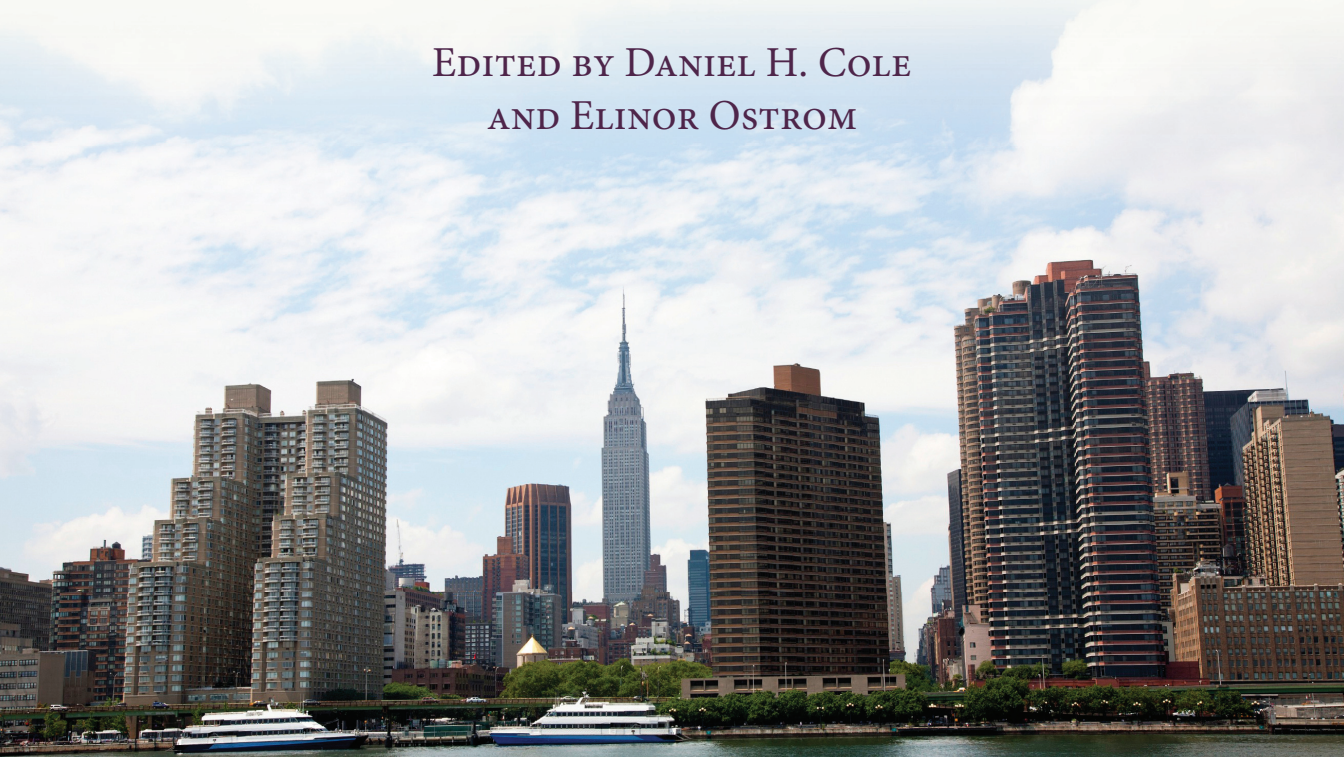
Property in Land and Other Resources

Edited by Daniel H. Cole
and Elinor Ostrom



Foreword by Douglass C. North

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Daniel H. Cole *and* Elinor Ostrom

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Sinking States

KATRINA MIRIAM WYMAN

In May 2009 the *New York Times Magazine* published an article 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 because of the rise in sea levels due to climate change.[1] Facing the possible submergence of most of the country's land mass, President Mohamed Nasheed is not only trying to encourage leading greenhouse gas emitters such as the United States to reduce their emissions, but also is beginning to plan for the possibility that the residents of his country will have to relocate. The article reported that the president has "proposed moving all 300,000 Maldivians to safer territory, he named 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, 40). At least one and possibly two other small island states also are seeking ways to resettle their residents because they similarly fear losing their territory to sea-level rise.[2]

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 chapter considers whether the citizens of the Maldives and other states that may be submerged because of sea-level rise should have a legal right to resettle elsewhere.

At first glance, a claim of a right to resettle by the Maldives or any other island state threatened by climate change sounds highly fanciful. Even the president of the Maldives has only proposed buying land for his citizens in other countries; he has not suggested that the citizens of the Maldives have any right to resettle in the

[1] On other small island nations whose existence may be threatened by climate change, see e.g., Kristof (1997).

[2] Kiribati and possibly Tuvalu may be looking for ways to resettle their populations (Crouch 2008; Kolmannskog 2008; Schmidle 2009). However, in describing the policies that Kiribati and Tuvalu are pursuing to deal with climate change, McAdam (2011) does not suggest that either country currently is looking to purchase land in other countries. In addition to relocating, building floating facilities is another option sinking states might consider. 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, such as a convention center and golf courses, for the country. The Maldives indicated that it would try to develop "floating housing units" with the company in the future (President's Office 2010).

territory of another country. But the claim may not be as far-fetched as it initially appears. Climate change is already affecting coastlines in the Maldives and elsewhere. Warming is expected to continue, regardless of whether the major greenhouse gas-emitting countries agree to reduce their emissions in the near future, and there are estimates that it will require millions of persons to relocate.[3]

Moreover, there are historical precedents for the claim that a country has the right to establish settlements in other countries or territories. Western colonization of North and South America, Asia, and Africa from the late 1400s to the 1800s prompted scholarly debates about whether there was a right to establish settlements on the land of another people or state. Although there is a widespread perception that the westerners who considered the legitimacy of colonization universally justified settlement, this was not the case. In the late eighteenth century in particular, well-known scholars criticized Western imperialism.[4] The threatened disappearance of the Maldives and other small island states once again raises the question of whether there is a right to establish settlements in other countries. In a historical irony, the peoples who might seek to claim a right to establish settlements in our time are often the descendants of people colonized by the old European powers. For example, the Maldives was a British protected area and then a protectorate from 1796 until it gained independence in 1965, and earlier the islands were under the influence of the Portuguese and the Dutch (Metz 1994). Adding to the irony, the claimants this time 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.

This chapter argues 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, the chapter starts from the premise that people who are forced to resettle because of climate change are unlikely to have a right to resettle elsewhere under existing international law. They are not likely to be considered refugees under the Convention Relating to the Status of Refugees (United Nations 1951).[5] Nor are they likely to be able to claim a right to resettle under international human rights law.[6] In addition, the chapter argues that the citizens of

[3] On the prospects for continued warming, see IPCC (2007).

[4] Georg Cavallar explains that "the late eighteenth century produced a row of 'enlightened critics of empire' . . . and colonialism, among them Davenant, Raynal, Diderot, Gibbon, Condorcet and Herder" (2002, 257). See also Muthu (2003).

[5] Under the Refugee Convention, a refugee is defined as a person with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" (United Nations 1951, Article 1A[2], in conjunction with United Nations 1967, Article 1[2]). People displaced because of climate change are unlikely to satisfy this definition for several reasons. For example, they are unlikely to satisfy the persecution requirement or the requirement that persecution be on one of the five listed grounds. For legal analyses of the obstacles to bringing most climate refugees within the definition of the Refugee Convention, see, e.g., Docherty and Giannini (2009); McAdam (2009a; 2009b); McAdam and Saul (2010); Office of the United Nations High Commissioner for Refugees et al. (2009); and United Nations High Commissioner for Refugees (2008).

[6] For example, climate refugees probably could not rely on the non-refoulement principle, which is included or has been held to be provided in various human rights instruments (the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3; International Covenant on Civil and Political Rights, Article 7; and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3) (Kolmannskog 2008). Climate refugees are unlikely to fall within the scope of the non-refoulement principle (McAdam and Saul 2010). Even if climate victims can invoke the principle, it is unlikely to meet the needs of most climate victims. It provides a right not to be returned, not the right to settle permanently in a for-

small island states should have an individual right to resettle. It sets to the side the fascinating question of whether a state or people should have a collective legal right to reconstitute itself elsewhere.[7] The possibility that a country threatened by climate change might disappear is difficult to contemplate. As Nauru's ambassador to the United Nations, Marlene 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). The recognition of an individual right to resettle would be a second-best response, but it is nonetheless a place to start as we begin adapting to climate change.

