

**International Law and Environmental Displacement:
Towards a New Human Rights-Based Protection Paradigm**



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**Under supervision of
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Thesis Abstract

Every year, millions of people are forced to leave their homes and become displaced. They are cut off from their roots, communities, social ties, and support networks. Climate change and natural hazard related disasters are understood to play a crucial part in some of these events. While the causes of displacement are manifold and complex, this thesis explores the increasing concern over the extent to which those suffering from forced (or potential) cross-border displacement as a result of environmental change are protected under international law, in particular human rights law. Formally, they are not entitled to admission or to stay in a third state country. This has been identified as an international “legal protection gap” that displaces people and impacts upon their human rights. This creates a situation where people’s predicaments do not receive adequate government intervention.

Centred around a holistic understanding of protection from-during-after displacement (but concentrating only on the first and last phases of environmental displacement) the study seeks to provide adequate answers to two basic questions: 1) whether and to what extent existing international law protects cross-border environmental displacement? and 2) whether and how existing formalised regional complementary protection standards can interpretively solidify and (re)conceptualise protection for cross-border environmental displacement?

The study stresses that the plight of the environmentally displaced warrants a human approach to their vulnerability, conveying human rights as an integral part of their protection, recognising that environmentally displaced persons, here defined as EDPs, are plainly entitled to enjoy a wide range of civil, political, economic and social rights set out in international and regional human rights treaties and customary international law, whilst at the same time highlighting the corresponding (home and host) states’ obligations.

The analysis of the human rights paradigm enshrined (explicitly and implicitly) in international and regional treaties and interrelated operational frameworks, as well as being erected jurisprudentially, underlines that states have the obligation to take preventative action to respect, to avoid violating, and to take positive steps to fulfil human rights. The discussion outlines that the protection of the human person is not only an *ex post* facto obligation of states, but must be increasingly seen as an *ex ante* one. It requires a transformational change in government practices towards working in a proactive rather a reactive matter. Here labour migration - as a new status of protection - has a legitimate role to play for vulnerable communities in particular, when adapting to environmental change. As the fields of human rights and environment expand and intertwine, so do the *legal cumulative effects* of these frameworks, which highlight the prevention of, or protection from, cross-border environmental displacement as an important protection dimension of emerging customary nature.

Importantly, the human rights framework identifies the “minimum standards of treatment” that should be afforded to EDPs (i.e., identifying the rights violated or at risk and how states need to deal with risk and their obligation to deal with it). It falls short, however, in providing an effective protection mechanism or status when someone crosses a border due to environmental factors. This is because the international legal protection regime has been traditionally geared, once displacement occurs, towards the narrow class of those fleeing political persecution under

the 1951 Convention Related to the Status of Refugees. This present legal structure, while relevant as a point of comparison, and although it offers protection and status to those who cross the border due to environmental factors in certain circumstances (where environmental impacts may amount to persecution based on qualified grounds), is still largely inadequate. The Refugee Convention was created for a different purpose and, therefore, has limited application to engage host states in particular obligations. Nevertheless, the increased convergence of the law of protection of the human person at regional level has expanded protection beyond the remit of that conventional instrument into codified forms of subsidiary or complementary protection under the European Union legal framework.

The analysis suggests that the European Union's regionally orientated protection regime can help states to consolidate an evolving *protection paradigm of proactive and reactive measures* being erected at the international level for environmental cross-border displacement and narrow the identified legal protection gaps. In other words, it helps states to (re)conceptualise protection as a holistic and dynamic enterprise. The objective is to highlight protection - as a way of reflecting the international human rights obligations of states - by way of a process of consolidation of existing: proactive (*ex ante*) and reactive (*ex post*) protection measures. *Ex ante* protection encapsulates protection of EDPs from displacement i.e. as prevention. It looks at strategies to deal with the predicted effects of environmental change (e.g., circular labour migration through the Seasonal Workers Directive and/or Mobility Partnerships). *Ex post* protection deals with the effects of environmental change and the various modes of legal protection that are available and that can be adapted to protect EDPs once they cross an international border (e.g., temporary protection through the Temporary Protection Directive and subsidiary protection through the Qualification Directive). The study takes an optimistic stance by engaging in a dynamic and contextual legal interpretative analysis of the existing European Union regional protection framework and related jurisprudence, suggesting it as a potential model, which can - in the short term - be a stepping-stone to consolidate protection for EDPs, reinforce existing states' obligations, and even reorient the international protection regime if needs be.

Preface

*Ideas, we all know, are not born in people's heads. They begin somewhere out there, loose wisps of smoke swirling directionless in their search for a befitting mind.*¹
Mia Couto "Sleepwalking Land"

As we see images of increasing numbers of displaced people around the world entering Europe's borders and elsewhere, it seems that this work is appearing at an opportune time. While the causes of people's displacement may be manifold and complex, the time has urgently come for states and the international community at large to gather and (re)consider the protection of the human person to be a holistic endeavour in all phases of displacement (before, during and after displacement occurs). This thesis offers the reader a fulcrum upon which an analysis of existing human rights protection standards, in the short term, might lead the way in the wake of new displacement challenges, such as those posed by a changing environment. More importantly, as the fields of human rights law and the environment expand and intertwine, and the jurisprudential glow continues to enlighten our path, so does the transformative capacity of the law. The conscious interpretation of the law made in the context of this work, aims at offering constructive and effective solutions and serves as a critical function for the advancement of the law of the protection of the human person. By using the *nous de modestie* throughout, the study aims at obliging the reader to think of the subject in discussion as a common concern, to erase the individualistic side and to unpretentiously accept this research path as just one of many others.

While over the past few years it was always difficult to separate feelings of activism from objective academic research when humanity is at stake, the protection of the human person should remain anything but a utopian pursuit. Writing this work has been a very enriching learning experience, both academically and personally. If it succeeds in reaching a befitting mind it will have achieved an even more rewarding undertaking.

¹ "As ideias, todos sabemos, não nascem na cabeça das pessoas. Começam num qualquer lado, são fumos soltos, tresvairados, rodando à procura de uma devida mente." Original Portuguese version from Mia Couto (1992) "Terra Sonâmbula."

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- Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, adopted on 17 November 1988, in force since 16 November 1999, OAS Treaty Series No.69, 28 ILM 161
- African Charter on Human and People's Rights (ACHPR), adopted 27 June 1981, in force since 21 October 1986, 21 ILM 58
- Agenda 21, action plan adopted at the UN Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992
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- Arab Charter on Human Rights (ArCHR), adopted by the Council of the League of Arab States in 2004, in force since 2008
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- Cartagena Declaration on Refugees (CDR), adopted on 19 - 22 November 1984
- Charter of Fundamental Rights of the European Union, adopted on 18 December 2000, in force since 1 December 2009, OJ 2000/C 364/01
- Charter of the Organization of American States (OAS Charter), adopted on 30 April 1948, in force since 13 December 1951, 119 UNTS 3 amended by the Protocols of Buenos Aires (1967, into force 1970), Cartagena de Indias (1985, into force 1988), Managua (1993, into force 1996) and Washington (1992, into force 1997)
- Charter of the United Nations (UN Charter), adopted on 26 June 1945, in force since 24 October 1945, 1 UNTS XVI
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- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture, CAT), adopted on 10 December 1984, in force since 26 June 1987, 1465 UNTS 85
- Convention concerning Migration for Employment N° 97 (*Revised*) adopted 01 July 1949 entry into force: 22 January 1952 C97
- Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers N° 143 adopted 24 June 1975 entry into force 09 December 1978 C143
- Convention concerning the Protection of the World Cultural and Natural Heritage, adopted on 16 November 1972, in force since 17 December 1975, 1037 UNTS 151
- Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted on 23 October 2009, in force since 6 December 2012, 52 ILM 397
- Convention No. 169 (ILO) concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, in force since 5 September 1991, 28 ILM 1383
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), adopted on 25 June 1998, in force since 30 October 2001, 2161 UNTS 447

Convention on Biological Diversity adopted 5 June 1992, in force since 29 December 1993, 1760 UNTS 79

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Council of the European Union Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted and European Parliament and Council of the European Union Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast) (EU Qualification Directive)

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Declaration of the UN Rio Conference on Environment and Development, adopted 14 June 1992, UN Doc. A/Conf.151/5/Rev 1, 31 ILM 874

Declaration of the UN Stockholm Conference on the Human Environment, adopted on 16 June 1972, UN Doc. A/Conf.48/14/Rev 1, 31 ILM 874

Declaration on the Rights of Indigenous People, adopted on 13 September 2007, UN Doc. A/RES/61/295

Draft Declaration of Principles on Human Rights and the Environment, Annex 1 to the Final Report of the UN Special Rapporteur on human rights and the environment, presented to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/sub.2.1994/9, 6 July 1994

European Commission Staff Working Document SEC (2009) 1240 final of 18 September 2009 Mobility Partnerships as a tool of the Global Approach to Migration (Mobility Partnerships)

European Convention on Human Rights (ECHR), adopted on 4 November 1950, in force since 3 September 1953, 213 UNTS 222

European Convention on the Legal Status of Migrant Workers, adopted on 24 November 1997, in force since 1 May 1983, CETS No.093

European Parliament and of the Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information

European Parliament and the Council of the European Union Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Seasonal Worker's Directive)

European Social Charter (ESC), adopted on 18 October 1961, in force since 26 February 1965, 529 UNTS 89, revised 1996

First Optional Protocol to the ICCPR, adopted on 16 December 1966, in force since 23 March 1976, 999 UNTS 302

Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) adopted 12 August 1949, in force since 21 October 1950, 75 UNTS 287

Guiding Principles on Internal Displacement (GPID), U.N. Doc. E/CN.4/1998/53/Add.2

Hyogo Framework For Action 2005-2015 Building the Resilience of Nations and Communities to Disasters adopted 16 March 2005, U.N. Doc. A/CONF.206/6

International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, in force since 23 March 1976, 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted on 16 December 1966, in force since 3 January 1967, 993 UNTS 3

Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), adopted on 11 December 1997, in force since 16 February 2005, 2303 UNTS 148

Peninsula Principles on Climate Displacement within States adopted 19 August 2013

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted 08 June 1977 in force since 07 December 1978, 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) adopted 08 June 1977 in force since 07 December 1978, 1125 UNTS 609

Protocol on the Protection and Assistance to Internally Displaced Persons to the Pact on Security, Stability and Development in the Great Lakes Region, adopted on 14-15 December 2006 by the Member States of the International Conference on the Great Lakes Region, in force since June 2008

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted 11 July 2003, in force since 25 November 2005

Protocol to the African Charter on Human and People's Rights, adopted 10 June 1998, in force since 25 January 2004

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998, in force since 25 January 2004

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted 10 September 1998, in force since 24 February 2004 (revised 2013) 2244 UNTS 337

Sendai Framework for Disaster Risk Reduction 2015-2030 adopted 14-18 March 2015, U.N. Doc. A/CONF.224/L.2

Statute of the International Criminal Court (ICC Statute), adopted on 17 July 1998, in force since 1 July 2002, 2187 UNTS 90

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community adopted on 13 December 2007, in force since on 1 December 2009, OJ 2007/C 306/01

United Nations Framework Convention on Climate Change (UNFCCC), adopted on 09 May 1992, in force since 21 March 1994, 1771 UNTS 107

Universal Declaration of Human Rights (UDHR), adopted on 10 December 1948, U.N. Doc. A/810 at 71, UNGA Res. 217 A (III)

