). He also insists that there is an exception to the right of countries to refuse trade: they cannot refuse to trade in goods that are “absolutely essential to human life” (III.III.11).

Kant maintains that there is “a right to visit” foreign lands but he carefully limits the purpose of this “right of foreign arrivals,” arguing that it “pertains ... only to conditions of the possibility of attempting interaction with the old inhabitants” (1795, 8:358).<sup>17</sup> In other words the right to visit is a right to offer to establish interactions with foreigners—not a right to establish such interactions, let alone to settle or conquer their lands. The larger purpose behind granting foreigners the right to visit is to enable “remote parts of the world [to] ... establish relations peacefully with one another, relations which ultimately become regulated by public laws and can thus finally bring the

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<sup>17</sup> Kant argues in *The Metaphysics of Morals* that all peoples originally stand in .... a community of possible physical *interaction* (*commercium*), that is, of a universal relation of one to all others to *present* oneself for possible *commerce* (*Verkehr*) with the each other. They have a right to try to enter into it, without the foreigner being justified in confronting him as an enemy for that reason” (1797, §62, 6:352). Similarly, he also states that it is “the right of a citizen of the earth to *attempt* to enter into community with all others and, to this end, to *visit* all regions of the world, even though this is not a right to *settle* on the land of another people (*ius incolatus*), which would require a special contract” (1797, §62, 6:353).

human species ever closer to a cosmopolitan constitution” (Kant 1795, 8:358). The right to visit is not an unqualified right. Visitors have to behave “peacefully” to enjoy the right (8:358).<sup>18</sup> Countries can refuse to admit visitors or establish limits on their travels, perhaps even for no reason.<sup>19</sup> Kant approvingly describes China and Japan as “wisely” limiting the “interaction” of westerners with their citizens in light of the westerners’ conduct in other parts of the world, such as “America, the negro countries, the Spice Islands [and ...] the Cape” (3:358).<sup>20</sup>

In general, the rights to interact that Kant and others recognized have limited contemporary relevance for citizens of states facing the loss of territory from sea level rise. The citizens of these disappearing states would not be seeking the right to visit or to trade with other countries, but rather the right to relocate. However, Pufendorf’s argument that a state does not have the right to refuse to trade goods essential to human life provides a potentially useful precedent for areas of the world predicted to lose drinking water under climate change, which could be in a situation of pleading with water-rich regions for access to their resources. Aside from this type of narrow claim, though, it seems unlikely that the right to interact would enable victims of sea level rise to achieve their ultimate objective of permanently relocating to safer territory. The

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<sup>18</sup> Kant explains “If it can be done without causing his death, the stranger can be turned away, yet as long as the stranger behaves peacefully where he happens to be, his host may not treat him with hostility” (1795, 8:358).

<sup>19</sup> Kleingeld argues that “A state has the right to deny a visit, as long as it does so non-violently” (1998, 75).

<sup>20</sup> China “allowed [foreigners] contact with, but not entrance to its territories” and Japan, “allowed this contact to only one European people, the Dutch, yet while doing so excludes them, as if they were prisoners, from associating with the native inhabitants” (Kant 1795, 3:358).

discussions from the “Age of Discovery” of the right to settle and especially the right to safe haven may offer greater assistance.

## 2. Right to settle

A second situation discussed in the “Age of Discovery” is where foreigners seek to settle in another state for economic or other opportunities, not because they face danger or peril in their home countries. Some scholars from this period argue that foreigners have a muscular right to settle without the consent of the peoples or states already in the territory. Hugo Grotius (1583-1645) is a case in point. Anticipating John Locke’s more famous agricultural argument for western colonization, Grotius maintains that “if within a nation’s territory there is any empty or barren soil, this should be granted to newcomers who ask for it. Indeed, they may rightfully take possession of it, because uncultivated land should not be considered occupied, except as regards the governing power, which still rests altogether with the original peoples” (II.2.XVII).<sup>21</sup>

On the other hand, there are western scholars who object to the idea that land can be settled without the consent of the persons currently using it. For example, Kant argues that the right to hospitality does not include the right to settle without the consent of the affected people. He maintains that settlement “on the land of another people ... would require a special contract” (1797, § 62 [6:353]).<sup>22</sup> Not surprisingly, Kant was a forceful

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<sup>21</sup> Cavallar indicates that the passage embodies “an embryonic form of the agricultural argument” (2002, 259-260).

Tuck offers the following explanation of the passage: “there is a general natural right to possess any waste land, but one must defer to the local political authorities, assuming they are willing to let one settle. If they are not, of course, then the situation is different, for the local authorities will have violated a principle of the law of nature and may be punished by war waged against them” (1999, 106).

<sup>22</sup> Kant (1795, 8:358) states: “It is not the right of a guest that the stranger has a claim to (which would require a special, charitable contract stipulating that he be made a member of the household for a certain period of time), but rather a right to visit, to which all human beings have a claim, to present oneself to society by virtue of the right of common possession of the earth.”

critic of western colonialism, partly because the European powers proceeded without the consent of the affected peoples in the Americas, Africa and Asia.<sup>23</sup>

In a historical irony, the argument that settlement can be justified without the consent of the affected peoples represents an attractive position for countries facing the possibility of losing their territory to sea level rise, many of which were colonized during the “Age of Discovery.”<sup>24</sup> However, as pragmatic matter, the argument that settlement of another country’s territory does not require that country’s consent seems unlikely to prevail in the twentieth-first century, given the importance that international law now attaches to state sovereignty.<sup>25</sup> Moreover, as the critiques of colonization of Kant and others suggest, the idea that other states’ or peoples’ lands could be settled without their consent was even controversial during periods of the “Age of Discovery.”

### **3. Right to safe haven**

In assessing the right of persons whose countries disappear due to sea level rise to resettle, the most promising precedent is discussions during the “Age of Discovery” of situations where individuals in peril seek refuge in a foreign state. These discussions

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<sup>23</sup>For example, Kant writes that, “If one compares with this the inhospitable behavior of the civilized states in our part of the world, especially the commercial ones, the injustice that the latter show when visiting foreign lands and peoples (which to them is one and the same as conquering those lands and peoples) takes on terrifying proportions. America, the negro countries, the Spice Islands, the Cape, etc., were at the time of their discovery lands that they regarded as belonging to no one, for the native inhabitants counted as nothing to them. In East India (Hindustan) they brought in foreign troops under the pretext of merely intending to establish trading posts. But with these they introduced the oppression of the native inhabitants” (1795, 8:358-8:359). See also Kant (1797, 6:353); Kleingeld (1998, 75); Muthu (2003, 188); Waldron (2000, 238).

<sup>24</sup> In *Spheres of Justice*, Michael Walzer recognizes a related historical irony: the idea that foreigners have a right to settle unused land, which once provided a rationale for colonialization, could also potentially ground a right to immigrate from intensely populated developing countries to countries such as the United States and Australia that were founded by colonists (1983, 45-56).

<sup>25</sup> For example, Ann Dummett argues that “[b]elief in ‘state sovereignty’ is the objection most often advanced against free immigration” (1992, 174).

suggest an obligation on the part of countries to admit foreigners who are in peril and outside their home countries and, by implication, that individuals enjoy what I label a right to a safe haven.<sup>26</sup> The right is probably best understood as a public international law analogue to the private right of necessity. The right of private necessity concerns the right of individuals to take the property of others to preserve their own lives or property when they face imminent peril, while the right to a safe haven addresses the right of individuals to enter foreign countries when they are in peril outside their home countries and unable to return them.