In arguing that the citizens of sinking states should have a legal right to resettle, we may start by returning to the scholarly discussions from the age of discovery about when there is a right to settle areas that already belong to other peoples or states. Scholarly discussions from this period of what might be labeled a "right to safe haven" provide a basis for thinking about a right to resettle that citizens of sinking states could invoke.[8] It is often argued 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; Penz 2010). However, the right to safe haven was discussed as a right (or a privilege) that displaced foreigners enjoyed against states generally and was therefore not rooted in corrective justice. Indeed the right to safe haven is likely preferable to claims rooted in corrective justice because it recognizes claims against many more countries and does not require claimants to prove that their current needs were caused by specific countries.[9]

There are several possible rationales for recognizing a right to safe haven in the twenty-first century. The chapter initially analyzes the option of 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 it explores whether there might be a narrower, independent argument for the right that does not require accepting a general cosmopolitan moral theory. The independent argument that appears to be most promising is a rationale rooted in the natural law tradition recently secularized by Mathias Risse (2009) in an article in which he attempts to craft a right to relocate that could be invoked by islands that disappear because of climate change.[10] The advantages of the rationale he suggests are discussed in detail.

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eign country (Docherty and Giannini 2009; Office of the United Nations High Commissioner for Refugees et al. 2009).

[7] For arguments that disappearing states may enjoy collective rights to sovereignty over territory, see Nine (2010). Meisels (2009) briefly sketches an argument for a collective right to sovereignty over territory based on egalitarian grounds. Gans (2008) offers a potentially relevant defense of ethnocultural nationalism and discusses the principles that should govern the allocation of territory among nations.

[8] The phrase "right to safe haven" is borrowed from Pauline Kleingeld (1998, 76), who uses the term in reference to Kant.

[9] Mathias Risse (2009) also distinguishes his recent effort to craft a right to relocate, which draws on the work of Hugo 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.

[10] Risse's article 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. Tally Kritzman-Amir (2008) argues that a category of socioeconomic refugees warrants legal protection. To motivate her analysis, Kritzman-Amir uses the hypothetical example of the island state of Elbonia, which is about to become uninhabitable because of rising water levels. There also is a helpful emerging policy literature proposing mechanisms to assist persons dislocated by climate change (Baer 2010; Biermann and Boas 2008; Burkett 2009; Byravan and Rajan 2006; 2010; Docherty and Giannini

Finally, the chapter discusses how a right to safe haven might be implemented. In general, the right could be implemented similarly to international refugee rights, which arguably reflect the same concerns.[11] For example, as with refugee rights, individuals would be able to claim the right. A key difference is that international refugee law does not allocate responsibility for refugees among countries (Schuck 1997), as the proposal for the right to safe haven due to climate change does.

In suggesting that the right to safe haven could support claims by citizens of threatened states to resettle in other countries, this chapter 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 colonized peoples may have grounds for claiming rights elaborated in the West during the era of imperialism.

Rise in Sea Level

The rise in sea level is one of the most frequently mentioned signs that the climate is warming (IPCC 2007). According to the 2007 synthesis report of the Intergovernmental Panel on Climate Change (IPCC), "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 "whether this faster rate for 1993 to 2003 reflects decadal variation or an increase in the longer-term trend is unclear" (IPCC 2007, 30). 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 stabilised" (IPCC 2007, 46).

Increases in sea levels are projected to have significant impacts. Milne et al. describe them 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 kilometres of land and one trillion dollars worth of assets [lie] . . . less than 1m above current sea level" (2009, 471). The synthesis report warns that "by 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 2007, 48).

It is important to recognize the difficulties that plague scientific work about sea-level rise. First, there is considerable uncertainty about "global average sea-level rise" (Milne et al. 2009, 471). Complicating efforts to estimate the amount the seas will rise on average is uncertainty about "future 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 2007, 73; Milne et al. 2009). Therefore, the synthesis report "does not assess the likelihood, nor provide a best estimate or an upper bound for sea level rise," opting instead for "model-based pro-

2009; Hodgkinson and Burton 2010; McAdam 2010; 2011; Penz 2010; Prieur et al. 2010). McAdam (2011) briefly reviews recent proposals for a treaty to protect victims of climate change.

[11] For the idea that modern refugee rights reflect Kant's concept of the right to safe haven, see Benhabib (2004) and Kleingeld (1998).

jections of global average sea level rise at the end of the 21st century (2090–2099)" (IPCC 2007, 45).

Second, predicting localized changes in sea levels is even more complicated than estimating the global rise (Milne et al. 2009). Noticeably absent from the synthesis report is any prediction that one or more specific small island states will disappear because of sea-level rise. Milne et al. explain, "Many different physical processes contribute to sea-level change . . . and none of these produce a spatially uniform signal. Indeed, one of the few statements that can be made with certainty is that future sea-level change will not be the same everywhere" (2009, 471). Satellite measurements of changes in sea-level rise since the 1990s provide evidence for this statement. Milne et al. explain 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" (2009, 471). Indeed, there are scientists who doubt that the Maldives will disappear, despite the dire predictions about its fate.[12]

Still, the inability of scientists to predict whether the Maldives or other 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 that will affect the earth's geography and its people. 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).[13] 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.[14] The focus here is on whether the victims of sea-level rise in countries that become uninhabitable due to climate change should have a legal right in international law to a safe haven. 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 island nations would be unable to relocate within their national borders. A document from the United Nations 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" (United Nations High Commissioner for Refugees 2008, 5).

[12] 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, 40). Webb and Kench (2010) suggest that the concerns that Pacific island nations will disappear as a result of sea-level rise may be exaggerated because historical data suggest that coral reef islands in the central Pacific have for the most part not eroded, but rather have changed their shape as sea levels have risen in recent decades. Zukerman (2010) reports on Webb and Kench's findings and reactions to them.

[13] There is considerable uncertainty about the number of persons who may be forced to relocate due to climate change. For discussions of the estimates and the uncertainty, see e.g., Biermann and Boas 2008; Brown 2008; Docherty and Giannini 2009; Guler 2009; Hulme 2008; McAdam 2009a.

[14] On the expectation that most people displaced by climate change will migrate internally within their home countries, see, e.g., McAdam 2011; Office of the United Nations High Commissioner for Refugees et al. 2009.

The Right to Safe Haven in Context

Writings on the rights of foreigners from the period of Western imperialism were 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, but one may use them to attempt to formulate a right that could 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 those lands (Pagden 1987). 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 best-known discussion today of the rights of foreigners to hospitality from the era of Western imperialism (Kleingeld 1998).[15] But hospitality rights antedate Kant (1724–1804). Duties to be hospitable to travelers were already recognized in many sources before the late 1400s, including Plato.[16] Indeed, Georg Cavallar (2002) 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 (1632–1694).[17]

The discussions of hospitality rights in Kant and earlier works tend to address different situations in which foreigners might present themselves to a state or a people other than their own without clearly distinguishing these situations. We can 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 noneconomic reasons; when foreigners seek to settle permanently in another country, but not because they are imperiled; and when foreigners require a safe haven because they are imperiled. The last is the one most relevant to the victims of warming-induced sea-level rise.

Right to Interact

One situation considered during the period of colonization concerned the efforts of foreigners to initiate trade with or simply to visit other countries or their citizens, not to establish permanent settlements. Some writers, such as the Thomist theologian Francisco de Vitoria (1486–1546), take positions friendly to the Western powers, insisting that hospitality rights provide foreigners with rights to travel and trade provided they "do no harm" to the local population (1917 [1532], xxxvi).[18] Pufendorf's more moderate and nuanced view arguably sets the stage for Kant's discussion. In contrast to Vitoria, Pufendorf (1934 [1688]) insists that countries have the right to deny admission to foreign travelers and the right to refuse to trade. But Pufendorf

[15] For examples of contemporary discussions of Kant's cosmopolitan right, see Benhabib (2004); Kleingeld (1998); and Waldron (2000).

[16] In Pufendorf's enumeration of examples of discussions of duties of hospitality in *De jure naturae et gentium libri octo* (1934 [1688], 3.3.9), his sources include "Plato, *Laws*, Book XII, where he lists the duties owed strangers."

[17] Cavallar argues that "Kant offers a new justification of hospitality rights" by "revising the traditional argument from original ownership" (2002, 368).

[18] See also Cavallar (2002); Pagden (1987).

warns that it might be unwise to deny foreigners the right to visit if countries want their citizens to be welcome abroad. He also suggests that there is an exception to the right of a country to refuse trade: it cannot refuse to trade in goods that are "absolutely essential to human life" unless the exporting country itself may require the goods (1934 [1688], 3.3.11).

Kant maintains that there is "a right to visit" foreign lands, but he carefully limits the scope of this "right of foreign arrivals," arguing that it "pertains . . . only to conditions of the possibility of *attempting* interaction with the old inhabitants" (2006 [1795], 8:358). 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.[19] 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 human species ever closer to a cosmopolitan constitution" (Kant 2006 [1795], 8:358). The right to visit is not an unqualified right. Visitors have to behave "peacefully" to enjoy the right (8:358). Countries can refuse to admit visitors or establish limits on their travels, perhaps even for no reason.[20] 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" (8:358).[21]

In general, the rights to interact that Kant and others recognized have limited contemporary relevance for citizens of states facing loss of territory from sea-level rise. These citizens 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 generally 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, whose residents could have to plead 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 discussions from the age of discovery of the right to settle and especially the right to safe haven may offer greater assistance.