Vienna Convention on the Law of Treaties (VCLT), adopted on 23 May 1969, in force since 27 January 1980, 1155 UNTS 331

World Charter for Nature adopted UN General Assembly 28 October 1982 U.N. Doc. A/RES/37/7

List of Frequently Used Abbreviations

ACHPR or Banjul Charter	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and People's Rights
African Refugee Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
Arab States Refugee Convention	Arab Convention on Regulating Status of Refugees
ArCHR	Arab Charter on Human Rights
ASIL	American Society of International Law
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDR	Cartagena Declaration on Refugees
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural rights
CETS	Council of Europe Treaty Series
CRC	Convention on the Rights of the Child
CRSR or Refugee Convention	United Nations Convention Relating to the Status of Refugees
DRR	Disaster Risk Reduction
EC	European Commission
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
EDPs	Environmentally Displaced Persons
EJF	Environmental Justice Foundation
ESC	European Social Charter
EU	European Union
EU Mobility Partnerships	European Commission Staff Working Document SEC (2009) 1240 final of 18 September 2009 Mobility Partnerships as a tool of the Global Approach to Migration
EU Qualification Directive	Council of the European Union Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted European Parliament and Council of the

EU Seasonal Worker’s Directive	European Union Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast)
EU Temporary Protection Directive	European Parliament and the Council of the European Union Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers
	Council of the European Union Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
GAMM	Global Approach to Migration and Mobility
GPID	Guiding Principles on Internal Displacement
HRC	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC Statute	Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDMC	Internal Displacement Monitoring Centre
IDP Protocol to the Great Lakes Pact	Protocol to the Pact on Security, Stability and Development in the Great Lakes Region on the Protection and Assistance to Internally Displaced Persons
IDPs	Internally Displaced Persons
ILC	International Law Commission
ILC	International Law Commission
ILO	International Labour Organisation
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
Kampala Convention	Convention for the Protection and Assistance of Internally Displaced Persons in Africa
LDCs	Least Developed Countries

Migrant Workers Convention	Convention on the Protection of All Migrant Workers and Members of their Families
NGO's	Non-Governmental Organisations
OAS	Organization of American States
OCHA	UN Office for the Coordination of Humanitarian Affairs
OHCHR	UN Office of the High Commissioner for Human Rights
SIDS	Small Islands Developing States
TEU	Treaty of the European Union or Lisbon Treaty
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

Chapter 1. Introduction

Every year, millions of people are forced to leave their homes and become displaced. They are cut off from their roots, communities, social ties, and support networks. In 2012, an estimated 32.4 million people were displaced by sudden-onset natural disasters.¹ Another 42 million people were affected by drought in the same year.² Climate change and natural hazard related disasters are understood to play a crucial part in some of these events.³ While the causes of displacement are manifold and complex,⁴ this thesis deals particularly, with the impacts of environmental change on cross-border human displacement. The effects of environmental change have been described as the “defining human development issue of our generation”⁵ and probably “the biggest humanitarian and economic challenge that the developing world will face in the coming decades.”⁶ It is now widely recognised that large-scale cross border environmental degeneracy impacts on human beings and their surroundings and are largely due to anthropogenic greenhouse gas emissions (which are primarily credited to developed countries). Its noticeable effects are found in extreme droughts and heat waves, floods and hurricanes, the sea level rise and submersing low-lying coastal areas, and other recurrently extreme weather conditions. Although the effects of environmental change may affect us indiscriminately they will be felt more acutely in some parts of the world than others.⁷

¹ See Internal Displacement Monitoring Centre (IDMC) (2013) “Global Estimates 2012: People Displaced by Disasters” p. 6 *available from:* <http://www.internal-displacement.org/assets/publications/2013/2012-global-estimates-corporate-en.pdf> [accessed 20 November 2014] and IDMC (2014) “Global Estimates 2014: People Displaced by Disasters” p. 15 *available from:* <http://reliefweb.int/sites/reliefweb.int/files/resources/201409-global-estimates.pdf> [accessed 20 November 2014]. In 2013, nearly 22 million people were displaced by disasters in at least 119 countries, almost three times as many as were newly displaced by conflict and violence.

² EM-DAT: The OFDA/CRED International Disaster Database (2012) Université Catholique de Louvain, Belgium *available from:* www.emdat.be [accessed 20 November 2014]. The word “affected” is defined in the EM-DAT database as “people requiring immediate assistance during a period of emergency; it can also include displaced or evacuated people.”

³ Intergovernmental Panel on Climate Change (IPCC) (2012) “Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation” *available from:* https://www.ipcc.ch/pdf/special-reports/srex/SREX_Full_Report.pdf [accessed 20 November 2014].

⁴ Morel, M. (2014) “The Right not to be Displaced in International Law” (Intersentia) p. 17. The causes of displacement can broadly be framed into five categories: conflict-related displacement, development-related displacement, displacement related to systemic human rights violations (such as violations committed by non-state actors such as ethnic cleansing, crimes against humanity, discrimination) environmental-related displacement (natural and/or human-induced disasters) and displaced related to other circumstances (e.g., real estate and land disputes; property and housing market forces; government decision to remove or reduce housing subsidies for low income groups, among others).

⁵ United Nations Development Programme (UNDP) (2007) Human Development Report 2007/2008 “Fighting Climate Change: Human Solidarity in a Divided World” (UNDP) p. 1.

⁶ Rajan, S. (2008) “Climate Migrants in South Asia: Estimates and Solutions” (Greenpeace India Society) p.1.

⁷ See Chapter 2.

By 1990, the First Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) foresaw that the largest single impact of environmental change could be on forced human displacement. Today, experts estimate that, by 2050 the number of environmentally displaced persons will be between 50 and 200 million,⁸ either within their own countries or across the borders, on a permanent or temporary basis.⁹ Though scientific uncertainty surrounds these numbers, in general, there will always be uncertainty surrounding the impacts of environmental issues.¹⁰ The forced displacement of millions of people in the drought-stricken Horn of Africa is yet more clear evidence of the causal link between environmental change and forced human displacement.¹¹ With weather-related natural disasters projected to increase both in frequency and intensity in several parts of the world as global average temperatures continue to rise over the next decades,¹² environmental change-related displacement is

⁸ See Meyers, N. & Kent, J. (1995) "Environmental Exodus: An Emergent Crisis in the Global Arena" Climate Institute pp. 15-16; Stern, N. (2007) "The Economics of Climate Change. The Stern Review" (Cambridge University Press) pp. 128-130. Brown, L. R. (2009) "Plan B 2.0: Rescuing a Planet under Stress and a Civilization in Trouble" Earth Policy Institute (W.W. Norton & Company); Environmental Justice Foundation (2009) "No Place Like Home. Where Next for Climate Refugees" (Environmental Justice Foundation) p. 4; See Chapter 2 Section 5 Between "Guesstimates" and Realities for more general estimates.

⁹ United Nations High Commissioner on Refugees (UNHCR) (2009) "Forced Migration in the Context of on Long-Term Cooperative Action under the Convention" (AWG-LCA 6) from 1 until 12 June in Bonn (19 May 2009) p. 1 available from: <http://unfccc.int/resource/docs/2009/smsn/igo/049.pdf> [accessed 20 December 2013].

¹⁰ Glantz, M. (1994a) "Creeping Environmental: Are societies equipped to deal with them?" Workshop on Creeping Environmental Phenomena and Societal Responses to Them National Center for Atmospheric Research, Boulder, Colorado USA (7-8 February 1994) pp. 1-10 p. 6. The author notes: "[t]hus, far most CEP [Creepings Environmental Problems] (e.g. global warming, ozone depletion, desertification, tropical deforestation) there has been a backlash, a minority voice, often loud, that plays up what scientists do not know as opposed to emphasising what they do know. To the public, to policy makers and the media such interactions within the scientific community (verging upon open combat in the electronic media, in professional journals, or in newspapers) tend to weaken the resolve of those whom action is expected. In other words, one can find in the scientific literature viewpoints as well as numbers which can be used to support or attack any particular action."

¹¹ UN Secretary General (2013) "Voices concern over drought in Sahel, Horn of Africa at Event on Building Resilience to Climate, Disasters" Press Release (3 June 2013) available from: <http://www.un.org/News/Press/docs/2013/sgsm15071.doc.htm> [accessed 28 August 2014] emphasis added: "*Climate change is especially critical for Africa. Droughts and floods killed thousands of Africans last year. Millions more lost homes, livelihoods and hope. The human tragedy is immeasurable. The financial cost runs in the billions of dollars. Predictions are dire. Severe water stress could affect as many as 250 million Africans - not in some distant future, but by the end of this decade. Failed rains are likely to cause extensive crop damage. That means less food for more people. Development setbacks can breed unrest. Countries destabilized by climate change are potential breeding grounds for extremism and international criminal activity. They are a source of mass migration.*"

¹² World Bank (2013) "Turn Down the Heat: Climate Extremes, Regional Impacts and the Case for Resilience" Potsdam Institute for Climate Impact Research and Climate Analytics pp. 7-18 available from: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/06/14/000445729_20130614145941/Rendered/PDF/784240WP0Full00D0CONF0to0June19090L.pdf [accessed 20 December 2013].

becoming part of what UN Secretary General Ban Ki Moon has depicted as “the new normal.”¹³

In light of these developments, the international community has concentrated on the scientific aspects of environmental change, on understanding its complexity and finding ways to mitigate the impact of human activity on the planet. As sophisticated scientific frameworks are progressively developed more accurate results and predictions are produced. At the same time academia, civil society organisations, governments, and humanitarian and other international organisations have shown an increased interest in studying the relationship between environmental factors and population displacement (moving beyond the traditional economic, political, demographic and social approaches). There is a growing academic debate between scholars from various fields on different aspects of this - contested- field of inquiry.

Ever since the suggestion in 1985 by El-Hinnawi in a UNEP Report of an “environmental refugee” to portray the idea of the devastating impacts of mismanagement of resources, pollution, biodiversity and livelihood loss, scholars have failed to build a consensual analytical definition for those displaced by environmental factors, and a proliferation of labels coexist in the literature including “climate refugee”, “environmental migrant,” “environmental displacee,” and “climate migrant,” among others. This is mainly due to the divergent views on environmental factors as a root cause of forced displacement.¹⁴ Consequently, methodologies and estimates of persons potentially displaced by environmental factors tend to vary. In addition, this field of research has been fuelled by populist assertions from the media of “sinking island states” and bundled too, into the international security discourse, which highlights the threat of environmental “refugee floodgates.”

Despite this uncertainty, researchers in the legal field - and this study in particular - have not been intimidated either by the terminology or by the causality of forced

¹³ Lewis, B. & Doyle, A. (2012) “Extreme Weather is New Normal U.N.’s Ban Tells Climate Talks” Reuters (4 December 2012) *available from:* <http://www.reuters.com/article/2012/12/04/us-climate-talks-idUSBRE8B217F20121204> [accessed 20 December 2013].