Grotius argues that “foreigners driven from their homes, who are seeking refuge” “should” not “be refused” “a permanent dwelling place” provided “they submit to the established government and to whatever other regulations are necessary to prevent tumults” (II.2.XVI).<sup>27</sup> For Grotius, though, the right to permanent refuge does not necessarily include the right to acquire land on which to settle in the receiving state. In a passage already quoted above, Grotius explains that newcomers only have the right to acquire land in the host state “if within a nation’s territory there is any empty or barren soil” (II.2.XVII).

Pufendorf also suggests that foreigners in peril have a right to settle in other countries, but the right he posits is considerably more qualified than the right Grotius sketches. After referring to the duty Grotius envisions to grant “permanent settlement to

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<sup>26</sup> As explained in note 8, I borrow the term “right to safe haven” from Pauline Kleingeld (1998) who uses it in reference to Kant.

<sup>27</sup> The passage states: “Nor should even a permanent dwelling place be refused to foreigners driven from their homes, seeking a refuge. But this should be on condition that they submit to the established government and to whatever other regulations are necessary to prevent tumults ... ‘To drive away strangers,’ says Strabo, following Eratosthenes, ‘is to act like barbarians’; and for conduct like that the Spartans were condemned ...”.

strangers who have been driven from their former home, and seek entrance into another,” Pufendorf argues that “[i]t belongs, indeed, to humanity to receive a few strangers, who have not been driven from their homes for some crime, especially if they are industrious or wealthy, and will disturb neither our religious faith nor our institutions” (III.III.10). In contrast to Grotius, Pufendorf stresses the right of countries to take into account pragmatic considerations, such as the number of refugees and their potential impact, in deciding whether to allow refugees to permanently resettle and if so how many:

But no one should be so bold as to assert that a great multitude, armed, and with hostile intent, should be received as if there were an obligation to do so, especially since it is hardly possible that the native inhabitants run no danger from such a host. Therefore, every state may decide after its own custom what privilege should be granted in such a situation. The state should consider well beforehand, whether it is to its advantage for the number of its inhabitants to be greatly increased; whether its soil is fertile enough to support all of them well; whether we will not be too crowded if they are admitted; whether the band that seeks admittance is competent or incompetent; whether the arrivals can be so distributed and settled that no danger to the state will arise from them (III.III.10).

Moreover, Pufendorf envisions newcomers as enjoying more circumscribed rights to land than Grotius. Pufendorf explains that the newcomers “cannot seize for themselves anything they may want or occupy ... or any section of our land that may be unused, but they must be content with what we have assigned them” (III.III.10). According to Pufendorf, foreigners do not even have a right to barren lands.

For Pufendorf, what I term the right to safe haven is a privilege or an imperfect right, and the decision to admit persons in peril is “an act of humanity” that “confer[s] a kindness” (III.III.10). While the pragmatic considerations he identifies may sometimes weigh in favor of denying entry, Pufendorf insists that there are pragmatic reasons for granting permanent refuge, suggesting that in general he might tilt the balance in favor of admission. He emphasizes that “we can observe that many states about us have grown

immensely because they received foreigners and aliens with open arms, while others, who have repelled them, have been reduced to second-rate powers” (III.III.10). Cavallar speculates that Pufendorf might have been referring to the migration in the 1580s of over 100,000 persons “from the Catholic south Netherlands ... to the north” who are credited with contributing “to the subsequent Dutch dominance of the ‘rich trades’” (2002, 205).

Kant devotes relatively little attention to the situation of the person in peril compared with the situations where foreigners seek settlement or the right to visit. The only time he refers to the situation is in a brief passage in the Third Definitive Article of Perpetual Peace, where he implies that a stranger cannot be turned away if the denial of entry would cause the stranger’s “death” [or “destruction” according to some translations]: “If it can be done without causing his death [or destruction], the stranger can be turned away, yet as long as the stranger behaves peacefully where he happens to be, his host may not treat him with hostility” (Kant 1795, 8:358).<sup>28</sup> According to Pauline Kleingeld (1998, 76), Kant elaborates on this statement in a draft of Perpetual Peace which states:

that people who are forced by circumstances outside their control to arrive on another state’s territory should be allowed to stay at least until the circumstances are favourable for their return. He gives the examples of shipwreck victims washed ashore and of sailors on a ship seeking refuge from a storm in a foreign harbour, thus in effect stating that cosmopolitan law implies the right to a safe haven (23:173).<sup>29</sup>

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<sup>28</sup> Translations differ on whether they use death or destruction. Kleingeld translates Kant as stating that “a state may refuse a visitor only ‘when it can happen without his destruction,’” rather than death (1998, 76). Kleingeld then argues that “‘destruction’ ... could be interpreted more broadly than referring to death only. It could conceivably also include mental destruction or incapacitating physical harm, in which case the range of cases to which applies would be much greater” (77). Benhabib (2004, 28) also translates the passage as triggering a duty to allow the stranger to remain if destruction is the alternative. For the remainder of the essay I assume the passage refers to “destruction” rather than “death”.

<sup>29</sup> Benhabib implies that Kant gave more examples than the shipwreck where the right to safe haven would apply, stating “[t]he right of hospitality entails a claim to temporary residency which cannot be refused, if such refusal would involve the destruction – Kant’s word here is *Untergang* – of the other. To refuse

Before Kant, Pufendorf similarly considered the rights of shipwreck victims to use the property of others to save themselves, but he did so in discussing the private right of necessity, not what I label the right to a safe haven. Just as Pufendorf maintained that refugees enjoy an imperfect right of refuge in foreign countries, so he concluded that there is an “imperfect obligation” to assist persons in need such as shipwreck victims under the rubric of private necessity (II.VI.6 and II.VI.5).

My brief survey of Grotius, Pufendorf, and Kant emphasizes that they all conceive of countries as having some obligations to foreigners outside their home countries who are in peril, and by implication, of foreigners in this situation as enjoying some sort of right of safe haven as against foreign nations. Although the authors differ in how they define the obligations of foreign countries and, consequently the rights of foreigners, they seem to agree on a number of basic elements.

First, the obligation extends to and the right is enjoyed by individual foreigners, not groups of foreigners. Grotius refers to “foreigners,” Pufendorf to “strangers,” and Kant to “the stranger.”

Second, the obligation extends to and the right is enjoyed by foreigners who meet certain criteria. Grotius, Pufendorf, and Kant seem to agree that foreigners must be seeking admission to a country other than their own, and that they must not be in their home countries and must be unable to return to them, at

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sojourn to victims of religious wars, to victims of piracy or ship-wreckage, when such refusal would lead to their demise, is untenable, Kant writes” (2004, 28). Benhabib does not provide a citation for these other examples.

least in the immediate future. Individual authors also identify additional qualifying criteria. Grotius indicates the obligation is owed to “foreigners driven from their own homes, who are seeking a refuge ... *on condition that they submit to the established government and to whatever other regulations are necessary to prevent tumults*” (emphasis added). For Pufendorf, “it belongs to humanity to receive a few strangers, *who have not been driven from their homes for some crime, especially if they are industrious or wealthy, and will disturb neither our religious faith nor our own institutions*” (emphasis added). According to the draft Kleingeld cites, the entitlement Kant sketches belongs to “*people who are forced by circumstances outside their control to arrive on another state’s territory*” (emphasis added). In the Third Definitive Article of Perpetual Peace, Kant indicates that the stranger must be facing “*destruction*” if he is denied entry (emphasis added).<sup>30</sup>

Third, the obligation is addressed to, and the right is enjoyed against, countries generally. None of the authors suggest that only countries that cause foreigners to be displaced are obligated to them or that foreigners have claims as against a foreign country only if they can prove that the country harmed them. In other words, the obligation toward foreigners is not rooted in corrective justice.