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[19] The scope of the right is further discussed in *The Metaphysics of Morals* (Kant 1996 [1797]). There Kant states "that all nations stand *originally* in a community of land, though not of *rightful* community of possession (*communio*) and so of use of it, or of property in it; instead they stand in a community of possible physical *interaction* (*commercium*), that is, in a thoroughgoing relation of each to all the others of *offering to engage in commerce* with any other, and each has a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt" (1996 [1797], 6:352). A bit later Kant refers to "the right of citizens of the world *to try to* establish community with all and, to this end, to *visit* all regions of the earth. This is not, however, a right to *make a settlement* on the land of another nation (*ius incolatus*); for this, a specific contract is required" (1996 [1797], 6:353).

[20] Kleingeld argues that "a state has the right to deny a visit, as long as it does so non-violently" (1998, 75).

[21] 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 it excludes them, as if they were prisoners, from associating with the native inhabitants" (Kant 2006 [1795], 8:359).

Right to Settle

A second situation discussed in the age of discovery is that of foreigners who 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, such as Hugo Grotius (1583–1645), argue that foreigners have a robust right to settle without the consent of the peoples or states already in the territory. Anticipating John Locke's more famous agricultural argument for Western colonization, Grotius maintains that "if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction, which always continues the Right of the antient People" (2005 [1625], II.2.XVII).[22]

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 nation" would require "a specific contract" (1996 [1797], 6:353).[23] In line with his insistence on consent for settlement, Kant was a forceful critic of Western colonialism.[24]

Ironically, the argument that settlement can be justified without the consent of the affected peoples represents an attractive position for countries facing loss of territory from sea-level rise, many of which were colonized during the age of discovery.[25] However, as a pragmatic matter, the argument that settlement of another country's territory does not require that country's consent seems unlikely to prevail in the twenty-first century, given the importance that international law now attaches to state sovereignty.[26] 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 controversial even during the age of discovery.

Right to Safe Haven

In assessing the right of persons to resettle, the most promising precedent in discussions during the age of discovery is situations in which individuals in peril seek

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[22] 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).

[23] Kant also 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 surface of the earth" (2006 [1795], 8:358).

[24] See e.g., Kant (1996 [1797]; 2006 [1795]) for critiques of Western imperialism. Secondary sources discussing Kant's views on imperialism include Kleingeld (1998); Muthu (2003); and Waldron (2000).

[25] Walzer (1983) recognizes a related irony: the idea that foreigners have a right to settle unused land, which once provided a rationale for colonialization, now potentially could ground a right to immigrate from intensely populated developing countries to less densely populated countries such as the United States and Australia that were founded by colonists.

[26] For example, Ann Dummett argues that "belief in 'state sovereignty' is the objection most often advanced against free immigration" (1992, 174).

refuge in a foreign state. These discussions suggest an obligation on the part of countries to admit foreigners who are in peril and outside their home countries, and they imply that individuals enjoy what can be called a right to safe haven. This right is probably best understood as a counterpart in public international law to the private right of necessity. The right of private necessity concerns the right of individuals in imminent peril to take the property of others to preserve their own lives or property; the right to safe haven addresses the right of individuals to enter foreign countries when they are in peril outside their home countries and are unable to return there.

Grotius argues that "a fixed Abode ought not be refused to Strangers, who being expelled from their own Country, seek a Retreat elsewhere: Provided they submit to the Laws of the State, and refrain from every Thing that might give Occasion to Sedition" (2005 [1625], II.2.XVI). However, the right to permanent refuge does not necessarily include the right to acquire land on which to settle in the receiving state. Grotius explains that newcomers have the right to land in the host state only "if there be any waste or barren Land" in the state (2005 [1625], II.2.XVII).

Pufendorf also suggests that foreigners in peril have a right to settle in other countries, but this right is considerably more qualified than the one Grotius sketches. After referring to the duty Grotius envisions to grant "permanent settlement to strangers who have been driven from their former home, and seek entrance into another," Pufendorf argues that "it 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" (1934 [1688], 3.3.10). 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 resettle permanently, and if so, how many:

> But no one would 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. (1934 [1688], 3.3.10)

Moreover, Pufendorf envisions newcomers as enjoying more circumscribed rights to land than Grotius does. 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" (1934 [1688], 3.3.10). According to Pufendorf, foreigners do not even have a right to barren lands.

For Pufendorf, 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"

(1934 [1688], 3.3.10). Although the considerations he identifies may sometimes favor denying entry, Pufendorf's insistence that there are pragmatic reasons for granting permanent refuge suggests 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" (1934 [1688], 3.3.10). Cavallar speculates that Pufendorf might have been referring to the migration in the 1580s of more than 100,000 persons "from the Catholic south Netherlands . . . to the north," who are credited with "contributing to what has been called the economic 'miracle' at the onset of the Golden Age" (2002, 205).

Kant devotes much less attention to persons in peril than to foreigners who seek settlement or the right to visit. In a brief passage in the "Third Definitive Article of Perpetual Peace," he states: "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" (2006 [1795], 8:358).[27] According to Kleingeld, Kant elaborates on this statement in a draft of Perpetual Peace that indicates "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" (1998, 76).[28]

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 the right to safe haven. Just as Pufendorf maintained that refugees enjoy an imperfect right of refuge in foreign countries, he concluded that there is "an imperfect obligation" to assist persons in need, such as shipwreck victims, under the rubric of private necessity (1934 [1688], 2.6.5). In discussing private necessity, though, Pufendorf conceded that in cases of "supreme necessity," the imperfect obligation to assist persons in need could ripen into something resembling a perfect obligation (1934 [1688], 2.6.6).[29]

This brief survey of the views of Grotius, Pufendorf, and Kant emphasizes that they all conceive of countries as having some obligations to foreigners who are in peril outside their home countries. Their views imply that foreigners in this situa-

[27] "Death" is the translation in Kant (2006 [1795]), but 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 it applies would be much greater" (1998, 77). Benhabib (2004) also translates the passage as triggering a duty to allow the stranger to remain if destruction is the alternative. For the remainder of this chapter, I assume that the passage refers to "destruction" rather than "death."

[28] Benhabib implies that Kant gave more examples than the shipwreck where the right to safe haven would apply: "To refuse 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).

[29] Salter (2005) also interprets Pufendorf as conceding that persons in extreme need have a perfect right to use the property of others, even though Pufendorf otherwise characterizes the property owner's duty to assist persons in need as an imperfect obligation. The rights of ships and sailors in distress to enter foreign ports and to receive assistance remain live issues today. For recent discussions of these rights, see Murray (2002); Oliver (2008–2009); and Whitehead (2009). Tully (2007) suggests that the existing state obligations to rescue persons in distress at sea offer a precedent for requiring states to provide at least temporary protections to the victims of sea-level rise.

tion enjoy some sort of right of safe haven in foreign nations. Although they 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 individual foreigners, not groups of foreigners. Grotius refers to "Strangers" (2005 [1625], II.2.XVI), Pufendorf to "strangers" (1934 [1688], 3.3.10), and Kant to "the stranger" (2006 [1795], 8:358).

Second, the foreigners must 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 be outside their home countries and unable to return to them, at least in the immediate future. These authors also identify additional qualifying criteria. Grotius indicates that the obligation is owed to "Strangers, who being expelled their own Country, seek a Retreat elsewhere: *Provided they submit to the Laws of the State, and refrain from every Thing that might give Occasion to Sedition*" (2005 [1625], II.2.XVI) (emphasis added). For Pufendorf, "[i]t 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 institutions* (1934 [1688], 3.3.10) (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" (1998, 76) (emphasis added). In the "Third Definitive Article of Perpetual Peace," Kant indicates that the stranger must be facing "'*destruction*'" if he is denied entry (Kleingeld 1998, 76) (emphasis added).[30]

Third, the obligation extends to all countries. None of the authors suggest that only countries that cause foreigners to be displaced are obligated to them or that foreigners have claims against a 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 that countries have is to admit qualifying foreigners, or at least some of them, potentially permanently. However, Grotius, Pufendorf, and Kant do not agree on the stringency of the obligation. Grotius most clearly articulates a right to enter and to obtain permanent refuge, stating that "a fixed Abode ought not to be refused to Strangers" provided they submit to the prevailing domestic authority (2005 [1625], II.2.XVI). According to the draft that Kleingeld cites, the beneficiaries of the right Kant sketches "should be allowed to stay at least until the circumstances are favourable for their return" (1998, 76). Although this wording does not explicitly refer to a permanent right to remain, it presumably would embrace such a right if the circumstances never become favorable for return, as in the case of a sinking state.[31] Pufendorf states that "it belongs, indeed, to humanity to receive a

[30] It is noteworthy that Kant is the only one of the three authors who mentions that the persons seeking refuge should be doing so through no fault of their own. Pufendorf's (1934 [1688]) failure to state this is striking because he insists that individuals seeking to use the property of another because of private necessity must be in need through no fault of their own. Indeed, he seems to fault Grotius for failing to insist that the need that triggers the private right of necessity must have arisen through no fault of the claimant. For more on Pufendorf's critique of the right of necessity in Grotius, see Salter (2005), whose interpretations of the role of fault in the Grotian right of necessity and of Pufendorf's critique of Grotius related to the role of fault differ from the interpretations presented here.