¹⁴ *See e.g.* Castles, S. (2002) “Environmental Change and Forced Migration: Making Sense of the Debate” New Issues in Refugee Research Working Paper No. 70 (United Nations High Commissioner for Refugees) pp.4-5. The author emphasizes that environmental factors are only one of many interrelated causes of forced displacement; Black, R. (2001) “Environmental Refugees: Myth or Reality?” New Issues in Refugee Research Working Paper N°34 (United Nations High Commissioner for Refugees). The author rejects environmental degradation as a root cause of displacement; Hugo, G. (1996) “Environmental Concerns and International Migration” 30 *International Migration Review* 1, Special Issue: Ethics, Migration, and Global Stewardship p. 118, pp. 105-131. The author argues that environmental stressors could only trigger movement when caused by other disruptions; *See generally*, Bates, D. (2002) “Environmental Refugees? Classifying Human Migrations Caused by Environmental Change” 23 *Population and Environment* 5 pp.465-477. For a classification of different causes of environmental migration.

displacement or estimates, and have elevated the debate by focusing it on the protection of the human person.

1. Objective of this Thesis

Having the protection of the human person in all circumstances as its main driver, the objective of this thesis is firstly to explore the role of international law, in particular human rights law and correlated states obligations, in the protection of people suffering from cross-border forced displacement as a result of environmental change, here defined as, environmentally displaced persons or EDPs. The plight of the environmentally displaced warrants a human approach to their vulnerability, conveying human rights as an integral part of their protection, recognising that EDPs are plainly entitled to enjoy a wide range of civil, political, economic and social rights set out in international and regional human rights treaties and customary international law whilst at the same time highlighting the corresponding (home and host) states' obligations. Particularly, our interest is not solely to explore the rights of EDPs as such, but rather the obligations of states in securing their protection under the existing international legal regime of protection of forced displacement.

Secondly, and following from the above, this research attempts to devise and consolidate protection for people in those situations by relying on the European Unions' (EU) regionally orientated protection regime. In order to attempt this, the research path starts by analysing existing or envisaged international legal regimes that can provide effective protection for EDPs. This comprises an analysis of the capability of those norms to produce the desired effects (through reinterpretation or revision), and also their effectiveness in light of current state practice. Presently, there is no formal legal protection framework that can provide any material or legal support to people who cross borders due to environmental degradation or because of the effects of environmental change. Formally, they are not entitled to admission or to stay in a third state country. This has been identified as an international "legal protection gap" that displaces people and impacts upon their human rights.¹⁵ This creates a situation where people's predicaments do not receive adequate government intervention.

The analysis of the human rights paradigm enshrined (explicitly and implicitly) in international and regional treaties and interrelated operational frameworks, as well as

¹⁵ United Nations High Commissioner for Refugees (2010) "High Commissioner's dialogue on protection challenges: Breakout session 1: gaps in the international protection framework and its implementation: report by the co-Chairs" (8-9 December 2010) p. 3; United Nations High Commissioner for Refugees (2011) "Statement by António Guterres United Nations High Commissioner for Refugees Nansen conference on climate change and displacement in the 21st century" (Oslo, 06 June 2011) *available from*: <http://www.unhcr.org/4def7ffb9.html> [accessed 12 June 2012]; "Chairpersons Summary Nansen conference on climate change and displacement in the 21st century" (Oslo, 06-07 June 2011) para. 23 *available from*: https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_summary.pdf [accessed 12 June 2012].

being erected jurisprudentially, highlights that states have the obligation to take preventative action to respect, to avoid violating, and to take positive steps to fulfil human rights. Importantly, it identifies the “minimum standards of treatment” that should be afforded to EDPs (i.e., identifying the rights violated or at risk and how states need to deal with risk and their obligation to deal with it). It falls short, however, in providing an effective protection mechanism or status when someone crosses a border due to environmental factors. This is because the international legal protection regime has been traditionally geared, once displacement occurs, towards the narrow class of those fleeing political persecution under the 1951 Convention Related to the Status of Refugees (CRSR or International Refugee Convention).¹⁶ Nevertheless, the increased convergence of the law of protection of the human person has expanded protection beyond the remit of that conventional instrument into codified forms of subsidiary or complementary protection under the EU legal framework. The present study attempts to take a more optimistic stance by offering an analysis on the existing EU regional protection framework as a potential model, which can - in the short term - be a stepping-stone to consolidating protection for EDPs, reinforce existing states’ obligations, and even reorienting the international protection regime if needs be.

1.1 Basic Premises of this Thesis

This thesis is based on two premises. First, as will be clarified, this thesis takes a holistic approach to protection. In this context, it urges the reader to look upon the displacement challenges before, during and after displacement occurs. It invites us to pragmatically rethink protection as a dynamic guiding concept of not only *reactive*, but also *proactive*, protection measures. In light of increasing forced displacement and the severe suffering that usually accompanies those situations the international community in general, and states in particular, should strive to take action to prevent and avoid environmental cross-border displacement. Indeed, prevention is better than the cure. There is much scope to use labour migration (e.g. the Seasonal Worker’s Directive,¹⁷ Mobility Partnerships¹⁸) as a consolidating preventative protection measure for people to adapt to environmentally changing conditions and avoid displacement. In addition, where cross-border displacement occurs, the formalised system of complementary protection (e.g., the Qualification Directive,¹⁹ the Temporary Protection Directive²⁰)

¹⁶ Convention Related to the Status of Refugees (CRSR or International Refugee Convention) adopted on 28 July 1951, in force since 22 April 1954, 189 UNTS 137, Amended by the Protocol relating to the Status of Refugees, adopted 31 January 1967, in force since 4 October 1967, 606 UNTS 267.

¹⁷ European Parliament and the Council of the European Union Directive (2014) “on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers” (Seasonal Worker’s Directive) 2014/36/EU (26 February 2014).

¹⁸ European Commission Staff Working Document (2009) “Mobility Partnerships as a tool of the Global Approach to Migration” (Mobility Partnerships) SEC (2009) 1240 final (18 September 2009).

¹⁹ Council of the European Union Directive (2004) “on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted” 2004/83/EC (29 April 2004). This

may offer important pragmatic solutions to protect those who are forced to move on a permanent or quasi-permanent basis where the prospects of return to their country of origin may be slim.

The second basic premise of this thesis is that a human rights approach is the essential cornerstone to the protection of EDPs. The specificity of a human rights approach is that it strengthens the existing (explicit and implicit) states' obligations to protect EDPs' rights under international and regional treaties and interrelated operational frameworks. This recognition, also judicial, is being continuously consolidated through dynamic and contextual interpretation of the conventional obligations of international protection of the human person. Together, this ensures that pragmatic solutions are sought to avoid and to remedy situations of forced cross-displacement by environmental factors, while at the same time safeguarding "the continuity of the process of expansion of the *law of protection*."²¹ It further highlights that every human being is a person and a rights holder, which empowers him or her to claim their rights against the duty bearers.

1.2 Research Questions

This thesis is based on four core research questions. The first question aims at contextualizing the topic under discussion, while the second aims at conceptualizing "environmentally displaced persons" within the remit of this study. The third and fourth research questions, which constitute the major premises of this thesis, plunge into the dogmatic, critical and strategic legal analysis. Each can be further divided into a number of sub-questions. The order in which the questions are presented is reflected on the structure of this thesis. Thus, the following research questions are subsequently examined:

- **What is the meaning of environmental displacement and the added value of framing it as a human rights issue? (Chapter 2)**

What is the definition of environmental change? What factors influence human displacement? To what extent is it relevant to consider the environment as an objective and autonomous factor that leads to displacement? To what extent is the concept of vulnerability useful when determining areas of the world where

Directive has been recast by the European Parliament and Council of the European Union Directive (2011) "on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted" Recast (Qualification Directive) 2011/95/EU (13 December 2011).

²⁰ Council of the European Union Directive (2001) "on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof" (Temporary Protection Directive) 2001/55/EC (20 July 2001).

²¹ Cançado Trindade, A. (2010) "International Law of Humankind, Towards a new *Jus Gentium*" (Martinus Nijhoff Publishers) p. 525.

people are/can be potentially displaced by environmental change? Why do people displaced by environmental factors merit legal protection contemplation? What is the added value of the human rights framework in the context of environmental displacement?

- **How is the concept of environmental displaced persons (de)constructed? (Chapter 3)**

How does the notion come into existence? How is it developed and/or been consolidated at institutional level and within the wider international protection agenda? What constitutes an environmental displaced person?

How to conceptualise the environmental-related movement within this study?

- **To what extent is the existing international legal regime of protection of forced displacement adequate to protect cross-border environmental displacement? (Chapters 4 and 5)**

What are the legal obligations of states in protecting the human rights of cross-border environmental displacees and granting them status under current international instruments? To what extent does current international law acknowledges (or has acknowledged) obligations of states to prevent cross-border environmental displacement and deal with situations of cross-border displacement thereto? To what extent does customary international law offers protection for cross-border environmental displacement? What are the current legal protection gaps?

- **To what extent can existing formalised complementary protection standards at the European Union level be (re)conceptualised to solidify protection, both to prevent and deal with cross border environmental displacement? (Chapter 6)**

What is the interpretative value of the existing statuses, such as the ones granted under the Seasonal Workers Directive and Mobility Partnerships, in consolidating a *proactive* approach to protection for environmentally displaced persons? What is the interpretative value of existing statuses, such as the one granted under the Temporary Protection Directive and the Qualification Directive, in consolidating a *reactive* approach to protection for environmentally displaced persons?

The analysis is grounded in the understanding that the law has an undetermined nature and is unable to answer the global fast-pacing setting of global environmental change and displacement. Existing legal frameworks may, nevertheless offer the language to debate this problematic topic and find the temporary and relative solutions that are needed to protect those in need. A coherent legal discourse may provide acceptability

and open the doors to the much-needed political and legal change. By recognizing the transformative capacity of the law in providing legal protection, the study builds on the strategic possibilities of international and regional legal standards and actions from states to protect EDPs.

1.3 Guiding Threads, Concepts and Caveats

To ensure coherence in such a complex theme, there are some other guiding threads that underline this work. Below we outline a list of concepts and caveats that we shall deploy, a more detailed account of which will be given in later chapters.

First, this study uses the concept of “environmental change” to explain the dynamic process whereby all environmental factors, whether natural (storms, tornados, volcanic eruptions, earthquakes) or man-made (environmental degradation, climate change, development, disasters) are interconnected and interdependent. This holistic view, enables us to understand that modern societies are gradually “risky societies,” a product of human agency whereby the term natural disaster has become an increasingly anachronic misnomer. For the purposes of convenience however, we will be using the term ‘environmental change’ and ‘climate change’ interchangeably, as well as the wording ‘natural’ and ‘human-made disasters’, mirroring their use in several international legal instruments.

Secondly, as previously mentioned, we use the term *Environmental Displaced Persons* or EDPs to encompass:

those individuals of a country who for compelling reasons of sudden disasters (in particular cyclones, storms surges and floods) or progressive environmental degradation (in particular drought, desertification, deforestation, soil erosion, water shortages and other climate change related conditions), natural and/or human-made, impacting in their lives or livelihoods are obliged to leave their country of origin temporarily or permanently to a third State.

This is not meant to be a legal but a descriptive definition, which can be tested and serve as a benchmark for further development. While recognising the multicausality of displacement within the context of social, political, economic, and environmental conditions, the definition depicts the forced movement of people (“no option”) across a border (temporary or permanently), where the negative impact of environmental change over a period of time is more enhanced for the environmental driver. The definition also looks upon the vulnerability of the individual when their livelihood or life is affected and impacts their human rights core (civil, political, economic, cultural, and social). The usage of the vulnerability token as a reflective concept enables us to expose the most vulnerable areas of the world affected by environmental change (“hot spots”), where people’s human rights are violated and/or at risk and in need of legal protection contemplation. In this context, the term *vulnerability layers* is used in order to clarify

that that while all of us are generally vulnerable to the effects of environmental change there are additional layers that render the individual or collective entity vulnerable, which may also be a result of the characteristics of a person, age, sex or group and the overall capacity to resist or adapt to environmental hazards.