Fourth, the obligation countries have is to admit qualifying foreigners, or at least some of them, potentially permanently. Grotius, Pufendorf, and Kant do

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<sup>30</sup> It is noteworthy that Kant is the only one of the three authors I canvass who mentions that the persons seeking refuge should be doing so through no fault of their own. Pufendorf’s failure to insist that the persons should be seeking refuge through no fault of their own is striking because he insists that individuals seeking to use the property of another under the private right of necessity must be in need through no fault of their own. Indeed, he faults Grotius for failing to insist that the need that triggers the private right of necessity must have arisen through no fault of the claimant. See Pufendorf 1710, II.VI.6 and 8.

not agree on the stringency of the obligation, though. Grotius is the most clear in articulating a right to enter and permanent refuge, stating “[n]or should even a permanent dwelling place be refused to foreigners driven from their own homes” provided the foreigners submit to the prevailing domestic authority. According to the draft that Kleingeld cites, the beneficiaries of the right Kant sketches have the right “to stay at least until the circumstances are favourable for their return.” While this wording does not explicitly refer to a permanent right to remain, it presumably would embrace such as permanent right if the circumstances never become favorable for return, as in the case of the sinking state.<sup>31</sup> Pufendorf states that “[i]t belongs, indeed, to humanity to receive a few strangers” but he is much more willing to allow receiving countries to limit and potentially refuse entry in accordance with domestic priorities.

For present purposes, the key point is that during the “Age of Discovery” there was a concept of what I label a right to safe haven, a concept to which the residents of sinking states could appeal at least rhetorically. If they ultimately are driven from their homelands by rising sea levels, the residents of sinking states would seem to meet the minimum requirements that the various authors canvassed above agree are necessary to invoke the right to a safe haven: they are

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<sup>31</sup> However, Benhabib describes what I term the right to safe haven as “a claim to *temporary residency* which cannot be refused, if such refusal would involve the destruction – Kant’s word here is *Untergang* – of the other” (the emphasis in “temporary residency” is mine). She elaborates, “To refuse sojourn to victims of religious wars, to victims of piracy or ship-wreckage, when such refusal would lead to their demise, in untenable, Kant writes” (2004, at 28).

Moreover, Benhabib suggests that it is ambiguous whether the claim to temporary residency she interprets Kant as elaborating is an enforceable legal right or a moral claim (2004, 28-29, 36 [referring to the duty to help persons whose life and limb are endangered as an “*imperfect moral duty*”]; 38 [referring to the “right to temporary sojourn,” which includes the right not be refused entry if life and limb are endangered, as “a right” rather than “a privilege”]).

individuals, seeking admission to a foreign country, outside their home country and unable to return to their home country at least in the immediate future.

#### **IV. Justifications for the right to safe haven**

In the famous property case of *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264, Supreme Court of New York (1805), the dissent mocks the majority's references to treatises such as Pufendorf's and Grotius's. One might similarly ask why we should pay any attention today to the discussions in Grotius, Pufendorf, and Kant about the right to safe haven. One reason for paying attention is that the right to a safe haven is justifiable in modern eyes.

Since the support of people from many different traditions will be necessary for the right to safe haven to be recognized in law and policy, it would be desirable if there was an overlapping consensus of several different rationales supporting the right.<sup>32</sup> Below I start by discussing the option of grounding the right to safe haven in a general moral theory, such as utilitarianism or a cosmopolitan variant of liberal egalitarianism. Then I explore the possibility of treating the right as an independent case for which a narrower, more focused argument could be made under the rescue principle or a resources argument rooted in the natural law tradition. I conclude by suggesting that the natural law rationale that I consider last offers the most persuasive grounding for the right.

##### **1. General cosmopolitan moral theories**

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<sup>32</sup> See Appiah (2003, 101, 104-109), who states at 105 that "The major advantage of instruments that are not framed as the working out of a metaphysical tradition is, obviously, that people from different metaphysical traditions can accept them."

One option would be to ground a right to a safe haven in a general moral theory. To be useful, the theory necessarily would have to suggest that we owe obligations across national borders to citizens of other states. Two possibilities are utilitarianism and a cosmopolitan variant of liberal egalitarianism.

(a) Liberal egalitarianism

At first glance, it might seem that cosmopolitan liberal egalitarian theories provide a promising route for approaching a right to a safe haven. Indeed, Tally Kritzman-Amir (2008, 10) argues for greater legal protection for socio-economic migrants, a category she defines to include the citizens of sinking islands, primarily although not exclusively on the basis of cosmopolitan liberal egalitarian theories of justice.<sup>33</sup> Consider for example the possibility of relying on Thomas Pogge's cosmopolitan extension of Rawls's theory of justice. Pogge treats the world as a single unit in which persons are the morally significant actors, and argues that "the social position of the globally least advantaged" should be "the touchstone for assessing our basic institutions" (Pogge 1989, 242). Would the plight of the citizens of sinking states, who will lose access to their land mass and the resources it harbors, count as an instance of injustice in Pogge's terms? Pogge (1989, 250) is sensitive to the global socio-economic inequalities that arise from countries' different degrees of access to "natural assets (such as mineral resources, fertility, climate, etc.)," and he suggests that it might be necessary to rearrange property rights in natural assets to reduce global socio-economic

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<sup>33</sup>For Kritzman-Amir's proposed definition of socio-economic migrants, see 238-239.

inequalities.<sup>34</sup> Under Pogge’s approach, then, the citizens of sinking states potentially might have a claim to natural resources (including perhaps land) from other states as part of general institutional reform to redress global socio-economic inequalities.

I use the term “might” deliberately though because to my knowledge Pogge has limited himself to a relatively modest proposal for addressing the socio-economic inequalities stemming from disparities in natural resource endowments that would not reallocate ownership of identifiable natural resources among countries. His proposed “Global Resource Dividend” would require countries to pay a small tax for using or selling their natural resources that would be channeled to assist the global poor, on the basis that the “global poor own an inalienable stake in all limited natural resources” (Pogge 2002, 196; see also Pogge 1994).<sup>35</sup> Consistent with his overriding concern with addressing global poverty, any proposal that Pogge might countenance for reallocating ownership of natural resources among countries presumably also would have to first and foremost aim to reduce the socio-economic need of the worst off around the globe. Thus even if Pogge contemplated reallocating resources among countries, the claims of the citizens of sinking states to resources would remain contingent on their socio-economic need and not specific to the fact that they face the loss of their land mass and the natural resources that it incorporates. The contingency of their claims would be particularly problematic for the wealthier citizens of sinking states—their financial assets might

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<sup>34</sup> “A global difference principle may justify not merely a general adjustment of market prices but a different specification of property rights over natural assets – involving, for example, an international tax on (or international ownership and control of) natural assets” (Pogge 1989, 264).

<sup>35</sup> Pogge (2002, 204-205) specifically states “This idea does not require that we conceive of global resources as the common property of humankind, to be shared equally. My proposal is far more modest by leaving each government in control of the natural resources in its territory.”

reduce the priority of their claims under Pogge's framework, even though they would be just as landless as their poorer compatriots.<sup>36</sup>

(b) Utilitarianism

Utilitarianism provides a second possible ground for a right to a safe haven. For utilitarians, the goal is to maximize overall well-being, and everyone's well-being is given the same weight, regardless of country of origin, in determining whether well-being is being maximized. There are many reasons why a right to safe haven might promote well-being. First and foremost it would save lives and reduce suffering by providing persons driven from their homes with a place to resettle. As Pufendorf mentions, receiving countries might benefit from the talents and diversity of the new arrivals and their offspring (1710, III.III.10).<sup>37</sup> Wide recognition of the right also would provide persons who were safely ensconced in their home countries with a form of insurance that that they would be able to settle somewhere if they were ever driven away.<sup>38</sup> To be sure, the right would not be cost-free. Implementing it would require a bureaucratic machinery, newcomers might need assistance resettling, and as with any form of insurance, there is a danger of moral hazard. Knowing that we have a right to resettle elsewhere if we are driven from our homes might induce some of us to invest less in our home countries or to unsustainably exploit them. The right also could have the

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<sup>36</sup> Recall that Pufendorf contemplated that "wealthy" persons might be admitted pursuant to what I am calling the right to a safe haven (1710, III.III.10).