[31] Benhabib describes what is here termed 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" (2004, 28). Benhabib is ambiguous about the status of the claim to temporary residency (2004, 36 [suggesting the

few strangers," but he is much more willing to allow receiving countries to limit and potentially to refuse entry in accordance with domestic priorities (1934 [1688], 3.3.10).

For present purposes, the key point is that during the age of discovery, there was a concept of a right to safe haven. If residents of sinking states ultimately are driven from their homelands by rising sea levels, they would seem to meet the minimum requirements that Grotius, Pufendorf, and Kant agree are necessary to invoke this right: they are individuals, seeking admission to a foreign country, outside their home country and unable to return to it at least in the immediate future.

Justifications of the Right to Safe Haven

In the famous New York property case *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (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 Grotius's, Pufendorf's, and Kant's discussions of the right to safe haven. One reason is that the right to safe haven is justifiable in modern eyes.

Because the support of people from many different traditions will be necessary for the right to safe haven to be recognized in law and policy, an overlapping consensus of several different rationales supporting the right would be desirable.[32] We 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 we 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.

General Cosmopolitan Moral Theories

One option would be to ground a right to safe haven in a general moral theory. To be useful, the theory would have to suggest that we are obligated across national borders to citizens of other states. A cosmopolitan version of liberal egalitarianism and utilitarianism are two possible theories.

LIBERAL EGALITARIANISM

At first glance, it might seem that cosmopolitan liberal egalitarian theories provide a promising route for approaching a right to safe haven. Such theories generally suggest that we are obligated as a matter of justice to achieve a measure of socioeconomic equality globally, a task which likely would require transfers to people in other countries. Indeed, Kritzman-Amir (2008) argues for greater legal protection for socioeconomic refugees (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.

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duty to help persons whose life and limb are endangered is an "*imperfect moral duty*"]; 38 [referring to "the right of temporary sojourn" as "a right" rather than "a privilege"]).

[32] Appiah states 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" (2003, 105).

Consider, for example, Thomas Pogge's cosmopolitan extension of John Rawls's theory of justice. Pogge treats the world as a single unit in which persons are the morally significant actors, and he argues that "the social position of the globally least advantaged" should be "the touchstone for assessing our basic institutions" (1989, 242). He is sensitive to the global socioeconomic inequalities that arise from countries' different degrees of access to "natural assets (such as mineral resources, fertility, climate, etc.)" (1989, 250), and he suggests that it might be necessary to rearrange property rights in natural assets to reduce those inequalities.[33] Under Pogge's approach, then, the citizens of sinking states might have a claim to natural resources (perhaps including land) from other states as part of a general institutional reform.

The word "might" is deliberately used because Pogge seems to have limited himself to a relatively modest proposal for addressing the socioeconomic 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]).[34] To be consistent with his overriding concern for addressing global poverty, any proposal that Pogge might countenance for reallocating ownership of natural resources among countries presumably would have to aim to reduce the socioeconomic need of those who are 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 socioeconomic need and not merely on the fact that they face the loss of their land mass and natural resources. The contingency of these claims would be particularly problematic for the wealthier citizens of sinking states because their financial assets might reduce the priority of their claims, even though they would be just as landless as their poorer compatriots.[35]

UTILITARIANISM

Utilitarianism provides a second possible ground for a right to 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. There are many reasons that a right to safe haven might promote well-being. First, it would save lives and reduce suffering by providing persons driven from their homes with a place to resettle. As Pufendorf (1934 [1688]) mentions, receiving countries might benefit from the talents and diversity of the new arrivals and their offspring.[36] Wide recognition of the right also would provide persons who were safely ensconced in their home countries

[33] "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).

[34] Pogge 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" (2002, 204–205).

[35] Recall that Pufendorf contemplated that "wealthy" persons might be admitted pursuant to what is here termed the right to safe haven (1934 [1688], 3.3.10).

[36] However, the economics of immigration are complex (Kritzman-Amir 2008).

with a form of insurance that they would be able to settle somewhere if they were ever driven away.[37] To be sure, the right would not be cost free. Implementation would require bureaucratic machinery, newcomers might need assistance in resettling, and, as with any form of insurance, there is a danger of moral hazard. If people know that they have a right to resettle elsewhere if they are driven from their homes, they might invest less in their home countries or exploit them unsustainably. The right also could have the unintended consequence of encouraging countries to drive some of their citizens or other countries' nationals from their homes because doing so would obligate other countries to accept the displaced individuals.[38] But overall, recognition of the right to safe haven probably 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 because claimants would be unable to return to their home country and would experience dislocation from resettling in another country.

One problem with grounding the right to safe haven in a utilitarian framework is that although 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 increase well-being should be our priority if we are utilitarians.[39] Singer (2009) highlights another way of alleviating suffering that might increase well-being more than recognizing the right to safe haven: giving aid and development assistance to developing countries to reduce global poverty.[40]

One staggering statistic on world poverty is that 1.4 billion people live on less than $1.25 a day, the poverty line established by the World Bank (Singer 2009). If the 855 million people with "an income above the average income of Portugal . . . . each . . . gave $200 per year, that would total $171 billion" (Singer 2009, 143), almost the estimated $189 billion it would cost to achieve the poverty reduction and other objectives of the Millenium Development Goals. Singer argues that because "suffering and death from lack of food, shelter, and medical care are bad," 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" (2009, 15). However, Singer recognizes 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 their lifestyles (2009). 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" (Singer 2009, 152).

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[37] Carol Rose suggested that the right to safe haven could be justified as a form of insurance and reminded me of the functional discussion of group ownership of land in Ellickson (1992–1993), in which Ellickson mentions that insurance can be an alternative to group ownership of land to spread risks.

[38] Schuck provides examples of reasons that a country 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" (1997, 273).

[39] I thank Liam Murphy for bringing this weakness of the utilitarian justification to my attention.

[40] See also Singer (1972).

Singer's proposal reminds us that we need to be cautious about grounding a right to safe haven in utilitarianism because there may be other measures, such as greater private and/or state aid to reduce poverty in developing countries, that might increase well-being even more and that should take priority under a utilitarian framework. Singer's proposal is not a substitute for the right to safe haven because he advocates greater private giving by individuals, not state action, which the recognition of the right would entail, although he is not opposed to state aid.[41] In fact, increasing aid to developing countries along the lines Singer recommends could be done as a complement to recognizing the right to safe haven.[42] But his proposal shows that utilitarianism offers at best a contingent case for the right to safe haven, because 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.

In addition to the specific difficulties with grounding the right to safe haven in utilitarianism or a cosmopolitan variant of liberal egalitarianism, there are broader reasons to resist grounding a right to safe haven in a general cosmopolitan moral theory. One is that rooting the right in a general theory requires endorsing that theory, as well as making a case that it would generate the right to safe haven. However, the notion that we are obligated to citizens of other states as a matter of justice is controversial (Nagel 2005), as are utilitarianism, Rawls's theory of justice, and probably any other general moral theory one might consider. If the right to safe haven has intuitive appeal, as it likely does for many people, it is probably not because they believe in a general moral theory of which that right is a part. It is more likely that there is something specifically compelling about people becoming homeless because the physical territory of their country disappears. It is possible that we can identify an independent rationale for the right that reflects this intuitive concern with the plight of the citizens of sinking states. We will consider two possibilities: the rescue principle and collective ownership of the earth.[43]

The Rescue Principle

The rescue principle is a potentially narrower rationale for the right to safe haven than the general theories discussed so far. As commonly understood, the rescue principle essentially holds that one has a positive duty to assist another person if that person is in urgent need and the first person can help him at little cost to himself. Even theorists who are reluctant to recognize obligations to citizens of other states as a matter of justice, or who outright reject this idea, claim that people sometimes should come to the assistance of citizens of other states on the basis of a humanitarian

[41] Point six of Singer's "seven-point plan" for individuals to help reduce global poverty is "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" (2009, 169).

[42] Kritzman-Amir discusses "financial aid" as a "complementary measure" to the use of refugee law to assist socioeconomic refugees (2008, 170).

[43] In investigating ethical responsibilities to climate refugees, Penz (2010) similarly considers and quickly rejects cosmopolitan theories of justice as a basis for responsibilities to them. He prefers to ground such responsibilities in a version of corrective justice, an idea inconsistent with the right to safe haven elaborated in this chapter.

rescue principle. In arguing that people sometimes are obligated as a matter of humanity, but not justice, these theorists resemble Pufendorf when he argues that as "an act of humanity," people should admit those who are forced from their home countries even though they do not enjoy a legally enforceable right to help (1934 [1688], 3.3.10).