Finally, the study works with the underlying assumption that it needs to cope with what we call the “Protection Paradox.” This states that some of the dangers of environmental change are intangible, and that its impact on human displacement are to some extent (in)visible in this day and age. In this context, it challenges international law to work within the known and unknown displacement estimates and requests the need to act and not to wait and see for forced displacement of populations to become more visible and acute. The amount of people being displaced by environmental factors is increasingly becoming a reality, while, for the time being there is no way to get rid of the existing greenhouse gases in the atmosphere. Therefore, while the following chapters take a compartmentalised approach towards the application of international legal regimes of protection of forced displacement and states’ obligations towards the human person affected by environmental conditions, it remains necessary to highlight that environmental or climate change impacts are borderless. It is continuously relevant to challenge international law as a basis for international solidarity and responsibility in a more general way.²² The establishment of cooperation between the global polity of states on these matters must imperatively recognise the establishment of an objective responsibility based on a collective action or shared responsibility.²³ Therefore, there is

²² Over the years, there has been an increased recognition of the principle of “international solidarity” as a principle underpinning international law. The principle of solidarity gained relevance with the writings of Karen Wellens, in particular highlighting the common responsibilities of states, international organisations, peoples and nations and civil society. More recently, it gained centre stage in the 2014 proposed draft declaration on the right of peoples and individuals to international solidarity. *See* Wellens, K. (2005) “Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations” in R. St. J. Macdonald & D. M. Johnston (eds.) “Towards World Constitutionalism: Issues in the Legal Ordering of the World Community” (Martinus Nijhoff) pp. 775-807; Wellens, K. (2010) “Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections” in R. Wolfrum and C. Kojima (eds.) “Solidarity: A Structural Principle of International Law” (Springer) pp.3-54 and U.N. Human Rights Council (2014) “Report of the Independent Expert on human rights and international solidarity, Virginia Dandan” U.N. Doc. A/HRC/26/34, annex, (1 April 2014) for the full text of the proposed draft declaration on the right of peoples and individuals to international solidarity.

²³ *See* Harris, P. (2008) “Climate Change and Global Citizenship” 30 Law Policy 4 pp.481-501, p.487. Stating that the preservation of the environment and the challenge to combat climate change is dependent upon solidarity between states and even more when states have a certain capacity to control pollution. *See* also U.N. Human Rights Council (2015) “Report of the Independent Expert on Human Rights and International Solidarity, Virginia Dandan” U.N.Doc. A/HRC/29/35 (2 April 2015) para. 28. The Independent Expert on human rights and international solidarity, Virginia Dandan, has stated that collective action by states in undertaking measures of *reactive solidarity*, as well as *preventive solidarity*, are of critical importance in minimizing adverse impacts on the exercise and enjoyment of human rights. This idea is to be further developed in more detail by the independent expert in a forthcoming report, but essentially, it builds upon the notion that states can no longer tackle current collective challenges (such as inequalities between developed and developing countries, structural obstacles that generate poverty, threats to peace, spread of diseases, climate change and disasters) exclusively in a reactive way, but must collectively act proactively by preventing, removing, or minimising the “root causes”.

a need to envisage solidarity as “a communion of responsibilities and interest between individuals, groups and States, connected by the ideal of fraternity and the notion of cooperation. The relationship between international solidarity and international cooperation is an integral one, with international cooperation as a core vehicle by which collective goals and the union of interests are achieved.”²⁴ The preservation of the environment and the challenges of environmental change, including human displacement²⁵ should benefit from a balanced system of cooperation founded on principles of equity and social justice.²⁶

1.4 The Academic and Societal Contribution of this Thesis

Ideally, any academic research aims to contribute to both academic science largely defined and to society and policy. This thesis aims to offer such a two-fold contribution. At an academic level, it contributes to the general knowledge gap regarding EDPs and their lack of protection and legal status *in abstracto* and how to narrow that gap *in concreto*. The study explains and systemises the legal obligations of states, which are valid in the international legal sphere on the international protection of persons facing threats from the environment. It examines the existing international protection paradigms and corresponding (home and host) states’ obligations under human rights law in general, and the 1951 Refugee Convention and the 1967 Protocol on the Status of Refugees in particular, with a view not only to seeking legal status but also as a means to construct a much needed holistic protection framework for EDPs. More specifically, it offers pragmatic protection solutions that can be consolidated by exploring existing EU regional protection standards for those arriving at EU borders and that could have a “ripple effect” beyond the EU.

²⁴ U.N. Human Rights Council (2008) “Human Rights and International Solidarity note by the United Nations High Commissioner for Human Rights” U.N. Doc. A/HRC/9/10 (15 August 2008) para.6.

²⁵ See on ethical responsibilities Penz, P. (2010) “International Ethical Responsibilities to ‘Climate Change Refugees’” in J. McAdam (ed.) “Climate Change and Displacement: Multidisciplinary Perspectives” (Oxford University Press) pp. 151-173.

²⁶ See U.N. Human Rights Council (2015) “Report of the Independent Expert on Human Rights and International Solidarity, Virginia Dandan” U.N.Doc. A/HRC/29/35 (2 April 2015) paras. 11 and 41. In this context and further elaborating the current Independent Expert on Human rights and International solidarity, Virginia Dandan has affirmed that “the principle of solidarity is a concept that progressively moves forward in asserting common rights and responsibilities and in the shaping of an international community, representing values to be attached, as a whole, to the life of present and future generations, and to the development of a democratic and equitable international order” and further acknowledges that “international solidarity is a powerful tool for addressing key global challenges to human rights. In the context of the sustainable development goals and the climate agreement to be forged in 2015, international solidarity [...] would ensure a fair and just relationship between State and non-State actors engaged in the pursuit of common goals or in overcoming a common challenge, in full cognizance of the human rights of the peoples, individuals and groups concerned.”

The protection of EDPs is far from being only one of those issue-areas maintaining such a “grip on the imagination of the research community;”²⁷ the aim is also to gain stronger international recognition of their plight. Displacement affects millions of people every year, severely compromising and disrupting their livelihoods. With environmental change exacerbating these trends it is the search for the legal mechanisms and their dynamic interpretation to consolidate, prevent, and/or mitigate forced displacement as a result of environmental change that therefore, underlies the societal value and contribution of this thesis.

1.5 The Contribution of This Thesis to Existing Literature

The research focus on environmental change and the related movement and the legal status and rights of EDPs has expanded over recent years. At a scholarly level, international law researchers have attempted to narrow the legal protection gap for those who could potentially cross an international border due to changing environmental conditions. Proposals have varied in content and imagination, with authors balancing their normative proposals between hard and soft law approaches. In this context, scholarship-coordinated efforts have abounded, with many proposing the treaty model approach.²⁸ However, environmental scholars in France have developed the most complete publication to date, a Draft Convention on the International Status of Environmentally Displaced Persons.²⁹ Less ambitious, but relying on existing

²⁷ Nicholson, C. (2012) “The Place of Epistemological Due Diligence in Relation to the Social and Political Science of Climate Change: The Case of Environmental Migration” Paper presentation ClimMig Conference on “Human Rights, Environmental Change, Migration and Displacement” Ludwig Boltzmann Institute Human Rights; IDDRI, SciencesPo. Vienna, Austria, (20-21 September 2012) p. 2 pp. 1-20.

²⁸ See e.g. Hodgkinson *et al.* (2008) “Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses” Issue 8 (September 2008) *available from*: <http://www.ias.uwa.edu.au/new-critic/eight> [accessed 20 May 2012]. This Convention was initially presented at the University of Copenhagen during a conference on Climate Change: Global Risks, Challenges and Decisions, 10-12 March 2009. Other convention proposals include: Docherty, B. & Giannini, T. (2009) “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees” 33 *Harvard Environmental Law Review* pp.349-403; Magniny, V. (1999) “Les Réfugiés de L’Environnement Hypothèse Juridique à Propos d’une Menace Écologique” Doctoral Dissertation Paris, Department of Law (University Paris I Panthéon-Sorbonne); McCue, G. S. (1993-1994) “Environmental Refugees: Applying International Environmental Law to Involuntary Migration” 6 *Georgetown International Environmental Law Review* pp. 151- 190. This last author emphasizes that congregating principles of refugee law and environmental law would be the best option for the protection of environmentally displacement persons under an international arrangement. He suggests creating a compensation fund that would enable the resettlement of people displaced by environmental factors.

²⁹ Prieur, M. *et al.* (2008) “Projet de Convention Relative au Statut International des Déplacés Environnementaux” University of Limoges (CRIDEAU-CRDP-OMIJ-CIDCE) 4 *Revue européenne de Droit de L’Environnement* pp. 391-406. This draft treaty model approach relies on three strands: protection, assistance and responsibility by including principles of environmental assistance, proximity, proportionality effectiveness and non-discrimination. It further creates legal apparatus to grant a status to environmentally displaced persons to be managed by each state through a national commission and develop cooperation efforts with various international and regional organizations. It further creates legal apparatus to grant a status to environmentally displaced persons to be managed by each state through a national commission and develop cooperation efforts with various international and regional organizations. It creates a custom made institution, the World Agency for Environmentally Displaced

mechanisms and treaties, some scholars have suggested a *sui generis* protection that would consist of adding a Protocol to the 1992 United Nations Framework Convention on Climate Change (UNFCCC),³⁰ or a adding a Protocol to the European Convention Human Rights (ECHR), concerning the right to a healthy and safe environment as a means of “enhancing the human rights protection mechanisms vis-à-vis the challenges of climate change and environmental degradation processes.”³¹ Additional proposals have consisted of extended legal protection or of adding an amendment or additional Protocol to the CRSR.³² Professor Jane McAdam, who has written extensively on the topic, has favoured a better implementation of the Guiding Principles of Internal Displacement (GPID) that could usefully inform a framework relating to cross-border environmental-related movement.³³ Some authors also favour strengthening “soft law” as an interim measure before there is a global consensus on a binding document for the protection of EDPs.³⁴ The building of a gradual consensus to address the challenges of

Persons for treaty related interpretation matters, to deal with appeals against national commission decisions, aided by a secretariat, an administrative and scientific council. In line with other proposals it also proposes that a World Fund for the Environmentally Displaced be set up. Importantly, the treaty outlines the fundamental rights which are common to both temporarily or permanently displaced persons and highlights the importance of the principle of common but differentiated responsibilities “with the aim of prevention and reparation” which should be covered by a specific protocol.

³⁰ Bierman, F. & Boas, I. (2008) “Protecting Climate Refugees: The Case for a Global Protocol” Environment (November-December 2008) *available from:*

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html> [accessed 20 May 2012]. This proposal gravitates around

five principles (principle of relocation and resettlement; principle of resettlement rather than temporary protection; principle of collective rights granted to local people; principle of international assistance within states; principle of sharing the burden of hosting refugees internationally). A specific funding mechanism (Climate Protection and Refugee Resettlement Fund) has also been forward which links protection with state responsibility for climate change.

³¹ Council of Europe (CoE) (2008) Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Populations, “Environmentally Induced Migration and Displacement: A 21st Century Challenge”, CoE Doc 11785 (23 December 2008) paras 6.3 and 121.