<sup>37</sup> The economics of immigration are complex though. See, e.g., Kritzman-Amir 2008, 52-54.

<sup>38</sup> Thank you to Carol Rose for suggesting that the right to a safe haven could be justified as a form of insurance and reminding me of the functional discussion of group ownership of land in Ellickson 1992-1993. See, e.g., Ellickson 1992-1993, 1342, note 120, where Ellickson labels as an insurance mechanism "a *forced sharing for needs* regime" Frank Michelman sketches "under which a needy person would be entitled to take property from anyone not in that predicament" (citing Michelman 1980).

unintended consequence of encouraging countries to drive some of their or other countries' nationals from their homes, since the right would obligate other countries to accept displaced persons.<sup>39</sup> But overall I suspect that the recognition of the right to a safe haven would improve well-being compared with the status quo, especially if the number of people who seek to claim it is relatively low, a likely scenario given the requirement that the claimant be unable to return to his or her home country and because of the dislocation involved in resettling in another country.

One problem with grounding the right to a safe haven in a utilitarian framework is that while the right might improve well-being compared with the status quo, it may not be the measure that would most increase well-being compared with the status quo, and doing what would most maximize well-being should be our priority if we are utilitarians.<sup>40</sup>

Peter Singer's recent book *The Life You Can Save: Acting Now to End World Poverty* (2009) highlights another way of alleviating suffering that might increase well-being by more than recognizing the right to a safe haven; he advocates for giving aid and development assistance to developing countries to reduce global poverty.<sup>41</sup>

The statistics on world poverty are staggering: 1.4 billion live on less than \$1.25 a day, the poverty line set by the World Bank (Singer 2009, 7). If the 855 million people with "an income above the average income of Portugal" "each ... gave \$200 per year, that would total \$171 billion," almost the \$189 billion it is estimated that it would cost to

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<sup>39</sup> Schuck (1997, 273) provides examples of reasons why countries might encourage refugee outflows from neighboring states. The instigating country might wish "to use the refugees' flight to discredit or destabilize the source country regime ... , or it may have revanchist designs on the source country."

<sup>40</sup> Thank you to Liam Murphy for bringing to my attention this weakness of the potential utilitarian justification for the right to a safe haven.

<sup>41</sup> See also Singer 1972.

halve “the proportion of the world’s people in extreme poverty” by 2015 (Singer 2009, 142) and achieve the other Millenium Development Goals (Singer 2009, 143). Singer argues that since “[s]uffering and death from lack of food, shelter, and medical care are bad,” and this suffering and death can be prevented by donating aid, we should be donating more to aid agencies because “it is in [our] ... power to prevent something bad from happening, without sacrificing anything nearly as important” (15). Singer recognizes though that the utilitarian principle that undergirds his argument—that we should give as much we can until giving would entail sacrificing something “nearly as important” as the additional lives that would be saved—requires the wealthy to donate considerably more than \$200 a year and in fact to significantly change our lifestyles (151-152). Thus he offers a more modest proposal in the hope of making progress in reducing world poverty: people “who are financially comfortable” should give “roughly 5 percent of” their “annual income” and “the very rich” should give “rather more” (152).

To be clear, I mention Singer’s proposal to underscore that we need to be cautious about grounding a right to safe haven in utilitarianism because there may be other measures that we could pursue, such as greater private and/or state aid to reduce poverty in developing countries, that might increase well-being even more and that under a utilitarian framework should take priority. Singer’s proposal is not a substitute for the right to a safe haven since he advocates greater private giving by individuals, not state action as the recognition of the right would entail, although Singer is not opposed to state aid.<sup>42</sup> In fact increasing aid to developing countries along the lines Singer recommends

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<sup>42</sup> Singer’s “seven-point plan” for individuals to help reduce global poverty includes as point six: “Contact your national political representatives and tell them you want your country’s foreign aid to be directed only to the world’s poorest people” (Singer 2009, 169).

could be done as a complement to recognizing the right to a safe haven.<sup>43</sup> But thinking about Singer's proposal reminds us that utilitarianism offers at best a contingent case for the right to safe haven since under the utilitarian framework the strength of the argument for the right depends on how much recognizing the right would increase well-being compared with other possible options for doing so.

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In addition to the specific difficulties I have already discussed with grounding the right to safe haven in utilitarianism or a cosmopolitan variant of liberal egalitarianism, I think there are broader reasons for resisting the pull to ground a right to safe haven in a general cosmopolitan moral theory. One is that rooting the right in a general theory requires endorsing a general theory (or theories), as well as making a case that the theory (or theories) would generate the right to a safe haven. The very idea that we owe obligations to citizens of other states as a matter of justice is controversial though,<sup>44</sup> as are utilitarianism, Rawls's theory of justice, and probably any other general moral theory we might consider. If the right of safe haven has intuitive appeal, as I think it does for many people, I doubt it is because they buy into a general moral theory of which the right represents a part.<sup>45</sup> It is more likely because there is something specifically compelling about people becoming homeless because the physical territory of their country disappears. I now want to turn to the possibility that we can identify an

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<sup>43</sup> Kritzman-Amir discusses "financial aid," as a "complementary measure" to using refugee law to assist socio-economic refugees (2008, 170). See *id.* at 169-175.

<sup>44</sup> See, e.g., Nagel (2005).

<sup>45</sup> See, e.g., Kritzman-Amir 2008, 54 ("[A]lthough maximizing utility is an important consideration in immigration debates, I believe that other political and moral considerations should also be taken into account when forming immigration policies").

independent rationale for the right detached from a general moral theory that reflects the intuitive concern with the plight of the citizens of sinking states. I will consider two possibilities, the first of which I will argue is still too general and the second of which I will suggest is up to the task.

## **2. Independent claims**

### **(a) Rescue principle**

The rescue principle is a potentially narrower rationale for the right to a safe haven than the general theories discussed so far. As commonly understood, the rescue principle essentially holds that we have a positive duty to assist someone if they are in urgent need and we can help them at little cost to ourselves. Even theorists who are reluctant to recognize that we have obligations to citizens of other states as a matter of justice, or who outright reject this idea, claim that we sometimes should come to the assistance of citizens of other states on humanitarian grounds on the basis of a rescue principle. In arguing that we sometimes are obligated as a matter of humanity, but not justice, to assist citizens in other countries, these theorists resemble Pufendorf when he argues that as “an act of humanity” we should admit persons forced from their home countries even though they do not enjoy a legally enforceable right to our help.