Consider, for example, the views of Thomas Nagel, who is skeptical of the idea that we are required to implement "global socioeconomic justice" (2005, 132). He argues that claims for distributive justice apply only to one's own state, because distributive justice "depends 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 "this minimal humanitarian morality . . . does not require us to make [others'] . . . 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). Furthermore, Nagel mentions that "in 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). 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 specifically endorses "the Rescue Principle" on the basis that "it is difficult to see how it could reasonably be rejected" and argues that it "applies only in cases in which one can prevent something very bad from happening at only slight or moderate cost to oneself" (1998, 225).

Michael Walzer also subscribes to a narrow setting for distributive justice, but he claims that we have obligations that extend to foreigners outside this setting. Like Nagel, Walzer takes what he calls "the political community" rather than the globe as the setting for distributive justice (1983, 28), although Walzer counts not only countries, but also cities, as political communities. 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 book *A Theory of Justice* (Walzer 1983, 33). He initially describes this principle in individual terms that suggest that 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, 33)

Walzer then 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, 51)[44]

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 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, it is uncertain that the rescue principle would provide a solid foundation for the right because the idea that there is an obligation to rescue someone who is in urgent need when we can do so at little cost to ourselves is indeterminate. Assume that the citizens of sinking states would count as "necessitous" or "urgently" in need, to borrow Walzer's terms (1983, 33) because their lives are at stake due to the existential threat to their countries. What would count as "risks" or "costs" 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, are questions that remain unanswered. It seems that Walzer, at least, would count not only the monetary costs of the rescue but also the noneconomic costs to the host country. These could be substantial even if the country is called on to admit only a small number of people if the country has a history of limited or no immigration.[45] Scanlon 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

[44] Walzer is largely silent on the grounds for the principle of mutual aid, although he implies that mutual aid might be a constraint derived from "justice" (1983, 61) or a "moral constraint" (1983, 62).

[45] Recall Walzer's statement that "The principle of mutual aid can only modify and not transform admissions policies rooted in a particular community's understanding of itself" (1983, 51).

that any plausible theory could eliminate the need for judgments of this kind" (1998, 225).

The rescue principle may also be problematic because it is not clear that it reflects the intuitive appeal of the right of safe haven for citizens of sinking states. The rescue principle obligates us to "relieve" (Nagel 2005, 131) or to "help" (Walzer 1983, 33) others. These are both fairly general obligations that could require us to do many things quite apart from or in addition to allowing persons to resettle in our country. Pursuant to the rescue principle, for example, we might be required to send foreign aid in addition to or instead of admitting refugees. The rescue principle is narrower than a general moral theory, but the basis it provides for the right to safe haven still encompasses more than opening up a country's territory to persons whose home country has physically disappeared.

Collective Ownership of the Earth

Mathias Risse (2009) argues that Grotius offers a rationale for what Risse calls a right to relocation that would benefit states submerged by sea-level rise due to climate change. Risse's secularization of this rationale may offer the most promising ground for the right to safe haven elaborated in this chapter.

To understand Grotius's rationale, it is necessary to turn to his discussion of the private right of necessity because he hints at his rationale there, but not in his discussion of the right to safe haven. As mentioned earlier, the right of necessity can be regarded as an analogue in private law of the public international law right to safe haven. In both rights, the issue is whether a person's urgent needs override existing rights—a property owner's right to exclude in the case of private necessity, and a state's right to control entry in the case of the right to 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.

Grotius argues that people facing "absolute Necessity" have a right to use the property of another (2005 [1625], II.2.VI.2).[46] However, there are limits on the right. The right that is granted is the right that according to Grotius existed before private property was established: a limited right to use resources that can be consumed, but not a right to accumulate resources.[47] Also, the necessitous person is entitled

[46] Grotius was by no means the first to argue for a right of necessity that overrides the owner's right to exclude. The idea that need trumps private property goes back at least to the twelfth century (Salter 2005). Aquinas's discussion (2002) of the idea that a person in need can take the property of another without being liable for theft is well known. For further discussion of Aquinas's views and their legacy, see e.g., Cavallar (2002); Hont and Ignatieff (1983); and Salter (2005).

[47] Grotius states that "in a Case of absolute Necessity, that antient Right of using Things, as if they still remained common, must revive" (2005 [1625], II.2.VI.2). He describes the primitive right to the use of things earlier in the chapter: "*All Things*, as *Justin* has it, *were at first common, and all the World had, as it were, but one Patrimony*. From hence it was, that every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use of the Right common to all Men did at that Time supply the Place of Property, for no Man could justly take from another, what he had thus first taken to himself; which is well illustrated by that Simile of *Cicero*, *Tho' the Theatre is common for any Body that comes, yet the Place that every one sits in is properly his own*" (2005 [1625], II.2.II.1). Buckle explains that "since the use-right arises precisely because of the person's needs, it extends no further than the satisfaction of those needs" (1991, 30). Salter (2005) argues that the original use right is even narrower and that it, and the right of necessity that mirrors the use right, are best understood as liberties or privileges, even though Grotius suggests that the right of necessity is a perfect right.

to take the property of another only after exercising "all other possible Means" of satisfying his own need (Grotius 2005 [1625], II.2.VII). For instance, Grotius suggests that the necessitous person must exhaust his own resources before taking the property of another.[48] In addition, the right cannot be exercised against an owner who is equally needy.[49] 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. Moreover, the right to use the private property of another in case of necessity entails the obligation to make restitution to the property owner after the necessity ends and the user is "able to do it" (Grotius 2005 [1625], II.2.IX).[50]

What is interesting is the justification that Grotius hints at, but does not develop, for the private right of necessity:

> Even amongst the Divines, it is a received Opinion, that whoever shall take from another what is absolutely necessary for the Preservation of his own Life, is not from thence to be accounted guilty of Theft: That Sentiment is not founded on what some alledge, that the Proprietor is obliged by the Rules of Charity to give of his Substance to those that want it; but on this, that the Property of Goods is supposed to have been established with this favourable Exception, that in such Cases one might enter again upon the Rights of the primitive Community. For had those that made the first Division of common Goods been asked their Opinion in this Matter, they would have answered the same as we now assert. *Necessity*, says *Seneca* the Father, *that great Resource of human Frailty, breaks through the Ties of all Laws*; that is, all human laws, or Laws made after the Manner, and in the Spirit of human Laws. (2005 [1625], II.2.VI.4)

According to Risse (2009), Grotius's 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 necessaries by the human construct of private property.[51] According to Grotius, the earth was originally given

[48] In discussing when the right of private necessity entitles a person to take the property of another, Grotius states that "all other possible Means should be first used, by which such a Necessity may be avoided; either, for Instance, by applying to a Magistrate, to see how far he would relieve us, or by entreating the Owner to supply us with what we stand in Need of" (2005 [1625], II.2.VII). Through approving citations of several authorities, he then suggests that a person must first exhaust his own resources before appropriating for his own use the property of another. Grotius states that "*Plato* did not permit one Man to draw out of another's Well, 'till he had digged so far in his own Ground that there was no longer any Hopes or Expectation of Water. And *Solon* required, that a Man should first dig to the Depth of forty Cubits" (2005 [1625], II.2.VII).

[49] Grotius states that "this is no Ways to be allowed, if the right Owner be pressed by the like Necessity; for all Things being equal, the Possessor has the Advantage" (2005 [1625], II.2.VIII).

[50] This obligation to make restitution raises the question whether the person in need is exercising a right in using the property of the other. For instance, Pufendorf (1934 [1688]) suggests that it is inconsistent for Grotius to describe the right to use the property of another as a right and simultaneously insist on the obligation to make restitution after the necessity passes. Grotius (2005 [1625]) attempts to address the critique by arguing that the obligation to make restitution inheres in the right to use the property of another in a case of necessity.

[51] The following discussion of Grotius's rationale and its implications for the rights of citizens of sinking states closely follows Risse (2009). There are other interpretations of Grotius's rationale for the private right of necessity. For example, Buckle (1991) 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, private property exists for "the preservation of human beings in sophisticated societies" (1991, 45). "By excluding all but

to humankind in common by God for humankind's use.[52] In the original community, everyone was given the right to use the resources granted by God, but not to accumulate more than he 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 (Grotius 2005 [1625]). But the agreements establishing private property, Grotius insists, included an "Exception" (II.2.VI.4), perhaps analogous to an easement, to ensure that no one in dire straits was denied a right necessary for his survival to use the resources of the earth given by God to everyone in common.

Because of the similarity between the right of necessity and the right of safe haven, Grotius's justification for the right of necessity might also be used to justify an imperiled person's right to enter and remain in a foreign country.[53] The 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 to enter and remain in foreign countries to exercise their right of self-preservation.

For nonbelievers, one potential problem with this justification is that it rests on the idea that God granted the 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 Grotius's 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 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.

The Grotius-inspired collective ownership of the earth rationale is the strongest of the four rationales for the right to safe haven discussed in this chapter. This rationale has the benefit of justifying precisely what the right to safe haven provides: access to a portion of the earth's territory in situations where the claimant lacks a territory. The starting point for Grotius's rationale is humankind's collective claim to the earth, and that rationale justifies access to land under another's control, not sending foreign aid or any of the myriad other ways one might assist foreigners in need.