³² Christiansen, S. M. (2010) “Environmental Refugees, A Legal Perspective” (Wolf Legal Publishers); Renaud *et al.* (2007) “Control Adapt or Flee, How to Face Environmental Migration?” Interdisciplinary Security Connection No. 5 (United Nations University Institute for Environment and Human Security); Coinsbee, M. & Simms, A. (2003) “Environmental Refugees: The Case for Recognition” New Economics Foundation; Cooper, J. (1998) “Environmental Refugees: Meeting the Requirements of the Refugee Definition” 6 New York University Environmental Law Journal pp. 480-488.

³³ McAdam, J. (2011a) “Climate Change and International Law: Complementary Protection Standards” (United Nations High Commissioner for Refugees Legal and Protection Policy Series) *available from:* <http://www.unhcr.org/4dff16e99.html> [accessed 20 May 2012] *See also* McAdam, J. (2012) “Climate Change, Forced Migration, and International Law” (Oxford University Press) p. 256. The author also suggests that any suitable response to the issue of environmental displacement should be guided by overarching normative principles of humanity, human dignity, human rights and international cooperation.

³⁴ Fatima, R. Wadud, A. & Coelho, S. (2014) “Human Rights, Climate Change, Environmental Degradation and Migration: A New Paradigm” Issue No. 8 (International Organization for Migration & Migration Policy Institute) p. 8. pp. 1-11. The authors note that given the lack of consensus on a legal and normative framework for EDPs a “soft law” approach should be explored because it allows leveraging expertise and knowledge base of actors such as non-governmental organisations; does not directly challenge state sovereignty, expands existing institutional arrangements and accommodates different views. Further, it allows a timely action in situations where governments reach a stalemate and helps expand on existing legal binding and non-binding agreements.

cross-border displacement in the context of disasters and climate change has been the cornerstone of the so-called Nansen Initiative.³⁵ Whilst all of them are worthy and merit recognition, among other things because they draw attention and offer insightful solutions into enhanced legal protection options surrounding environmental cross-border displacement, none of them address the matter all-inclusively from a normative and pragmatic/strategic point of view.

This research aims to contribute to filling this scholarly gap, first by taking a holistic approach to protection in all phases of displacement - from, during and after displacement - for environmentally displaced persons. This is particularly necessary, given that the solutions that can be envisaged for those who cross an international border due to environmental factors have to be conceptualised and combined with measures to avoid displacement or to adapt to the conditions of a changing environment. While this study concentrates on only two phases of displacement due to time and space reasons (status and protection from cross-border displacement and status and protection after cross-border displacement), it aims at highlighting the needs and rights of EDPs and corresponding home and host states' obligations. We approach this from a human rights-based perspective and by analysing existing or envisaged international legal regimes (hard and soft law) and their evolution informed by the interpretative dynamics of jurisprudential review. All of these legal forces contribute overall to the *cumulative effects* in providing effective protection for EDPs. No overview and analysis of these legal protection instruments and the corresponding states obligations' by analogy towards EDPs currently exists to our knowledge.

Secondly, the research examines the issue of the legal protection of EDPs in a more detailed manner. This is particularly true as regards to the obligations of the country of origin and the analogy of the underlying duty of states to take preventative and adaptive measures for the protection EDPs, which derives from (quasi) jurisdictional decisions and international and regional instruments that consolidate the emerging customary character of such an obligation. This is also done as regards the obligations of the host state deriving from existing international instruments such as the CRSR and the extent to which those duties are transferrable in particular to protect EDPs. It asserts that the *non-refoulement* obligation is not confined to the CRSR and that human rights law, through constant judicial review, has increasingly driven the evolution of the law of the protection of the human person – and by analogy to EDPs.

Thirdly, this analysis aims at narrowing the “legal protection gap” by consolidating protection for EDPs in a more pragmatic matter, which has not been done in previous

³⁵ The Nansen Initiative is an intergovernmental process that was launched in 2012 by Switzerland and Norway to address the challenges of cross-border displacement in the context of disasters and climate change. Its “Protection Agenda” builds upon consultative processes carried out in various regions of the world available from: <http://www2.nanseninitiative.org> [accessed 19 April 2015].

studies. To achieve this, and in order to (Re)Conceptualise protection for EDPs, it relies on the European Union regional protection regime as a model for testing and devising both *proactive* and *reactive* protection solutions – and as a way of reflecting states human rights obligations - with potential replication. In other words, the research intends to look upon the protection of those environmentally displaced within the walls of the academic debate (at the doctrinal level), but also offers pragmatic solutions for states that are already available and that can ultimately open doors, beyond the academic walls, towards a more formalised system of protection for EDPs (at the level of international law and policy making).

In sum, this study looks backwards in order to move forwards. It addresses the existing legal framework of protection and underlying principles of forced displacement, which is relevant *in context (de lege lata)* and in how it can be utilised, interpreted and consolidated to protect EDPs now and in the near future (*de lege ferenda*).³⁶

2. Method, Methodology and Opportunities

2.1 Legal Methodologies: A Window of Opportunities in Today's Complex World?

To write about legal methodology and legal method aims at delimiting and mapping our research process, but also makes it more comprehensive and the outcome more predictable.³⁷ The research questions outlined in the previous sections reflect how the research carried out in this thesis can be classified as contextual, conceptual and legal. These are described in the next sections. Before that, however, in order to justify the methodological path taken in this research, it is importance to assert that methods in international law are a “matter of art,” as each method has its own view of what constitutes legal rigor and usefulness. There is no “one size fits all” legal method. The question one should ask is whether we can achieve legal consistency in today's intertwined specialised legal fields (environmental law vs. human rights law, private law vs. human rights law, integration of international law in domestic law, European Union law vs. human rights law, among others) in a fragmented and complex legal world.³⁸

³⁶ See Higgins, R. (1994) “Problems and Process: International Law and How We Use It” (Oxford University Press) pp.5,10. The author states that the distinction between *lex lata* and *lex ferenda* is in reality, a “false dichotomy.” This is because both normative considerations and policy factors should be dealt with “systematically and openly” by the authorised decision-maker.

³⁷ Hesselink, M. (2009) “A European Legal Method? On European Private Law and Scientific Method” 15 European Law Journal pp.33-34; pp.20-45.

³⁸ See generally, “Proceedings of the Annual Meeting of American Society of International Law” (March 2012) 106 American Society of International Law pp. 291- 423. The 2012 and 106th annual event of the American Society of International Law was focused precisely on “confronting complexity”. The introduction to the event highlighted that “Contemporary reality is confoundingly complex: it is marked by rapidly evolving technologies, increasing global interconnectedness, rising population, and deepening understanding of science and the environment. New international actors; changes in social, economic, and political dynamics; a multipolar power structure; and novel security threats only add to the complexity.

Finding coherence is perhaps the most vital and hard aspect of legal research, and of this study in particular.³⁹ But today's legal method goes beyond the thoughts of earlier writers who considered legal method as a conceptual framework of mere application of abstract international law theories to contemporary problems. Today's method is a "living method, employed by a diverse community of scholars who help ensure its continuous evolution."⁴⁰

Before embarking on the justification for choosing specific methods and methodology within the context of this work, there is a need to distinguish between legal method and legal methodology. Legal method is a more encompassing term of contemporary scholarship underpinning legal theories that are relevant for international scholars and lawyers facing today's complex world.⁴¹ Legal methodology, in our view, is the *modus operandi* in which all those theories and scholarship work to achieve legal consistency. In other words "methodology challenges us to make our implicit beliefs and assumptions explicit in order to avert herd behaviour, to avoid relying too easily on authoritative sources, and to test what may appear obvious at first sight."⁴²

Irrespective of the definition of terms in reality, both concepts are deeply intertwined. The way one understands them might range from a narrower or larger point of view.⁴³ One might even be tempted to say that distinguishing between them might render them uninteresting. What matters here is to explain the road taken to the solution of a problem(s), i.e. the protection of EDPs, which theoretical framework(s) was/were applied and explicitly explain why a regional approach to protection using the wider EU

Amidst this confusion, international law can be a source of order and clarity. It can provide frameworks to peacefully resolve disputes, regulate relations between different actors, and clarify rights and obligations. It can foster technological development and facilitate exchanges of knowledge and goods. It is no surprise that managing global financial crises, protecting global commons, responding to conflicts spilling across borders, and guaranteeing public health and safety have all been added to international law's purview. In our crowded, connected world, civil uprisings, financial collapses, [and] natural and human-caused disasters are no longer domestic crises: they are global crises." See Cohen, H. Giorgetti, C. & Payne, C. (2012) "An Introduction: Confronting Complexity" 106 *American Society of International Law* pp. 1-3.

³⁹ Tuori, K. (2009) "Critical Legal Positivism" (Ashgate Publishing) p. 170 The author notes: "Coherence does not denote mere logical consistency but rather the substantive congruity of the legal order. The assessment of coherence draws attention to the substantive links the legal order maintains with moral norms, ethical values and socio-political objectives."

⁴⁰ Ratner, S. & Slaughter, A.-M. (1999) "Symposium on Method in International Law – Appraising the Methods of International Law: A Prospectus for Readers" 93 *The American Journal of International Law* p. 292; pp.291-302.

⁴¹ *Ibid.*

⁴² Van Gestel, R. Micklitz, H.-W. & Poyares Maduro, M. (2013) "Methodology in the New Legal World" *EUI Working Papers Department of Law* p. 4 pp. 1-23.

⁴³ There seems to be some degree of confusion between the terms method and methodology. For Coomans, Grunfeld and Kamminga legal methodology and method seem to be used interchangeably. See generally, Coomans, F. Grunfeld, F. & Kamminga M. (2009) "Methods of Human Rights Research" (Intersentia). For Ratner & Slaughter, method is "the application of a conceptual apparatus or framework – a theory of international law – to concrete problems faced in the international community." Methodology, on the other hand the authors say "denotes the way to identify and locate primary and secondary resources." Ratner & Slaughter (1999) *Op. cit.* p. 292.

legal context as a consolidating protection model is and/or might be the appropriate road in the short term to protect them.

2.2 Research Methods

In order to respond to the research questions and the general complexity of the theme, several research methods are used. The mélange of research methods and methodological canons reflects the multidimensional character of the topic. Our approach aims to achieve research coherence that would otherwise be lost if only one method was employed.⁴⁴ Moreover, it will render the research process more adaptable to the ever-changing environment of the law today.

2.2.1 Contextual Analysis

The first part of the analysis is concerned with explaining and situating the context of the topic. This path is deemed relevant to constructing our research analysis and academic knowledge. Today's boundaries of legal scholarship have to be understood in a wider context to understand not only the changes in the environment around the world and the push and pull factors of displacement, per se, but also, more importantly, to understand the transformative capacity of the law. We need to understand for example, the concept of environmental change and the determinants of human mobility; the particular impact of environmental change in people's displacement and their geographical reach. By contextualizing the topic, we also enable the research aims, theories chosen, other methods, and sources of knowledge to be open in order to meet the challenges of this particular contemporary situation under study.⁴⁵

2.2.2 Conceptual Analysis

This research also makes use of a conceptual analysis. The different terminologies used and the conceptualization of who EDPs are within this study is important. Baldwin explains this by saying that a “[c]onceptual analysis is not concerned with testing hypotheses or constructing theories, though it is relevant to both. It is concerned with clarifying the meaning of concepts.”⁴⁶

However, a conceptual analysis is more than this, in that it also enables us, amongst the wide multiplicity of terms and in the absence of a consensual one, to build a concept of EDPs for guidance. It is not only about defining or describing what constitutes an EDP but also about producing a concept as an object of knowledge. (De)constructing the concept of EDPs serves three purposes. Firstly, it has a terminological interest in

⁴⁴ Tuori (2009) *Op. Cit.* Indeed coherence is not something that should be taken for granted but rather “a very precarious quality, which has to be produced and reproduced ever anew.”