Consider, for example, the views of Thomas Nagel, who is skeptical of the idea that we are required to implement “global socioeconomic justice” (2005, 113, 132). He argues that claims for distributive justice lie only as against one’s own state, because they “depend[] on rights that arise only because we are joined together with certain others in a political society under strong centralized control” (2005, 127). Nonetheless, Nagel maintains that there is a “moral minimum” of basic rights and duties that “governs our

relations with everyone in the world” (2005, 131). This moral minimum seems to include the rescue principle. Nagel explains that “[t]his minimal humanitarian morality ... does not require us to make [other’s] ... ends our own, but it does require us to pursue our ends within boundaries that leave them free to pursue theirs, *and to relieve them from extreme threats and obstacles to such freedom if we can do so without serious sacrifice of our own ends*” (2005, 131) (italics are mine). Furthermore Nagel mentions that “[i]n extreme circumstances, denial of the right of immigration may constitute a failure to respect human rights or the *universal duty of rescue*. This is recognized in special provisions for political asylum, for example” (2005, 130) (italics are mine). For Nagel, “minimal humanitarian morality” is “the consequence of the type of contractualist standard expressed by Kant’s categorical imperative and developed in one version by Scanlon” (2005, 131). Adding further weight to the idea that Nagel’s moral minimum includes the rescue principle, Scanlon (1998, 228-229) specifically endorses “the Rescue Principle” on the basis that “it is difficult to see how it could reasonably be rejected.” He argues the principle “applies only in cases in which one can prevent something very bad from happening at only slight or moderate cost to oneself” (225).

Michael Walzer also subscribes to a narrow setting for distributive justice but claims that we have obligations that extend to foreigners outside this setting. Similar to Nagel, Walzer takes what he calls “[t]he political community” rather than the globe as the setting for distributive justice, although Walzer counts not only countries but also cities as political communities (1983, 28-30). Nonetheless, Walzer, like Nagel, indicates that we may have obligations to persons outside our political communities, including potentially the obligation to allow them to enter our country.

Walzer discusses “the principle of mutual aid,” a concept he borrows from John Rawls’s *A Theory of Justice*. He initially describes this principle in individual terms that suggest it resembles a positive duty to rescue:

It is the absence of any cooperative arrangements that sets the context for mutual aid: two strangers meet at sea or in the desert or, as in the Good Samaritan story, by the side of the road. What precisely they owe one another is by no means clear, but we commonly say of such cases that positive assistance is required if (1) it is needed or urgently needed by one of the parties; and (2) if the risks and costs of giving it are relatively low for the other party. Given these conditions, I ought to stop and help the injured stranger, wherever I meet him, whatever his membership or my own (1983, 28-30).

Then Walzer indicates that there is a collective analogue to the individual principle of mutual aid:

It is, moreover, an obligation that can be read out in roughly the same form at the collective level. Groups of people ought to help necessitous strangers whom they somehow discover in their midst or on their path. But the limit on risks and costs in these cases is sharply drawn (1983, 33).

For Walzer, the collective version of mutual aid seems to be a modest constraint on the right of countries to exclude persons. Walzer does not elaborate much on the implications of the principle, but he suggests that it would obligate a country to accept refugees, although only if admission would not fundamentally transform the country:

The call “Give me your huddled masses yearning to breathe free” is generous and noble; actually to take in large numbers of refugees is often morally necessary; but the right to restrain the flow remains a feature of communal self-determination. The principle of mutual aid can only modify and not transform admissions policies rooted in a particular community’s understanding of itself (1983, 151).<sup>46</sup>

In practice, Walzer’s collective principle of mutual aid and Nagel’s moral minimum suggest the possibility of grounding the right to safe haven in the rescue

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<sup>46</sup> Walzer is largely silent on the grounds for the principle of mutual aid (1983, 33), although he suggests in one place that mutual aid is a constraint derived from “justice” (1983, 61-62).

principle. The argument would be that the citizens of sinking states are persons urgently in need and host countries can alleviate this need at little cost to themselves by allowing these persons to resettle in their midst. Unfortunately, though, we cannot be certain that the rescue principle would provide a solid foundation for the right because the idea that there is an obligation to rescue someone urgently in need when we can do so at little cost to ourselves is indeterminate. Let's assume that the citizens of sinking states would count as "necessitous" or "urgently" in need, to borrow Walzer's terms, since their lives are at stake given the threatened physical disappearance of their countries. That still leaves unanswered what would count as a "risk" or "cost" in determining whether the duty to rescue would apply and how we are to know when these "risks" or "costs" are sufficiently "low" to generate the duty on the part of host countries. It seems that Walzer at least would count not only the monetary costs of the rescue but also the non-economic costs to the host country of the rescue, which could be substantial even if the country is called upon to admit only a small number of persons if the country has a history of limited or no immigration ("The principle of mutual aid can ... not transform admissions policies rooted in a particular community's understanding of itself"). Scanlon (1998, 225) admits the indeterminacy problem underlying the rescue principle, warning that:

I would not say, for example, that we would be required to sacrifice an arm in order to save the life of a stranger. But here a judgment is required, and I do not think that any plausible theory could eliminate the need for judgments of this kind.

Setting aside the possibility that the rescue principle might not provide a solid ground for the right to a safe haven because the right would be contingent on an evaluation of its costs and benefits, the rescue principle also may be a problematic rationale because it is not clear that it reflects the intuitive appeal of the right of safe

haven for the citizens of sinking states. The rescue principle obligates us to “relieve” or to “help” others, both fairly general obligations which could require us to do many things quite apart from or in addition to allowing persons to resettle in our midst. Pursuant to the rescue principle, for example, we might be required to send foreign aid as well as or instead of admitting refugees. While narrower than a general moral theory, the basis that the rescue principle provides for the right to safe haven is nonetheless still sufficiently capacious to encompass more than what we would be doing in opening up our territory under the right to safe haven to persons whose home country had physically disappeared due to the submergence of its land mass.

**(b) Collective ownership of the earth**

In a recent article, Mathias Risse argues that Grotius offers a rationale for what Risse calls a right to relocation that would benefit states submerged by climate change-induced sea level rise (Risse 2009). I think that this rationale, as secularized by Risse, may offer the most promising ground for the right to a safe haven.

To understand the Grotian rationale, it is necessary to turn to Grotius’s discussion of the private right of necessity, since he hints at the rationale in discussing the right of necessity but not what I am labeling the right to a safe haven. As mentioned above, the right of necessity can be regarded as a private law analogue of the public international law right to a safe haven. In both cases, the issue is whether a person’s urgent needs override existing rights—the property owner’s right to exclude in the case of private necessity, and the state’s right to control entry in the case of the right to a safe haven. But Grotius discusses the right to seek refuge in foreign nations separately from the right of persons in dire necessity to take the property of other individuals to save themselves,

an age old question which arose again recently after the earthquakes in Haiti and Chile (McNeil, Jr. 2010).

Grotius argues that persons in “extreme necessity” have a right to take the property of another (1625, II.2.VI).<sup>47</sup> There are limits on the right though. The right that is granted is the right that existed before private property was established: a limited right to use resources that can be consumed, but not a right to accumulate resources (II.2.VI).<sup>48</sup> Also the right cannot be exercised against an owner who is “in an equal state of need himself” (1625, II.2.VIII). This implies an outer, albeit generous, limit on the right to take even the basic necessities—a person in urgent need must stop taking if he reduces the owner to an equal state of need.

What is interesting for present purposes is the justification which Grotius hints at, but does not develop, for the private right of necessity. Grotius explains:

This rule is not founded, as some allege, on the law of charity, which obliges the owner of goods to give to him who needs, but on the idea that when all things were divided among private owners, there was a benevolent reservation in favor of the primitive common right. For if those who made the first division had been asked their opinion on the matter, their reply would have been what we are saying. “Necessity,” says Seneca the elder, “the great protectress of human infirmity, breaks all law,” – human law, that is, and all rules made in the spirit of human law (1625, II.2.VI).