Another advantage of Grotius's 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

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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).

[52] "Almighty GOD at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World" (Grotius 2005 [1625], II.2.II.1)

[53] Indeed, Kant arguably attempts to ground cosmopolitan right in a metaphorical version of the common-ownership thesis that underpins Grotius's necessity-based justification (Benhabib 2004; Cavallar 2002).

exercise their right to self-preservation.[54] Citizens of sinking states would fall within this rationale because the disappearance of their islands would leave them without any land. Conceivably, the rationale might also apply to citizens of states whose territory is diminished through sea-level rise due to climate change, but these people would have to establish that they do not have enough remaining land within their home countries to exercise a right to self-preservation. Under this rationale, individuals could not claim the right to 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.

The fact that Grotius's rationale suggests limits on the right to safe haven is important because the right will not be politically viable unless it has limits. One lesson 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 larger numbers of refugees tend to create political backlashes (Martin 1991). Although the attitudes that give rise to backlashes might be criticized, they must be kept in mind in contemplating the creation of a new right to safe haven. One of the ways in which refugee law in the United States and elsewhere currently restrains the flow of refugees is the internal flight alternative doctrine (Martin et al. 2007). Under this doctrine, 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 Grotius's rationale suggests for the right to safe haven similarly would require potential claimants to draw first on the resources of their home country. 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.

Implementation

Assume that individuals enjoy a right to safe haven on the basis of collective ownership of the earth. How might this right be implemented for the benefit of the victims of sea-level rise, the concern of this chapter? In reality, any right to safe haven is likely to be implemented through political discussions at both international and domestic levels. To provide a starting point for these political discussions, the principle that should guide the implementation of the right to a safe haven and possible mechanisms for implementing the right are discussed below.

Principle for Allocating Responsibility

There is an emerging policy literature that emphasizes the absence of any international law framework for dealing with the refugees whom climate change may

[54] Some evidence that Grotius envisions the right as coming into force when a person cannot turn to his home country is that he refers to an obligation to provide "a fixed Abode . . . to Strangers, who being expelled their own Country, seek a Retreat elsewhere" (2005 [1625], II.2.XVI). Framing the duty as owed to people "expelled" from their countries sets a high bar that leaves people who are living very poorly within their home countries unprotected. As mentioned earlier, Grotius's discussion of the right of private necessity similarly implies that a person in need is justified in using the property of another only after he has exhausted his own resources.

create. Various options have been proposed to avoid a crisis situation where countries fall back on ad hoc responses (Baer 2010; Biermann and Boas 2008; Burkett 2009; Byravan and Rajan 2006; 2010; Docherty and Giannini 2009; Hodgkinson and Burton 2010; McAdam 2010; 2011; Penz 2010; Prieur et al. 2010).[55] Under one intriguing proposal, "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; Byravan and Rajan 2010). This proposal implicitly assumes that a sort of corrective justice should guide the allocation of responsibility for climate change migration. The term "corrective justice" is used loosely because the proposal allocates responsibility on the basis of country shares of overall emissions, not particular injuries caused by particular countries.[56]

As was implied earlier, there are drawbacks to allocating responsibility for climate change migration on the basis of corrective justice (Posner and Sunstein 2008). One is that corrective justice is a backward-looking approach that will limit victims to making claims against countries in proportion to their historical emissions, with the practical result that the relatively small number of countries with historically large emissions will bear most of the responsibility for climate migration. These emitters may not be the countries best suited to absorb newcomers or finance their relocation by the time citizens of sinking states migrate, given the potentially long time frame during which migration may occur. Moreover, if migration occurs decades or centuries in the future, it may be unjust to hold future citizens of historically large emitters responsible for emissions by their ancestors. One argument for holding future citizens responsible is that they are beneficiaries of the earlier wrongs. But future citizens of historically large emitters may not be net beneficiaries of their ancestors' emissions by the time migration occurs, because it is hoped that these large emitters will soon take significant actions to reduce their emissions. Some of those actions could be costly for present and future generations (Posner and Sunstein 2008). An important advantage of the collective ownership of the earth rationale for the right to safe haven is that this rationale offers a present or forward-looking basis for allocating responsibility for climate change migration. The collective ownership of the earth rationale focuses attention on what should be a more important principle than past wrongdoing in allocating responsibility: a country's resources to absorb or finance the absorption of newcomers.

Under this approach, the availability of resources, not historical wrongdoing, would be the basis for allocating responsibility for climate change migrants. Because the collective ownership of the earth rationale emphasizes everyone's equal entitlement to the resources of the earth, the remedy for a breach of the right to a safe haven should tend toward equalizing resource shares by imposing greater responsibilities for climate refugees on countries with greater resources. Thus, the availability

[55] Byravan and Rajan warn that "the international community . . . is probably inclined to treat the problem in the *ad hoc* manner in which refugee problems are otherwise managed" (2006, 248–249).

[56] In other words, Byravan and 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.

of land, perhaps as measured 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 responsibility, while more densely populated countries should face less responsibility.

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—that has not already been allocated among nations, as there arguably was in Grotius's day.[57] 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. A country could have an expansive, relatively unpopulated land mass but be poorly positioned to take responsibility for resettling people because the country's land is of modest quality and the country has not developed other sources of wealth to support its existing population, let alone new people. Similarly, a country could be very densely populated but well positioned to accept newcomers because its land mass is extremely rich or because it has amassed economic wealth through other means. We should take account of measures of wealth, as well as population density, and thus use a basket of metrics.

Table 15.1 is a first step in thinking about the allocation of responsibility for climate migrants if a right to safe haven is grounded in the collective ownership of the earth. The table allocates responsibility for 300,000 persons, roughly the population of the Maldives, among the 34 current members of the Organisation for Economic Co-operation and Development (OECD) plus Brazil, Russia, China, and India. Three metrics are used. One metric is population density as of 2005, an indicator of the availability of land (United Nations 2008). 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 2010). 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. The table displays the number of refugees for which a country would be responsible under the average of the three metrics and under each metric individually, as well as under a metric of country-specific cumulative emissions of carbon dioxide from energy for the period 1850 to 2005 (World Resources Institute 2010). Countries are listed in descending order of the number of refugees for which they would be responsible under the average of the three metrics. Table 15.2 highlights the implications of relying on the basket of metrics rather than historical emissions by comparing country shares under the two approaches. If countries agreed to assume responsibility for climate refugees on the basis of the basket of metrics, country allotments would need to be periodically updated to reflect changes in the availability of

[57] There may not have been much, if any, empty land available in Grotius's era if aboriginal use is given due respect.

TABLE 15.1

Allocation of Responsibility for 300,000 Climate Change Refugees Among 34 OECD Countries plus Brazil, Russia, India, and China

Country	Average	Per Capita GDP	Total GDP	Land per Person	Historical Emissions
United States	33,530	12,767	82,272	5,552	103,072
Canada	25,085	10,514	7,369	57,371	7,737
Australia	24,010	10,131	4,529	57,371	3,875
Iceland	22,663	10,551	69	57,371	29
China	12,356	1,216	34,595	1,256	29,656
Russia	12,036	3,539	11,053	21,514	28,777
Japan	11,597	9,068	25,211	511	13,585
Norway	9,997	14,214	1,433	14,343	567
Germany	8,738	9,115	16,353	745	25,028
United Kingdom	7,624	9,597	12,581	694	21,295
France	7,618	9,137	12,166	1,551	10,040
Luxembourg	7,428	21,108	214	962	209
Finland	6,967	9,104	1,041	10,757	750
Brazil	6,904	2,573	10,315	7,823	2,878
Sweden	6,775	9,793	1,926	8,606	1,332
Italy	6,644	8,414	10,635	883	5,780
New Zealand	6,529	7,443	671	11,474	408
Spain	5,987	8,229	7,707	2,025	3,265
India	5,491	624	15,349	500	8,258
Mexico	5,124	3,736	8,451	3,187	3,577
Ireland	5,123	11,468	1,032	2,869	507
The Netherlands	4,878	10,476	3,721	438	2,853
Korea	4,772	6,815	7,139	360	2,971
Austria	4,567	10,130	1,815	1,756	1,383
Switzerland	4,548	10,954	1,734	956	758
Chile	4,259	3,661	1,293	7,823	533
Denmark	4,192	10,029	1,181	1,366	1,089
Belgium	4,100	9,599	2,196	505	3,362
Greece	3,794	7,522	1,811	2,049	839
Estonia	3,618	4,971	146	5,737	360
Turkey	3,349	3,292	4,865	1,891	1,650
Slovenia	3,013	6,996	305	1,739	181
Poland	2,963	4,060	3,372	1,459	6,937
Israel	2,957	7,246	1,055	570	448
Portugal	2,953	5,989	1,372	1,497	556
Czech Republic	2,915	6,061	1,349	1,334	3,193
Hungary	2,592	5,069	1,114	1,594	1,304
Slovak Republic	2,306	4,792	562	1,565	959

SOURCE: Table 15.1 was prepared by Mark LeBel.