⁴⁵ See Svensson, E.-M. (2007) “Boundary-Work in Legal Scholarship” in A. Gunnarsson, E.-M Svensson & M. Davies (eds.) “Exploiting the Limits of the Law, Swedish Feminism and the Challenge to Pessimism” (Ashgate Publishing) p. 39; pp. 17-49.

⁴⁶ Baldwin, D. (1997) “The Concept of Security” 23 *Review of International Studies* p.5; pp. 5-26.

establishing what the content entails so we can talk about, study, and communicate it. Secondly, it has an epistemological interest as an object of knowledge that can contribute to ameliorating discussions and propelling positive change within the wider human rights and environmental legal spheres. Finally, it has a normative value in determining the applicable legal regime that they cover.⁴⁷

2.3. Legal Analysis

2.3.1 Our Legal Method: ‘Hybrid’ in Character

In the over-cited article from the *American Journal of International Law*, as an outcome of an appraisal of methods in international law, several legal methods are outlined as underpinning today’s scholarship: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence and law and economics⁴⁸. While some are designated as classical approaches, others focus more on international relations and policy-oriented perspectives to international law. In addition to this legal methods symphony, European scholars have included natural law, cosmopolitanism, constitutionalism, new governance queer theory, postcolonial theory, Marxism, law and literature and law and sociology.⁴⁹

All legal method theories, in one way or the other, try to achieve a coherent discourse in their own intellectual operations and try to advocate their method as the indispensable one. All theories are, in fact, a system capable of reasoning in particular contexts. It is not our intention to discuss here all the aforementioned legal methods due time and space limitations. Neither is it to merely “pick and choose” (or as Koskenniemi calls it, take a “shopping-mall approach to method(s)”⁵⁰) amongst the method collection, but rather to expose the relevant choice of our selection, a selection that is an outcome of a perusal of the relevant legal methods, of a mapping exercise of the strengths and weaknesses of those theories, and of a choice of the most suitable one(s) – in other words- that can help us answer the research questions that we proposed.

Our legal method presents itself as a hybrid legal method which departs from an enlightened positivistic fashion to include formal legal sources, but considers moral and policy processes that form *part* of the law.⁵¹ Within this line of thought, we see our research as a process of analysis of ingenious sources of law to achieve consistency. We look at the law *as it is* but try to answer the normative question of what the law *ought to*

⁴⁷ See Sgro, A. (2013) “Les Déplacés de L’Environnement à L’Épreuve de la Catégorisation en Droit de L’Union Européenne”. Thèse pour le Doctorat en Droit Public Institut Du Droit de la Paix et du Développement (Université de Nice Sophia Antipolis UFR) p. 20.

⁴⁸ See generally, ASIL (1999) “Symposium on Method in International Law” 93 American Journal of International Law pp.291-423.

⁴⁹ Cryer, R. *et al.* (2011), “Research Methodologies in EU and International Law” (Hart Publishing) p. 5.

⁵⁰ Koskenniemi, M. (1999) “Letter to the Editors of the Symposium” 93 American Journal of International Law p.352 pp.351-379.

⁵¹ Simma, B. & Paulus, A. (1999) “The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View” 93 American Journal of International Law 2 p. 308; pp. 302- 316.

be. To achieve this, we employ not only an internal normative approach of interpretation of treaties and court decisions in a positivistic fashion of what the *law says*, but how it *should read* from a normative standpoint. From this perspective, we employ an “external normative approach”⁵² - a method that recognizes the importance of facing future problems backwards, but acknowledges the limits of positivism. Human rights law is by nature value-laden and is influenced in its interpretation by the wider contextual moral, political, international and legal bubble.⁵³

By centering the gravity of this study within the wider human rights context, we soon realize that the discussion of the protection of EDPs needs to be understood not only from a legal normative standpoint (e.g., of interpretation of international legal norms of protection of forced displacement, interpretation of European “environmental human rights jurisprudence”), but that it also does not discount the combination of relevant regional legal and related policy processes. The latter is justified due to the fact that the subject under scrutiny has elements of incertitude attached to it (Who are EDPs? How many exist? Where are they located?) and is highly prospective (What legal standards and derived policy processes potentially offer protection to EDPs? Is more law necessary?). This is why the view of the New Haven School – that policy shapes international law as a product of the interface of several actors in the decision-making process⁵⁴ - is also particularly grounded in this study. While we do not map all the possible and different actors (and limit ourselves to protection obligations of states) or their roles and perceptions in an effort to avoid conflating politics and law, we share their approach as to the relevance (for the purpose of our study) of the added value of EU policy actors (European Union and its Member States) in shaping the current law as *it is* and arriving at solutions that reflect it as *it ought to be*. The overriding goal is to

⁵² Smits, J. M. (2009) “Redefining Normative Legal Science: Towards an Argumentative Discipline” in Coomans, F. Grünfeld & Kamminga, M. T. (eds.) “Methods of Human Rights Research” (Intersentia) pp.50 and 58. The author notes, “the main business of academics should be with what the law *should* say and this cannot be decided primarily by reference to national statutes and court decisions. We therefore have to make a difference between the question what the binding law says (which is always a matter of looking at authoritative sources) and how the law should read from a purely normative viewpoint. Put another way and perhaps somewhat paradoxically: legal scholars should adopt an *external* normative approach.” In sum, “the paradigm shift is this: do not look at binding court decisions and legislation as telling us what the national law says (there can be relative certainty about this), but as informing us about the strength of a normative viewpoint. Law should not be considered a binding system (focusing on the question whether law realizes some goal), but a normative system (what is it we should do?).”

⁵³ See Woodcock, A. (2006) “Jacques Maritain, Natural Law and the Universal Declaration of Human Rights” 8 *Journal of History of International Law* pp. 245-266. The author recognises that both philosophical and ethical claims about rights serve a fundamental purpose in that it creates the necessary stage for the critical assessment of international law free from the limitations of positivism and excessive formalism. In the same vein, as international lawyers get more engaged in confronting interdisciplinary undertakings such as environmental change and human rights protection it is increasingly fruitful and necessary for the progress of international law to confront the tensions that may derive between a strict formalistic positivist legal international argument and a critical legal orientation based on moral values and philosophy.

⁵⁴ See Wiessner, S. & Willard, A. (1999) “Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity” 93 *American Journal of International Law* 2 pp.316-334.

arrive at solutions that protect EDPs and at the same time “reflect the global common interest in approximating a world public order of human dignity.”⁵⁵

By resting on the international and regional EU processes, we highlight the EU’s normative value-creation -EDPs protection as a process- in which all actors (with particular focus on states) and legal and policy areas engage (implicitly and explicitly) towards the construction of protection strategies for EDPs. Here it might seem that we reminisce on the new International Law Process (ILP). The resulting new ILP would advocate that the knowledge of the legal system and institutional settlement align with today’s wider international society’s values (e.g. protection of human rights, protection of the environment) through dynamic procedures.⁵⁶ In other words, as society’s values evolve, so do decision makers “have the authority to develop new legal standards and even to adapt otherwise clear (...) text to accommodate a changed societal and legal environment.”⁵⁷

In sum, the *mélange* of the different legal methods is not to instrumentalise the law so that it becomes a mere tool for policy making, but rather uncover the law that might be applicable to protecting EDPs and situating them within the wider European legal and policy context of constructing and/or consolidating possible protection solutions.

2.3.2 Our Legal Methodology: The *Modus Operandi* and Applied Sources

As previously mentioned, legal methodology is the *modus operandi* in which all legal theories work to achieve legal consistency. It encompasses elements of interpretation, systematization and argumentation techniques and is seen as an autonomous task.⁵⁸ “Methodology should not be seen as something that it is imposed upon legal scholars by others but as a voluntarily *modus operandi* that can make one’s research more challenging, more valid and more credible”⁵⁹ In the following sections we outline the methodological canons used.

2.3.2.1 Legal Sources

After contextualizing and conceptualizing EDPs, we turn to surveying what is the substance of law; i.e., its sources. The classical definition of sources of international law is laid down in Article 38(1) of the Statute of the International Court of Justice (ICJ). This provision states that the Court shall decide disputes by applying:

“a. international conventions, whether general or particular, establishing rules expressly recognized by the

⁵⁵ *Ibid.* p. 334.

⁵⁶ O’Connell, M. (1999) “New International Legal Process” (1999) 93 *American Journal of International Law* p. 338; pp.334-351.

⁵⁷ Van Alstine, M. (1998) “Dynamic Treaty Interpretation” (1998) 146 *University of Pennsylvania Law Review* p.687, pp. 687-793.

⁵⁸ Posner, R. A. (2002) “Legal Scholarship Today” 115 *Harvard Law Review* 5, p.1361, pp. 1314-1326.

⁵⁹ van Gestel, Micklitz & Poiares Maduro (2013), *Op. Cit.*, p. 6

contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

The sources of law explored to protect EDPs are to be found in the international legal framework for the protection of forced migrants, such as refugee law⁶⁰ and international human rights law. But other disciplines such as environmental law⁶¹ and European Union Law, will also be considered and subsumed to the aforementioned table of rules. We consider these sources of international law create an adequate legal context for the analysis. The analysis puts emphasis on treaties formally adopted by states, which have become the most important source of human rights standards (as the definition in Article 38 (1) traditionally outlines).

In addition to these, as indicated in the ICJ Statute, we also consider other sources of international law, such as customary international law, general principles of law including “soft law,” and judicial decisions. Customary international law is based on two elements: state practice (general and consistent) and *opinio juris* (belief that this practice is required). The relationship between the two in the particular context of human rights law is rather complex. The general rule is that to qualify as customary law, it is “sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule.”⁶² Kälin and Künzli clarify that “deviations from a practice cannot be deemed to undermine its validity, but rather imply a breach of the customary rule, provided that other states oppose it and characterise the criticised conduct as a violation of international law.”⁶³ With regards to *opinio juris*, “resolutions adopted by the UN General Assembly and other international bodies are significant indicators of the existence of a relevant conviction if they are adopted unanimously or by a representative majority and their content consists of statements that are *de lege lata* rather than *de lege ferenda*.”⁶⁴

⁶⁰ Convention Related to the Status of Refugees (CRSR or International Refugee Convention) adopted on 28 July 1951, in force since 22 April 1954, 189 UNTS 137, Amended by the Protocol relating to the Status of Refugees (Additional Protocol to CRSR), adopted on 31 January 1967, in force since 4 October 1967, 606 UNTS 267.

⁶¹ See e.g. United Nations Framework Convention on Climate Change adopted on 09 May 1992, in force since 21 March 1994, 1771 UNTS 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997, in force since 16 February 2005, 2303 UNTS 148.

⁶² ICJ, Case concerning military and paramilitary activities in and against Nicaragua, *Nicaragua v The United States of America*, ICJ Reports (27 June 1986) para. 186.

⁶³ Kälin, W. & Künzli, J. (2010) “The Law of International Human Rights Protection” (Oxford University Press) p. 67.