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<sup>47</sup> Grotius is by no means the first to argue for a right of necessity that overrides the owner’s right to exclude. Aquinas’s discussion of the right of necessity is well-known. On Aquinas, see, e.g., Hont and Ignatieff 1983, 1, 27-28; Cavallar 2002, 239-240.

<sup>48</sup> The passage states: “in case of extreme necessity, the primitive right to the use of things is revived, as if they had remained in common” (1625, II.2.VI). Grotius describes the primitive right to the use of things earlier in the chapter: “every man could take at once for his own use whatever he wanted and consume whatever was consumable” (1625, II.2.II). See also Buckle (1991, 30) who explains that “Since the use-right arises precisely because of the person’s needs, it extends no further than the satisfaction of those needs.”

If we follow Risse (2009, 285), the Grotian rationale for the right of necessity is that it would be inconsistent with the divine grant of the earth to humankind in common if the necessitous were deprived of the right to claim the basic necessities by the human construct of private property.<sup>49</sup> To step back: for Grotius, the earth was originally given to humankind in common by God for humankind's use.<sup>50</sup> In the original community, everyone was given the right to use the resources granted by God, but not as mentioned above to accumulate more than he or she could use. The use right exists because "the preservation of life requires the using of natural resources" (Buckle 1991, 30). Human beings transitioned from the original community to private property by agreement, either "express" or "tacit," according to Grotius (1625, II.2.II). But the agreements establishing private property, Grotius insists, included a "reservation" analogous perhaps to an easement to ensure that no one in dire straits was denied a right necessary for their survival to use the resources of the earth given by God to everyone in common.

Given the similarity between the right of necessity and the right of safe haven, we might use Grotius's collective ownership of the earth justification for the right of necessity to also ground an imperiled person's right to enter and remain in a foreign

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<sup>49</sup> The following discussion of the Grotian rationale and its implications for the rights of citizens of sinking states closely follows Risse (2009). There are other interpretations though of the Grotian rationale for the private right of necessity. For another prominent interpretation of the rationale for the private right of necessity, see Buckle (1991, 45), which argues that the right of necessity exists to ensure that the reason for which private property was established is not undermined by the existence of private property. According to Buckle (1991, 45), private property exists for "the preservation of human beings in sophisticated societies." "By excluding all but the owner from free enjoyment of its product, however, systems of property, will, if applied indiscriminately, exclude even those in dire necessity" (Buckle 1991, 45).

<sup>50</sup> "At the first creation of the world God gave to mankind in general dominion over all things of inferior nature, a grant renewed upon the restoration of the world after the Deluge....Accordingly, every man could take at once for his own use whatever he wanted and consume whatever was consumable" (Grotius 1625, II.2.II).

country.<sup>51</sup> The collective ownership of the earth justification for the right to safe haven would run as follows. The earth was originally granted to humankind in common, and national borders are human constructs. People in urgent need of a physical territory have a right to ignore national borders and enter and remain in foreign countries to exercise their right of self-preservation.

For nonbelievers, one potential problem with the collective ownership of the earth justification as just sketched is that it rests on the idea that God granted earth to humankind. It is this original divine grant that triggers the right of individuals to override the rights of others to exercise the right of self-preservation. Risse recognizes the religious underpinnings of the Grotian thesis and attempts to “revitalize it nontheologically” (2009, 283). He does so by arguing that “all humans, no matter when and where they are born, must have some sort of symmetrical claim” to the earth because “the earth’s resources and spaces are the accomplishment of no one, whereas they are needed by everyone” (286). Thus we might justify the right to a safe haven on the basis that persons who require a refuge have a right to enter the territory of another country because everyone has an equal claim to the earth’s resources, since none of us created them and each of us needs them to survive.

I think that the Grotius-inspired collective ownership of the earth rationale is the strongest of the four I have canvassed for the right to a safe haven. The collective ownership of the earth rationale has the benefit of justifying precisely what the right to

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<sup>51</sup> Indeed, Kant seems to ground the main hospitality right that he discusses, the right to visit, in a metaphorical version of the very same common ownership thesis that underpins Grotius’s necessity-based justification, Cavallar 2002, 363-364; Benhabib 2004, 29-30 (Kant justifies “the ‘temporary right of sojourn’” based on “two different premises,” “the capacity of all human beings ... to associate” and “the juridical construct of a ‘common possession of the surface of the earth’”). Benhabib is not convinced that the common possession of the surface of the earth does much to explain the basis of the right of temporary sojourn, however (2004, 127).

safe haven provides: access to a portion of the earth's territory in situations where the claimant lacks a territory. The starting point for the Grotian rationale is humankind's collective claim to the earth, and it is access to land under another's control that the rationale justifies, not sending foreign aid or any of the myriad other ways we might assist foreigners in need.

Another advantage of the Grotian rationale is that it suggests some limits on the circumstances in which countries would have to open their borders to admit persons. The import of the rationale is that it comes into force in extreme cases where persons lack access to land within their home countries sufficient to enable them to exercise their right to self-preservation.<sup>52</sup> Citizens of sinking states would fall within this rationale since the disappearance of their islands would leave them without any land. Conceivably the rationale also might embrace citizens of states whose territory is diminished through sea level rise due to climate change on the basis that these states lack enough territory for their population. But the rationale sets up a fairly restrictive test for citizens of states that still have territory to claim the benefits of the right to a safe haven: these persons would have to establish that they do not have enough land within their home countries to exercise a right to self-preservation. Under the Grotian rationale, individuals could not claim the right to a safe haven merely because their home states lacked enough territory to guarantee them a continued livelihood or to secure them a certain attractive standard of living.

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<sup>52</sup> Some evidence of this is that, as I mentioned earlier, Grotius refers to an obligation to provide "a permanent dwelling place ... to foreigners driven from their own homes, who are seeking a refuge" (II.2.XVI). Framing the duty as owed to persons "driven from their own homes" sets a high bar that leaves unprotected persons who are living very poorly in their home countries. To be clear, though, the just-quoted passage on what I label the right to a safe haven is separate from the passage where Grotius discusses the private right of necessity and the rationale for this right.

The fact that the Grotian rationale suggests limits on the right to a safe haven is important because the right will not be politically viable unless it is possible to define limits to it. One lesson we can take from refugee law and politics under the existing Refugee Convention is that there is limited public tolerance in many potential host countries for admitting refugees and that calls to admit increasing numbers of refugees tend to generate political backlashes.<sup>53</sup> While we might criticize the attitudes that give rise to backlashes against refugee claimants, they must be kept in mind in contemplating the creation of a new right to a safe haven. One of the ways that refugee law in the U.S. and elsewhere currently restrains the flow of refugees is through the internal protection principle.<sup>54</sup> Under this principle, persons who otherwise might be considered refugees under the Refugee Convention are denied asylum in foreign countries when there is a part of their home country to which they could relocate and avoid persecution. The limit that the Grotian rationale suggests for the right to a safe haven similarly would require potential claimants to draw first on the resources of their home country before seeking to relocate elsewhere. As long as the home country retained sufficient land to enable persons to exercise their right to self-preservation there would be no right to resettle elsewhere.

## **V. Implementation**

Assume individuals enjoy a right to a safe haven on the basis of our collective ownership of the earth. How might the right be implemented for the benefit of the

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<sup>53</sup>See Martin 1991, 61.

<sup>54</sup> On the internal protection principle, also known as the “internal flight alternative” or the “internal protection alternative,” see Martin, Aleinikoff, Motomura & Fullerton 2007, 119-131.

victims of sea level rise, the concern of this essay? In reality, any right to safe haven is likely to be implemented through political discussions at the international and the domestic levels. To provide a starting point for these political discussions, I briefly discuss the principle that I think should guide the implementation of a right to a safe haven for the victims of sea level rise, and I describe possible mechanisms for implementing the right.