NOTE: The numbers in Table 15.1 are independently rounded. Due to rounding, the allocations for the average of per capita and total GDP and land per person may appear slightly off given the published numbers for each of these three metrics.

TABLE 15.2

Country Shares Under Average of Three Metrics and Historical Emissions

Country	Percentage Under Average of Three Metrics	Percentage Under Historical Emissions
United States	11.2	34.4
Canada	8.4	2.6
Australia	8.0	1.3
Iceland	7.6	0.0
China	4.1	9.9
Russia	4.0	9.6
Japan	3.9	4.5
Norway	3.3	0.2
Germany	2.9	8.3
United Kingdom	2.5	7.1
France	2.5	3.3
Luxembourg	2.5	0.1
Finland	2.3	0.2
Brazil	2.3	1.0
Sweden	2.3	0.4
Italy	2.2	1.9
New Zealand	2.2	0.1
Spain	2.0	1.1
India	1.8	2.8
Mexico	1.7	1.2
Ireland	1.7	0.2
The Netherlands	1.6	1.0
Korea	1.6	1.0
Austria	1.5	0.5
Switzerland	1.5	0.3
Chile	1.4	0.2
Denmark	1.4	0.4
Belgium	1.4	1.1
Greece	1.3	0.3
Estonia	1.2	0.1
Turkey	1.1	0.6
Slovenia	1.0	0.1
Poland	1.0	2.3
Israel	1.0	0.1
Portugal	1.0	0.2
Czech Republic	1.0	1.1
Hungary	0.9	0.4
Slovak Republic	0.8	0.3

SOURCE: Table 15.2 was prepared by Mark LeBel.

NOTES: The percentages in Table 15.2 are based on underlying data prepared for Table 15.1, not the rounded data published in Table 15.1.

resources, such as land and economic wealth, as well as changes in information about the expected number of citizens of sinking states requiring refuge as the science of sea-level rise improves.

Implementation Mechanisms

Even if there is agreement 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 for climate refugees. Under Schuck's proposal, countries would agree to take quotas of refugees that they 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 mitigating the conflict between two rights at stake in the refugee context, the right of refugees to safe haven and the right of countries to control entry, because countries that did not want to admit refugees could pay others to resettle them. Although allowing countries to refuse entry to refugees might seem inconsistent with the idea that there is a right to 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 explains with respect to modern refugee law, "Refugees are entitled only to basic protection from persecution, not residence in the society of their choice" (1997, 285).

Tradability could be achieved in two ways.[58] 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 all or part of the quota. In a centralized regime, an international agency would, in effect, tax countries for the cost of resettling refugees on the basis of the quotas and then contract with countries to resettle the refugees. Schuck (1997) argues that a decentralized approach 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 endorsement, 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.[59] Restricting

[58] The following discussion of tradable quotas for climate refugees draws heavily on Schuck's (1997) proposal for tradable quotas for refugees in general and his discussion of possible objections to the idea.

[59] 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" (1997, 282). He also suggests mechanisms for "minimizing" the "risk" that refugees will be treated poorly by countries that are paid to take them, although he acknowledges that the risk cannot be completely eliminated (294).

the market in these ways might reduce the gains from trade. By limiting the number of countries where refugees could be resettled, we might reduce the overall number of refugees who could be protected. But the costs of protecting refugees from inhospitable or dangerous circumstances almost certainly are worth incurring.

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 the fate of refugees because these countries would determine through negotiations where refugees would be resettled. In doing so, the regime would fail to honor the suggestion from Nauru's ambassador to the United Nations that "the people who are most affected" should be asked what do about climate change (Mohrs 2009, 3). 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 those states. The board could be given the task of approving any contracts to resettle individuals, and those states' representatives 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.[60]

In the United States and elsewhere, policy makers are mainly focusing on measures to mitigate climate change by reducing greenhouse gas emissions. This chapter draws attention to the need to start thinking about the adaptations that climate change may require. In particular, it is possible 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. At the moment, the prospects seem slim that an international legal regime will soon emerge 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 (McAdam 2011), and no politically powerful country is championing relocation assistance. But as Thomas Homer-Dixon (2010) argues, climate change is upon us, and it would be better not to wait until there is a crisis induced by climate change to think through the options for dealing with it.

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[60] Schuck (1997) has a series of different responses to the commodification objection to tradable quotas for refugees.

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REFERENCES

Appiah, K. Anthony. 2003. Grounding human rights. In *Human rights as politics and idolatry*, eds. Amy Gutmann, Michael Ignatieff, K. Anthony Appiah, David A. Hollinger, Thomas W. Laqueur and Diane F. Orentlicher, 101–116. Princeton, NJ: Princeton University Press.

Aquinas, Thomas. 2002. *On law, morality, and politics*. 2nd ed. Trans. Richard J. Regan. Eds. William P. Baumgarth and Richard J. Regan. Indianapolis: Hackett Publishing Company.

Baer, Paul. 2010. Adaptation to climate change: Who pays whom? In *Climate ethics: Essential readings*, eds. Stephen Gardiner, Simon Caney, Dale Jamieson and Henry Shue, 247–262. New York: Oxford University Press.

Benhabib, Seyla. 2004. *The rights of others: Aliens, residents and citizens.* Cambridge, U.K.: Cambridge University Press.

Biermann, Frank, and Ingrid Boas. 2008. Protecting climate refugees: The case for a global protocol. *Environment* 50(6):8–16. http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html.

Brown, Oli. 2008. The numbers game. *Forced Migration Review* 31:8–9.

Buckle, Stephen. 1991. *Natural law and the theory of property*: *Grotius to Hume*. Oxford: Oxford University Press.

Burkett, Maxine. 2009. Climate reparations. *Melbourne Journal of International Law* 10:509–542.

Byravan, Sujatha, and Sudhir Chella Rajan. 2006. Providing new homes for climate change exiles. *Climate Policy* 6:247–252.

———. 2010. The ethical implications of sea-level rise due to climate change. *Ethics and International Affairs* 24(3):239–260.

Cavallar, Georg. 2002. *The rights of strangers*. Surrey, England: Ashgate Publishing.

Crouch, Brad. 2008. A road to nowhere. *Sunday Times*, October 5: 15.

Docherty, Bonnie, and Tyler Giannini. 2009. Confronting a rising tide: A proposal for a convention on climate change refugees. *Harvard Environmental Law Review* 33:349–403.

Dummett, Ann. 1992. Natural law and transnational migration. In *Free movement: Ethical issues in the transnational migration of people and of money*, eds. Brian Barry and Robert E. Goodin, 169–180. University Park: Pennsylvania State University Press.

Ellickson, Robert. 1992–1993. Property in land. *Yale Law Journal* 102:1315–1400.

Farber, Daniel. 2008. The case for climate compensation: Justice for climate change victims in a complex world. *Utah Law Review* 2008:377–413.

Gans, Chaim. 2008. *A just Zionism: On the morality of the Jewish state*. New York: Oxford University Press.

Grimm, Daniel. 2007. Global warming and market share liability: A proposed model for allocating tort damages among CO_2 producers. *Columbia Journal of Environmental Law* 32:209–250.

Grotius, Hugo. 2005 [1625]. *The rights of war and peace,* ed. Richard Tuck. 3 vols. Indianapolis: Liberty Fund. http://oll.libertyfund.org/title/1877.

Guler, Claudio. 2009. The climate refugee challenge. International Relations and Security Network (April 14). http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?ots591=4888CAA0-B3DB-1461-98B9-E20E7B9C13D4&lng=en&id=98861.

Hodgkinson, David, and Tess Burton. 2010. A convention for persons displaced by climate change. http://www.ccdpconvention.com/index.html.

Homer-Dixon, Thomas. 2010. Disaster at the top of the world. *New York Times*, August 22: A23.

Hont, Istvan, and Michael Ignatieff. 1983. Needs and justice in the *Wealth of Nations*: An introductory essay. In *Wealth and virtue: The shaping of political economy in the Scottish Enlight-*

enment, eds. Istvan Hont and Michael Ignatieff, 1–44. Cambridge, U.K.: Cambridge University Press.

Hulme, Mike. 2008. Commentary—Climate refugees: Cause for a new agreement? *Environment* 50(6):50–51. http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/hulme-full.html.

International Monetary Fund. 2010. World Economic Outlook database. April 2010. http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/index.aspx.

IPCC (Intergovernmental Panel on Climate Change). 2007. *Climate change 2007: Synthesis report*. http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm.

Kant, Immanuel. 1996 [1797]. *The metaphysics of morals*. Trans. and ed. Mary Gregor. Cambridge, U.K.: Cambridge University Press.

———. 2006 [1795]. Toward perpetual peace: A philosophical sketch. In *Toward perpetual peace and other writings on politics, peace, and history: Immanuel Kant*, ed. Pauline Kleingeld. Trans. David L. Colclasure. New Haven, CT: Yale University Press.