⁶⁴ ICJ, Case concerning military and paramilitary activities in and against Nicaragua, *Nicaragua v The United States of America* *Ibid.* para. 188.

As regards paragraph (c) of Article 38 of the ICJ Statute, no agreement among scholars exists as to the nature of “general principles of law recognised by civilized nations.” Therefore, they are generally perceived as a “non-consensual” source of international law. Arguments vary between “[general principles] which can be derived from a comparisons of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or the majority, of them” and “general principles applicable directly to international legal relations, and general principles applicable to legal relations generally.”⁶⁵ In any event, both views are complementary, as general principles can be used to “fill the gap” when there is no provision in an international treaty or statute, nor when any recognized customary principle of international law is available for application in an international dispute or at the international level at large.

Resolutions and declarations adopted by, or endorsed in some way by states, or international organisations, in particular, the United Nations organs, are strictly seen as “soft law” and not legally binding by nature, but they play an important pragmatic role - particularly in the context of this work - because they “reflect a consensus among states regarding what is required in the area of human rights – if not legally, at least morally.”⁶⁶ In addition, they offer interpretative guidance of important human rights treaties that clarify the content of such norms, can present concrete goals for future state action and may constitute a stepping-stone towards the adoption of legally binding conventions.⁶⁷

Judicial review as a “subsidiary means for the determination of rules of law” is an important element in this study. We particularly take into account relevant case law, which derives from the European Court of Human Rights (ECtHR); the Inter-American Court of Human Rights (IACtHR) and the Court of Justice of the European Union (CJEU).⁶⁸ Importantly, in addition to the stringently judicial enforcement bodies, we take into account decisions of quasi-judicial bodies, such as the Human Rights Committee (HRC), the Inter-American Commission on Human Rights (IACmHR), and the African Commission on Human and People’s Rights (ACmHPR), as they contribute overall to the interpretation and clarification of human rights norms. Despite the fact that their decisions are not legally binding by nature, their relevance and authority as an autonomous source of law derives from their complaint procedures, which are

⁶⁵ Thirlway, H. (2006) “The Sources of International Law” in D. Evans (ed.) “International Law” (2nd edition Oxford University Press) p. 128.

⁶⁶ Kälin & Künzli (2010) *Op. Cit.* pp. 74-75

⁶⁷ *Ibid.* pp.75-76.

⁶⁸ With the entry into force of the Treaty of Lisbon in 2009 the called Court of Justice of the European Communities or European Court of Justice obtained its current name Court of Justice of the European Union (CJEU). To ensure some consistency and avoid confusion we will be using the initials CJEU throughout this text including case law referencing.

analogous to a strict judicial review⁶⁹ bound by the general rules of treaty interpretation.⁷⁰

Other European-specific sources are also used, such as unilateral acts and agreements.⁷¹ The amalgamation of all these sources of law is important for considerations about the relevance of consolidation of protection of European regional protection standards for EDPs.

We look at all these sources as part of the holistic normative system of international law i.e. “the specialised social processes to which the word “law” refers include many things besides rules.”⁷²

The focus on regional protection standards is seen as a path to consolidating and/or developing integrated protection strategies, as reflected in international human rights norms, for EDPs. The focus on human rights at the regional level aims to define the standards of protection that EDPs should have, both in their country of origin and in the country of destination. This is based on the assumption that general human rights standards have an “expansive character,” as they are both explicitly embedded within international human rights instruments and within the overall objectives of the European Union.

2.3.2.2 The Value of Interpretation

The importance of interpretation within the context of this study enables us to attribute a meaning to a particular treaty provision. It is a constitutive feature of legal practice. When analysing the aforementioned human right treaties, the Vienna Convention on the Law of Treaties (VCLT) is, in principle, applicable to them. Articles 31-33 set out the rules of interpretation where semantics are of special importance to discovering the

⁶⁹ *Ibid.* pp. 206-238.

⁷⁰ Battjes, H. (2006) “European Asylum and International Law” (Martinus Nijhoff Publishers) p. 19.

⁷¹ “Unilateral acts can be divided into two categories: those listed in Article 288 of the Treaty on the Functioning of the EU: regulations, directives, decisions, opinions and recommendations and those not listed in Article 288 of the Treaty on the Functioning of the EU, i.e. “atypical” acts such as communications and recommendations, and white and green papers; international agreements, signed by the EU and a country or outside organisation; agreements between Member States; and interinstitutional agreements, i.e. agreements between the EU institutions”. This definition is *available from*: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114528_en.htm [Accessed 12 February 2014].

⁷² Higgins (1994) *Op. Cit.* p. 2. The author argues that international law is a process rather than a set of rules. *See also* Higgins, R. (1968) Policy Considerations and the International Judicial Process” 17 *International and Comparative Law Quarterly* pp.59-59; pp.58-84 where the author had previously affirmed that: “When (...) decisions are made by authorised persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what occurs is legal decision making. In other words, international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the references to the trend of past decisions, which are termed “rules.” There inevitably flows from this definition a concern, especially where the trend of past decision is not overwhelmingly clear, with policy alternatives for the future.”

meaning of words or expressions in a particular treaty provision.⁷³ However, natural sciences are also relevant when the law refers to objects or conditions in the real world. For example, the UNFCCC acknowledges in its preamble (emphasis added) that the “steps required to understand and address climate change will be environmentally, socially and economically most effective if they are *based on relevant scientific, technical and economic considerations* and continually re-evaluated in the light of new findings in these areas.”⁷⁴ In today’s complex world ensuring effective protection of environmentally displaced persons does, therefore, call for a “multidisciplinary approach to interpretation.”⁷⁵

The VCLT serves as a guide to treaty interpretation and is frequently used in international litigation, but it is not to be seen as a limiting factor. Letsas has taken a strong view in this regard. He argues that different projects call for different methods of interpretation. Thus, it is necessary to take a specific interpretative approach to international human rights treaties. His vision is partly because a “first misconception is to think that Articles 31-33 VCLT set out single rules of interpretation for all treaties.”⁷⁶ In reality, however, “there are no general methods of treaty interpretation if by methods we mean some set of rules which takes the relevance of certain facts (e.g. preamble, state intentions, practices, etc.) as given.”⁷⁷

There are many cases where the VCLT allows state parties to deviate from the Conventions provisions (e.g. in case of reservations, procedures on amendments, and so on).⁷⁸ While Article 31 establishes the “general rule” of interpretation, Article 32, is a “supplementary” tool that can be used when the conditions outlined in the Article come into play (e.g., *travaux préparatoires*). They are to be used in an integrated way to determine the adequate meaning of the text. Of relevance within this study is the “context” of the treaty terms, which includes the treaty text, preamble, and annexes as well as “any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty”⁷⁹ and “any rules of international law

⁷³ See Andenæs, M. (2015) “Reassertion and Transformation: From Fragmentation to Convergence in International Law.” 46 *Georgetown Journal of International Law* 3 p. 698 pp. 685-734. The author notes: “in the view of the European Court [of Human Rights] itself, the European Convention [of Human Rights] must be interpreted in accordance with Articles 31-33, applying the scheme of the Vienna Convention as set out in Article 5. Adding that the court must do so “taking into account the *special nature* of the Convention” does not change this. In a sense, the special nature approach of the European Court follows from the Vienna rules themselves. This works well with the approach taken in the Vienna Convention in which, apart from Article 5, there is no such distinction in the principles of treaty interpretation. It also introduces an interesting circularity to the debate: how can a “specialized approach” be deemed specialized if it is mandated by a “generalist” approach?”

⁷⁴ Preamble para. 16 UNFCCC (1992)

⁷⁵ De Feyter, K. (2009) “Treaty Interpretation and Social Sciences” in F. Coomans, Fr. Grünfeld & M. T. Kamminga (eds.) “Methods of Human Rights Research” (Intersentia) p. 218; pp. 213-231.

⁷⁶ Letsas, G. (2010) “Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer” 21 *European Journal of International Law*, 3 p. 512; pp. 509-541

⁷⁷ *Ibid.*, p. 538.

⁷⁸ *Ibid.*

⁷⁹ Article 31.2 VCLT

applicable in the relations between parties,⁸⁰ including customary international law. In the context of EU law, the understanding of “preparatory documents” is even more encompassing, as it relates to all the different phases of preparation of legislation engendered by all actors at the EU level.⁸¹

2.3.2.3 The Importance of Time

The VCLT provisions summarise the elementary elements of treaty interpretation: the *subjective* element, which refers to the intention of the parties and drafters of the treaty; the *objective* element, that looks upon the wording of the text; and the *teleological* element, which puts emphasis on the object and purpose of the treaty. Generally, courts consider all elements of interpretation, but the weight given to each can vary on a case-by-case basis. “In international human rights law, monitoring bodies tend to stress the importance of the objective elements, even in ways not explicitly envisaged in the Vienna Convention.”⁸² This is because courts have found that conventions should be interpreted in a way that enables rights to be tangible, practical and effective, rather than illusory or theoretical.⁸³ Such an *effective and evolutionary approach*⁸⁴ to interpretation does not contradict the VCLT, but enables the consideration of the object and purpose of a Convention, its context, and subsequent developments to its conclusion: “[H]uman rights treaties are living instruments, which accompany the evolution of times and of the social milieu in which protected rights are exercised.”⁸⁵ The European Court of Human Rights (ECtHR) has mentioned many occasions in which the European Convention of Human Rights is a “living instrument which [...] must be interpreted in light of the present-day conditions”⁸⁶ The Court has also highlighted that evolutive interpretation goes beyond substantive treaty provisions into

⁸⁰ Article 31.3 litra c VCLT

⁸¹ “‘Preparatory documents’ means all documents corresponding to the various stages of the legislative or budgetary process. They include Commission legislative proposals, Council common positions, legislative and budgetary resolutions and initiatives of the European Parliament, and opinions of the European Economic and Social Committee and of the Committee of the Regions, etc.” This definition is *available from*: <http://eur-lex.europa.eu/en/prep/index.htm> [Accessed 12 February 2014].

⁸² Feyter (2009) *Op. Cit.* p.215. The IACtHR has explicitly referred that: “In case of human rights treaties (...) objective criteria of interpretation that look to the text themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the parties”. IACtHR, “Restrictions to the Death Penalty,” Advisory Opinion, Series A No. 3, 8 September 1983, para. 50.

⁸³ See ECtHR, *Artico v Italy*, Application No. 6694/74 (13 May 1980) para.33.

⁸⁴ Cassese, A. (2005) “International Law” (2nd edition Oxford University Press) p. 179. The author is of the opinion that the drafters of the VCLT “set great store by the principle of “effectiveness” (*ut res magis valeat quam pereat*) whereby a treaty must be given an interpretation that enables its provisions to be “effective and useful”, that is, to have the appropriate effect. This principle is mainly intended to expand the normative scope of treaties, to the detriment of the old principle whereby in case of doubts limitations of sovereignty were to be strictly interpreted.” It should be highlighted that both effective interpretation and evolutive/dynamic interpretation are methods of interpretation that are considered part of teleological interpretation. Construing legal text effectively and realistically does not necessarily mean that this can be evolutive or progressive though in many cases it is.

⁸⁵ Cançado Trindade (2011) *Op. Cit.* p. 38.