### **1. Principle for allocating responsibility**

There is an emerging policy literature emphasizing the absence of any international law framework for dealing with the refugees that climate change may create, and proposing various options to avoid a crisis situation where countries fall back on ad hoc responses.<sup>55</sup> One intriguing proposal is that responsibility for the persons displaced by climate change should be allocated among countries based on countries' historical greenhouse gas emissions (Byravan and Rajan 2006; see also Byravan and Rajan 2010). Under this option, "people living in areas that are likely to be obliterated or rendered uninhabitable would be provided the early option of migrating legally in numbers that are in some rough proportion to the host countries' cumulative greenhouse gas emissions" (Byravan and Rajan 2006, 249). This proposal implicitly assumes that corrective justice should loosely guide the allocation of responsibility for climate change migration because it assigns responsibility for refugees to countries in proportion to their wrongdoing as indicated by their historical emissions. I use the term loosely because the

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<sup>55</sup> For examples, see sources cited in note 10. Byravan and Rajan (2006, 248-249) warn that "the international community ... is probably inclined to treat the problem in the *ad hoc* manner in which refugee problems are otherwise managed."

proposal does not allocate responsibility on the basis that any particular country caused any particular injuries, but rather on the basis of country shares of overall emissions.<sup>56</sup>

As implied in the introduction, there are drawbacks to allocating responsibility for climate change migration based on corrective justice (see generally Posner and Sunstein 2008). One is that corrective justice is a backward-looking approach that will limit victims to claiming against countries in proportion to their historical emissions, with the practical result that the relatively small number of historically large emitting countries will bear most of the responsibility for climate migration. The historically large emitters may not be the countries best suited to absorbing or financing the absorption of newcomers by the time that citizens of sinking states migrate, given the potentially long time-frame over which migration may occur. Moreover, if migration occurs decades or centuries into the future, it may be unjust to hold the future citizens of historically large emitters responsible for emissions by their ancestors. One argument for holding future citizens responsible for the wrongs of their forerunners is that that the future citizens are beneficiaries of the wrongs of their predecessors. But the future citizens of historically large emitters may not be net beneficiaries of their ancestors' emissions by the time that migration occurs, as these large emitters (hopefully) will soon take significant actions to reduce their emissions, some of which could be costly for present and future generations of their citizens (compare Posner and Sunstein 2008, 1593-1594, 1602). An important advantage of the principle for allocating responsibility sketched in this essay is that it is present or forward looking. It focuses attention on what I maintain should be a more

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<sup>56</sup> In other words, Byravan & Rajan (2006, 2010) advocate a form of market share liability. See also Grimm, (2007). Market share liability is not universally regarded as consistent with corrective justice.

important principle than past wrongdoing in allocating responsibility for climate change migration: a country's resources to absorb or finance the absorption of newcomers.

Under the approach sketched in this essay, the availability of resources would be the basis for allocating responsibility for climate change migrants, not historical wrongdoing. Since the rationale for the right to safe haven is everyone's equal entitlement to the resources of the earth, the remedy should tend toward equalizing resource shares by imposing greater responsibilities for climate refugees on countries with greater resources. Thus the availability of land, as measured perhaps by population density, should be a key consideration, given that the rationale for the right is the collective ownership of the earth. Less densely populated countries should incur more responsibilities and more densely populated countries should face less responsibilities.

However the availability of resources alone cannot be the sole basis for assigning responsibilities among countries. We live in a highly populated world that has been carved up among nations. There is no "empty" surplus land available for settlement—or resettlement—as there arguably was in Grotius's day.<sup>57</sup> When we allocate responsibility for the citizens of sinking states among countries, we in effect are taking away land from citizens of existing states. In doing so, it makes sense to consider not just each country's available land mass, but also which countries can most afford to give up resources such as land. To do this we need to look at more than population density since a country could have an expansive, relatively unpopulated land mass but be poorly positioned to give up any of its land because it is of modest quality and the country has not developed other sources of wealth. Similarly, a country could be very densely populated but well

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<sup>57</sup> There may not have been much if any "empty" land available in Grotius's era if aboriginal use is given due respect.

positioned to accept newcomers because its land mass is extremely rich, or because it has amassed economic wealth through other means. In allocating responsibilities among countries I suggest that we should take account of measures of wealth as well as population density and thus use a basket of metrics.<sup>58</sup>

Consider Table 1 as a first step in thinking about the allocation of responsibility for climate migrants based on a right to a safe haven grounded in the collective ownership of the earth. The table allocates responsibility for 300,000 persons, roughly the population of the Maldives, among the 32 countries currently members of the Organisation for Economic Co-operation and Development (OECD) plus Brazil, Russia, China, and India, based on an average of three metrics. One metric is population density as of 2005, an indicator of the availability of land (United Nations). Countries with lower population density are allocated responsibility for more newcomers. The other two metrics are 2005 Gross Domestic Product (GDP) and 2005 GDP per capita, adjusted for purchasing power parity (International Monetary Fund). GDP is a proxy for a country's total wealth while GDP per capita is an indication of the average wealth of the country's citizens. Countries are listed based on the number of refugees for which they would be responsible under the average of the three metrics, with countries with higher allotments at the top. The table indicates the number of refugees for which a country would be responsible under the average of the three metrics and each metric individually. For comparison, Table 1 also indicates the number of refugees for which countries would be

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<sup>58</sup> Schuck (1997, 279) proposes tradable quotas for refugees in general, not specifically climate refugees, with country's initial quotas determined solely based on national wealth on the basis that "Protective capacity is largely, though, not exclusively, a function of wealth." Schuck (1997, 281) recognizes that "population density and land mass .... may well affect the ease with which a state can protect or resettle refugees on its own territory" but he maintains that "these factors are probably best taken into account as they are reflected in the prices that states are willing to pay to transfer their burden to other states."

responsible based on country-specific cumulative emissions of carbon dioxide from energy from 1850 to 2006 (World Resources Institute). Table 2 highlights the implications of relying on the basket of metrics I propose or historical emissions by comparing country shares under the two approaches.

If countries agreed to assume responsibility for climate refugees on the basis I suggest, country allotments would need to be periodically updated to reflect changes in the availability of resources, as reflected in changes in the availability of land and economic wealth. In addition, allotments would need to be updated to reflect changes in information about the expected number of citizens of sinking states requiring refuge, as the science of sea level rise improves.

**Table 1: Allocation of responsibility for 300,000 climate change refugees among 32 OECD countries plus Brazil, Russia, India and China, based on average of 3 criteria and historical emissions**