Kleingeld, Pauline. 1998. Kant's cosmopolitan law: World citizenship for a global order. *Kantian Review* 2:72–90.

Kolmannskog, Vikram Odedra. 2008. Future floods of refugees: A comment on climate change, conflict and forced migration. Norwegian Refugee Council. http://www.nrc.no/arch/_img/9268480.pdf.

Kristof, Nicholas D. 1997. Island nations fear sea could swamp them. *New York Times*, December 1: F9.

Kritzman-Amir, Tally. 2008. Socio-economic refugees. J.S.D. diss., Tel Aviv University Faculty of Law.

Martin, David A. 1991. The refugee concept: On definitions, politics, and the careful use of a scarce resource. In *Refugee policy: Canada and the United States*, ed. H. Adelman, 30–51. North York, Ont.: York Lanes Press.

Martin, David A., T. Alexander Aleinikoff, Hiroshi Motomura, and Maryellen Fullerton. 2007. *Forced migration: Law and policy*. St. Paul, MN: Thomson/West.

McAdam, Jane. 2009a. Environmental migration governance. University of New South Wales Faculty of Law Research Paper No. 2009-1. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412002.

———. 2009b. From economic refugees to climate refugees? *Melbourne Journal of International Law* 10:579–595.

———. 2010. "Disappearing states," statelessness and the boundaries of international law. In *Climate change and displacement*, ed. Jane McAdam, 105–109. Oxford: Hart Publishing.

———. 2011. Swimming against the tide: Why a climate change displacement treaty is not *the* answer. *International Journal of Refugee Law* 23(1):2–27.

McAdam, Jane, and Ben Saul. 2010. An insecure climate for human security? Climate-induced displacement and international law. In *Human security and non-citizens: Law, policy and international affairs*, eds. Alice Edwards and Carla Fertsman, 357–403. Cambridge, U.K.: Cambridge University Press.

Meisels, Tamar. 2009. *Territorial rights*. 2nd ed. Breinigsville, PA: Springer.

Metz, Helen Chapin, ed. 1994. *Maldives: A country study*. Washington, DC: U.S. Government Printing Office for the Library of Congress. http://countrystudies.us/maldives/.

Milne, Glenn A., W. Roland Gehrels, Chris W. Hughes, and Mark E. Tamisiea. 2009. Identifying the causes of sea-level change. *Nature Geoscience* 2:471–478.

Mohrs, Falko. 2009. H. E. Ms. Moses makes a clear statement. October 16. http://www.unyouth.com/index.php?option=com_content&view=article&id=170:speech-ms-moses&catid=1:frontpage.

Murray, Christopher F. 2002. Note: Any port in a storm? The right of entry for reasons of *force majeure* or distress in the wake of the *Erika* and the *Castor*. *Ohio State Law Journal* 63:1465–1506.

Muthu, Sankar. 2003. *Enlightenment against empire*. Princeton, NJ: Princeton University Press.

Nagel, Thomas. 2005. The problem of global justice. *Philosophy and Public Affairs* 33(2):113–147.
Nine, Cara. 2010. Ecological refugees, states borders, and the Lockean proviso. *Journal of Applied Philosophy* 27(4):359–375.
Office of the United Nations High Commissioner for Refugees in cooperation with the Norwegian Refugee Council, the Representative of the Secretary General on the Human Rights of Internally Displaced Persons and the United Nations University. 2009. *Forced displacement in the context of climate change: Challenges for states under international law* (May 20). http://www.unhcr.org/4a1e4d8c2.html.
Oliver, John T. 2008–2009. Legal and policy factors governing the imposition of conditions on access to and jurisdiction over foreign-flag vessels in U.S. ports. *South Carolina Journal of International Law and Business* 5:209–345.
Pagden, Anthony. 1987. Dispossessing the barbarian: The language of Spanish Thomism and the debate over the property rights of the American Indians. In *The languages of political theory in early-modern Europe*, ed. Anthony Pagden, 79–98. Cambridge, U.K.: Cambridge University Press.
Penz, Peter. 2010. International ethical responsibilities to "climate change refugees." In *Climate change and displacement: Multidisciplinary perspectives*, ed. Jane McAdam, 151–173. Oxford: Hart Publishing.
Pogge, Thomas W. 1989. *Realizing Rawls*. Ithaca, NY: Cornell University Press.
———. 1994. An egalitarian law of peoples. *Philosophy and Public Affairs* 23(3):195–224.
———. 2002. Eradicating systemic poverty: Brief for a global resources dividend. In *World poverty and human rights*: *Cosmopolitan responsibilities and reforms*, ed. Thomas W. Pogge, 196–215. Cambridge, MA: Polity.
Posner, Eric A., and Cass R. Sunstein. 2008. Climate change justice. *Georgetown Law Journal* 96:1565–1612.
President's Office, Republic of Maldives. 2010. *Government and Dutch Docklands sign an agreement to develop floating facilities in the Maldives* (March 4). http://www.presidencymaldives.gov.mv/Index.aspx?lid=11&dcid=987.
Prieur, Michel, Jean-Pierre Marguénaud, Gérard Monédiaire, Julien Bétaille, Jean-François Dubost, Bernard Drobenko, Jean-Jacques Gouguet, Jean-Marc Lavieille, Séverine Nadaud and Damien Roets. 2010. *Draft Convention on the International Status of Environmentally-Dispaced Persons*. Second version (May). http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons%20%28second%20version%29.pdf.
Pufendorf, Samuel. 1934 [1688]. *De jure naturae et gentium libri octo*. Trans. C. H. Oldfather and W. A. Oldfather. Oxford: Clarendon Press; London: Humphrey Milford.
Rawls, John. 1971. *A theory of justice*. Cambridge, MA: Harvard University Press.
Representative of the Secretary General on the Human Rights of Internally Displaced Persons. 2008. *Displacement caused by the effects of climate change: Who will be affected and what are the gaps in the normative frameworks for their protection?* (October 10). http://www.brookings.edu/papers/2008/1016_climate_change_kalin.aspx.
Risse, Mathias. 2009. The right to relocation: Disappearing island nations and common ownership of the earth. *Ethics and International Affairs* 23:281–299.
Salter, John. 2005. Grotius and Pufendorf: On the right of necessity. *History of Political Thought* 26(2):284–302.
Scanlon, T. M. 1998. *What we owe to each other*. Cambridge, MA: Belknap Press of Harvard University Press.
Schmidle, Nicholas. 2009. Wanted: A new home for my country. *New York Times Magazine*, May 10:38.
Schuck, Peter H. 1997. Refugee burden-sharing: A modest proposal. *Yale Journal of International Law* 22:243–297.
Singer, Peter. 1972. Famine, affluence, and morality. *Philosophy and Public Affairs* 1(3):229–243.
———. 2009. *The life you can save: Acting now to end world poverty*. New York: Random House.

Tuck, Richard. 1999. *The rights of war and peace: Political thought and the international order from Grotius to Kant*. New York: Oxford University Press.

Tully, Stephen. 2007. The contribution of human rights as an additional perspective on climate change impacts within the Pacific. *New Zealand Journal of Public and International Law* 5:169–199.

United Nations. 1951. "Convention Relating to the Status of Refugees." Entered into force April 22, 1954. Treaty Series, vol. 189. http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf.

United Nations. 1967. "Protocol Relating to the Status of Refugees." Entered into force October 4, 1967. Treaty Series, vol. 606. http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf.

United Nations. 2008. Population Division. World population prospects: The 2008 Revision Population Database. http://esa.un.org/unpd/wpp/Other-Information/publications_2.htm.

United Nations High Commissioner for Refugees. 2008. *Climate change, natural disasters and human displacement: A UNHCR perspective* (October 23, 2008). http://www.unhcr.org/refworld/docid/492bb6b92.html.

Vitoria, Francisco de. 1917 [1532]. *De Indis*. Trans. John Bawley Pate. In *De Indis et de ivre belli relectiones*, ed. Ernest Nys. Washington, DC: Carnegie Institution of Washington. Reprint. 1934. In James Brown Scott, *The Spanish origin of international law: Francisco De Vitoria and his law of nations*. Oxford: Clarendon Press.

Waldron, Jeremy. 2000. What is cosmopolitanism? *Journal of Political Philosophy* 8:227–243.

Walzer, Michael. 1983. *Spheres of justice: A defense of pluralism and equality*. New York: Basic Books.

Webb, Arthur P., and Paul S. Kench. 2010. The dynamic response of reef islands to sea-level rise: Evidence from multi-decadal analysis of island change in the Central Pacific. *Global and Planetary Change* 72:234–246.

Whitehead, Lena E. 2009. No port in a storm—A review of recent history and legal concepts resulting in the extinction of ports of refuge. *Naval Law Review* 58:65–88.

World Resources Institute. 2010. Climate Analysis Indicators Tool. CAIT version 8.0. http://cait.wri.org/.

Zukerman, Wendy. 2010. Shape-shifting islands defy sea-level rise. *New Scientist* 206(2763):10.