<b>Country</b>	<b>Average</b>	<b>Per capita GDP</b>	<b>Total GDP</b>	<b>Land per person</b>	<b>Historical emissions</b>
United States	33,861	13,309	82,603	5,671	103,412
Canada	25,654	10,961	7,399	58,603	7,749
Australia	24,570	10,561	4,548	58,603	3,888
Iceland	23,223	10,999	69	58,603	29
China	12,428	1,267	34,734	1,283	29,687
Russia	12,254	3,690	11,098	21,976	28,869
Japan	11,762	9,453	25,312	522	13,656
Norway	10,302	14,818	1,439	14,651	569
Germany	8,894	9,502	16,419	761	25,090
United Kingdom	7,782	10,004	12,632	709	21,348
France	7,774	9,525	12,215	1,584	10,057
Luxembourg	7,734	22,004	215	982	209
Finland	7,175	9,490	1,045	10,988	755
Brazil	7,010	2,683	10,357	7,991	2,878
Sweden	6,978	10,208	1,934	8,790	1,334
Italy	6,783	8,771	10,677	902	5,787
New Zealand	6,718	7,759	674	11,721	409
Spain	6,128	8,578	7,738	2,068	3,261
India	5,524	650	15,410	511	8,284
Ireland	5,307	11,955	1,036	2,930	508
Mexico	5,211	3,894	8,485	3,256	3,583
Netherlands	5,034	10,920	3,736	447	2,859
Korea	4,880	7,104	7,168	368	2,971
Austria	4,725	10,560	1,822	1,794	1,388
Switzerland	4,712	11,419	1,741	977	759
Chile	4,369	3,817	1,298	7,991	520
Denmark	4,345	10,455	1,186	1,395	1,094
Belgium	4,242	10,006	2,204	516	3,399
Greece	3,918	7,841	1,818	2,093	838
Turkey	3,416	3,432	4,884	1,932	1,654
Slovenia	3,125	7,293	306	1,776	176
Portugal	3,050	6,243	1,378	1,529	554
Poland	3,036	4,232	3,385	1,490	6,957
Czech Republic	3,012	6,319	1,355	1,363	3,200
Hungary	2,677	5,284	1,118	1,628	1,311
Slovak Republic	2,386	4,995	564	1,598	961

**Table 2: Country shares under average of 3 criteria and historical emissions.**

<b>Country</b>	<b>Percentage under average of 3 metrics</b>	<b>Percentage under historical emissions</b>
United States	11.3%	34.5%
Canada	8.6%	2.6%
Australia	8.2%	1.3%
Iceland	7.7%	0.0%
China	4.1%	9.9%
Russia	4.1%	9.6%
Japan	3.9%	4.6%
Norway	3.4%	0.2%
Germany	3.0%	8.4%
United Kingdom	2.6%	7.1%
France	2.6%	3.4%
Luxembourg	2.6%	0.1%
Finland	2.4%	0.3%
Brazil	2.3%	1.0%
Sweden	2.3%	0.4%
Italy	2.3%	1.9%
New Zealand	2.2%	0.1%
Spain	2.0%	1.1%
India	1.8%	2.8%
Ireland	1.8%	0.2%
Mexico	1.7%	1.2%
Netherlands	1.7%	1.0%
Korea	1.6%	1.0%
Austria	1.6%	0.5%
Switzerland	1.6%	0.3%
Chile	1.5%	0.2%
Denmark	1.4%	0.4%
Belgium	1.4%	1.1%
Greece	1.3%	0.3%
Turkey	1.1%	0.6%
Slovenia	1.0%	0.1%
Portugal	1.0%	0.2%
Poland	1.0%	2.3%
Czech Republic	1.0%	1.1%
Hungary	0.9%	0.4%
Slovak Republic	0.8%	0.3%

## 2. Implementation mechanisms

Assume we agree that a country's resources as well as its economic wealth should determine the extent of the responsibilities that it owes the citizens of sinking states. It is still necessary to determine the mechanisms that countries could use to satisfy their obligations. Drawing partly on proposals for tradable quotas to deal with environmental problems such as greenhouse gases, Schuck (1997) proposes a tradable quota regime for refugees in general, not specifically climate refugees. Under Schuck's proposal, countries would agree to take quotas of refugees, quotas which countries could meet either by accepting refugees or paying other countries to do so. Country allotments of climate refugees similarly could be made tradable.

Tradability would provide a way of reconciling two rights at stake in the refugee context: the right of refugees to a safe haven, and the right of countries to control entry. Tradability would allow countries to honor their responsibilities to climate refugees while respecting the traditional prerogative of the state to control entry because countries that did not want to admit refugees could pay others to resettle them. While allowing countries to refuse entry to refugees might seem inconsistent with the idea that there is a right to a safe haven, recall that there is nothing in Grotius, Pufendorf, Kant, or contemporary refugee law that gives refugees the right to choose their country of refuge. As Schuck (1997, 285) explains with respect to modern refugee law, "[r]efugees are entitled only to basic protection from persecution, not residence in the society of their choice."

Tradability could be achieved in two ways.<sup>59</sup> In a decentralized regime, countries would have quotas that they could honor either by accepting the requisite number of climate refugees, or by paying other countries to take the entire or part of the quota. In a centralized regime, an international agency in effect would tax countries for the cost of resettling refugees based on the quotas countries were allotted, and then “contract” with countries to resettle the refugees. Schuck favors a decentralized approach, arguing that it would be more likely to garner state support because it would have lower transaction costs and allow host countries to receive not only cash but also other goods, such as trade benefits or political support, for agreeing to accept refugees.

There are many possible objections to tradable quotas for climate refugees. One is that refugees could be required to settle in countries that lack the resources or the will to absorb newcomers. This concern could be addressed to some extent by restricting the countries to which quotas could be sold (in a decentralized regime) and the countries that could be contracted to resettle refugees (in a centralized regime) to countries with a certain level of resources and commitment to refugee protection, or potentially just to countries that received quotas in the first place.<sup>60</sup> Restricting the market in these ways might reduce the gains from trade, but the price of protecting refugees is likely worth it.

A second possible objection is that a tradable quota regime would treat vulnerable people as commodities. Especially in a decentralized form, the tradable quota regime would make countries with the resources and wealth to absorb newcomers the masters of

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<sup>59</sup> The following discussion of tradable quotas for climate refugees draws heavily on Schuck’s proposal for tradable quotas for refugees in general in Schuck 1997 (283-284, 289-297).

<sup>60</sup> Schuck proposes that refugee quotas should not be allotted “to a state that engages in systematic violations of human rights” (1997, 281) or to states “whose wealth falls below some minimal level” (282). He also suggests mechanisms for “minimizing” the “risk” that refugees will be treated poorly by countries

the fate of the citizens of sinking states since these countries would determine through negotiations where refugees would be resettled. In doing so, the regime would fail to honor the suggestion from the Ambassador from Nauru to the U.N. quoted above that we should “Ask the people who are most affected” what do about climate change (Mohrs 2009). One way of allowing individuals from sinking states a voice in where they are resettled would be to adopt a centralized trading regime with an agency overseen by a board with representation from sinking states. The board could be given the task of approving any contracts to resettle individuals, who through sinking state representation on the board would have an opportunity to influence the location of resettlement. Representation on the board would seem a small concession to make to people whose lives are being fundamentally uprooted through no fault of their own.

## **VI. Conclusion**

In the United States and elsewhere policymakers are mainly focused on measures to mitigate climate change by reducing greenhouse gas emissions. In this essay I have drawn attention to the need to start thinking about the adaptations that climate change may require. In particular, I have highlighted the possibility that sea level rise caused by climate change may lead to the submergence of small island states and consequently the need to resettle their citizens. Going back to another era when there was much discussion of the rights of foreigners to settle in other countries, I have argued that there is a historical precedent for a right to a safe haven which the citizens of sinking states could invoke, at least rhetorically. I also have analyzed a number of rationales for recognition of the right that could appeal to modern eyes, including a rationale rooted in the

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that agree to take them in exchange for payment, although he acknowledges that the risk cannot be completely eliminated (294-295).

collective ownership of earth that I think is particularly promising. In addition, I have briefly discussed the possible implementation of a right to a safe haven grounded in the collective ownership of the earth.

At the moment, the prospects seem slim that an international legal regime will emerge soon to address the adaptations that climate change will require. The small island states themselves apparently are divided about whether to raise the need for measures to facilitate relocation, and there is no politically powerful country championing relocation assistance. But as Thomas Homer-Dixon argued in a recent opinion piece (2010), climate change is upon us and it would be better not to wait until a crisis induced by climate change to think through the options for dealing with it.

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