⁸⁶ ECtHR, *Tyler v UK*, Application No.5856/72 (23 April 1978) para. 31.

the operative level.⁸⁷ The same evolutive interpretation has been reaffirmed by the Inter-American Court of Human Rights (IACtHR).⁸⁸

Furthermore, due to the special character of human rights treaties, they “are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights.”⁸⁹ In addition, the Inter-American Court of Human Rights (IACtHR) has asserted that human rights treaties are not traditional treaties to exchange rights to mutually benefit states (emphasis added): “Their *object and purpose is the protection of the basic rights of individual human beings* irrespective of their nationality (...). In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, *for the common good, assume various obligations*, not in relation to other States, but *towards individuals within their jurisdiction*.”⁹⁰

Current needs and aspirations of humankind cannot be seen from a strict inter-state reciprocity of international law, as new needs of protection of human beings occur in the international arena such as EDPs. One also has to acknowledge preventative measures of protection for present and for future generations, - that of the global commons: “if in the past the principles and rules of the law on the international responsibility of states evolved in an essentially inter-spatial dimension, revealing accentuated territorial ingredients, they are nowadays reconsidered in a new temporal [in a dynamic individual (state-individual) and collective (state-global commons) human] dimension.”⁹¹ As the ECtHR puts it, they are “objective obligations that benefit from collective enforcement.”⁹² One needs to analyse the protection of EDPs under the lens of a “dynamic or evolutive interpretation of the treaties of protection”⁹³ - in context

⁸⁷ ECtHR, *Loizidou v Turkey*, (Preliminary Objections) Application No. 15318/89 (23 March 1995) p.23, para.71. Right to individual petition.

⁸⁸ IACtHR, “Interpretation of the American Declaration of the Rights and Duties of Man” Advisory Opinion OC-10/89, Series A, No. 10 (14 July 1989) p. 45, para.37.

⁸⁹ U. N. Human Rights Committee, General Comment No. 24 (1994) “Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant” UN Doc. CCPR/C/21/Rev.1/Add.6 para.17 (02 November 1994).

⁹⁰ IACtHR, “The effect of reservations on the entry into force of the American Convention on Human Rights,” Advisory Opinion, Series A No.2 (24 September 1982) para. 29.

⁹¹ Cançado Trindade (2010) *Op. Cit.* p. 34.

⁹² The ECtHR stated in *Ireland v The United Kingdom*, Application No. 5310/71 (18 January 1978) at para. 239 that (emphasis added): “unlike international treaties of the classic kind, the Convention comprises more than merely reciprocal engagements between Contracting States. It creates, over and above a network of *mutual, bilateral relationships, objective obligations*, which, in the words of the Preamble, *benefit from a "collective enforcement."* Likewise the IACtHR, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights. Advisory Opinion OC- 2/82 (24 September 1982) para. 29 and more generally for different types of treaties, see Fitzmaurice, G.G. (1957) Special Rapporteur “Second Report on the Law of Treaties”, Yearbook of the International Law Commission, Vol. II p.54; pp.16-70 ILC Doc. A/CN.4/107 called those obligations “integral.”

⁹³ See Letsas, G. (2007) “A Theory of Interpretation of the European Convention on Human Rights” (Oxford University Press); Letsas, G. (2010) “Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer” 21 European Journal of International Law 3 pp. 509-541.

- and even, if necessary, go beyond its natural limitations into *new forms of law* that may prove to be suitable for emerging protection needs. In this sense, interpreting legal provisions does not mean a total alienation of their contextual environments.

2.3.2.4 ‘Normative Force’ Cornerstone of a Juridical Intelligence

In the context of this research we borrow the operational concept of “normative force”⁹⁴ to explain the importance of legal and related policy processes in EDPs protection.

The concept of “normative force” has been tabled by French scholars in the book “La Force Normative – Naissance d’un Concept” under the leadership of Catherine Thibierge.⁹⁵ The concept is above all a unifying concept that invites jurists, lawyers, and researchers to build an “interdisciplinary comprehension of the law.” In our view, it is not a legal theory per se, but is an operational methodological concept that enables the researcher to deal with the multiplication of the existing sources of law, fragmentation processes and actors in constructing the law. It is an “intuitive concept” because everyone has an understanding of what it entails and what it means in its own field.⁹⁶

Inspired by this *modus operandi* and juridical openness, we oversee the “potential” normative force of the “intra-systemic communication”⁹⁷ between various legal orders within human rights law (e.g., ECHR and the EU legal framework) and their relevance for the construction *inter alia* of a protection framework for EDPs. In particular, we look at the lessons from “environmental human rights jurisprudence” and how the effects of these judgments may serve as a “reference force” for EDPs protection.

Further, by combining the *cumulative normative forces* or effects of the law of protection of the human person and related judicial review, we (re)conceptualise protection as a dynamic guiding concept of existing *ex ante* and *ex post* measures for EDPs. Some protection frameworks were built for other purposes but have an explicit or implicit impact and may be geared to consolidate protection towards EDPs. The legal and policy dynamics surrounding these frameworks enable us to narrow the EDPs’ protection gap. In this exercise we highlight the fruitful collaboration between this multi-layered European human rights regime in consolidating protection for environmentally displaced persons and answering the research questions that we proposed. This fertile dynamic thinking, together with the aforementioned legal theories, invite us to (re)think the normative force of these processes, which is not dictated, per se, but is being constructed.

⁹⁴ Arnaud, A.-J. (2009) “La Force Normative Pierre Angulaire d’Une Intelligence Juridique” in C. Thibierge *et al.* (ed.) “La Force Normative – Naissance d’un Concept” (Lextenso Éditions) pp. 14-18.

⁹⁵ Thibierge, C. *et al.* (2009) “La Force Normative – Naissance d’un Concept” (Lextenso Éditions).

⁹⁶ *Ibid.*, p. 34.

⁹⁷ See Varju, M. (2012) “European Human Rights Law as a Multi-layered Human Rights Regime” (2012) in Wetzel, J. (ed.) “The EU as a “Global Player” in Human Rights” (Routledge) p. 51; pp. 49-65.

3. Legal Methodologies: A Window of Opportunities in Today's Complex World? Yes, but towards a Principled Approach

While legal methodologies may present themselves as a window of opportunities to understand and interpret today's complex world, all of them must work towards achieving legal consistency through a *principled approach*. This approach recognises that international law has to move towards "greater justice" and a "higher level of humanity".⁹⁸

"[i]n an international legal order in constant evolution, the solutions crystalized in a given epoch are always submitted to new value judgments; with the passage of time, the meaning itself of words evolves, the legal vocabulary expands and enriches. The accelerated development of contemporary International Law bears eloquent witness of the purpose of reshaping the international legal order in fulfilment of the changing needs and aspirations of the international community as a whole"⁹⁹

4. Research Scope and Limitations

The subject under investigation has intrinsic methodological difficulties, as the nature of the inquiry is highly complex and prospective. Devising the best legal methodology in this particular case can be a challenging task. The methods and methodological path chosen may be the subject of criticism. We tried to choose the most suitable methodology to offer "cosmos" in a naturally "chaotic" theme. Displacement due to environmental factors can be conceived from multi-layered and interactive approaches from human rights to environmental perspectives, or security, migration and humanitarian perspectives.

The study can be further criticized because it does not take into account all those disciplines or that it only takes one particular path. However, due to time limitations and permitted textual space it would be an impossible task. Limiting it to the human rights framework was the ultimate choice, given the subject matter - protection of the human person affected by environmental change – and the theoretical and practical points of view. The final focus on EU regional protection strategies embedded in a wider human rights framework as a test case was selected, as it offers formalised statuses and consequently a potential model of legal protection (*proactive* and *reactive*) for those (potentially) displaced by environmental factors.

It should also be noted that the focus of this research lies on a narrowing of the legal protection gap by focusing on the obligations of states to protect environmentally displaced persons in whose territory or whose jurisdiction people are (or potentially will be) displaced. It is essentially a study primarily focused on the applicability of substantive norms under human rights treaties and related instruments and does not deal

⁹⁸ Castberg, F. (1968) "Natural Law and Human Rights" 1 *Revue des Droits de L'Homme/ Human Rights Journal* 14 p. 37; pp. 14-40.

⁹⁹ Cançado Trindade (2010) *Op. Cit.* p.36

with questions regarding the responsibility of states in relation to one another or the international community in general to protect people in other countries from environmental displacement. Inevitably however, some assertions on this are made. We neither address issues of responsibility of states through the rules governing the responsibility of states for international wrongful acts,¹⁰⁰ or the responsibility of United Nations organs *per se*¹⁰¹ or through the draft articles on the responsibility of international organisations or the potential implication of the application of the “responsibility to protect” concept.¹⁰²

Therefore, a second issue beyond the scope of this work is the question of the human rights obligations of non-state actors (e.g. UNHCR, corporations among others) under international law in the environmental displacement context. With regard to non-state actors, it should be noted, however, that the states of origin have a general obligation to take all the necessary measures to protect the human rights of people from potential displacement by non-state actors or in any other circumstances that could potentially lead to displacement. It is from this perspective, that non-state actors (in particular, in the case law discussions) are present in this study.

As previously mentioned, this study takes a holistic approach to protection, which imposes obligations on states during all phases of displacement: before, during and after. The focus is not only on remedial and reactive perspective, but also on a preventative approach to the protection of cross-border environmental-induced displacement and *inter alia* host and home states’ obligations under current international protection instruments. The issue of immediate assistance during the time they are displaced, as well as issues of compensation, redress, and reparation for victims of displacement or the issue of statelessness due to environmental factors, are briefly addressed or, where necessary, referred to, but they do not constitute the heart of this work.

Finally, even if this piece of research constitutes a legal black letter analysis in a hybrid fashion, it may be appropriate to acknowledge another limitation – or advantage – that may derive from the professional background of the author. Having worked in the Brussels milieu for over a decade as an advocate and legal advisor, policy considerations are (perhaps sometimes naively) inferred. While you can take a girl out of politics, you cannot easily take the politics out of the girl! Let us remember, however, that the issue of protection of the human person (fortunately or unfortunately) is anything but an apolitical subject.

¹⁰⁰ See Epiney, A. (2011) “ ‘Environmental Refugees’: Aspects of International State Responsibility” in E. Piguet, A. Pecoud & P. Guchteneire (ed.) “Migration and Climate Change” (Cambridge University Press) pp. 388-427.

¹⁰¹ See Bierman & Boas (2008) *Op. Cit.*

¹⁰² According to this concept in case of serious or apparent human rights violations within a state the international community, the U.N, Security Council and third states should intervene, to protect the people that have been affected by resorting, if necessary, to the use of force.

5. Outline of the Thesis

The thesis is divided into four parts, which address the research study's questions from contextual, conceptual and legal research perspectives. This structure takes a rather legal compartmentalised approach for two reasons. First, for presentation reasons, it departs from the application and interpretative dynamics of the existing international human rights framework and related instruments, coupled with the states' (home and host) obligations in order to narrow the identified "legal protection gap" for cross-border environmental displacement. Second, for comprehension reasons, it enables the reader to depict the evolution of the law of protection of the human person and the transformative capacity of the law in order to (re)conceptualise protection for EDPs.

The present *Chapter 1* provides the reader with an overall background; context for the emergence of this study, including research questions, methods, and methodological canons and scope and inherent limitations. In *Part I* of this study, which includes *Chapter 2* we give a more detailed account of the environmental, legal, and politico-economic factors that influence the discussion on environmental human displacement. We outline environmental displacement scenarios and identify some vulnerable geographical areas where the effects of environmental change are/will be most acute and where movement is/will be particularly felt. First, however, it is necessary to define the concept of environmental change and then explain in more detail the meanings(s) of vulnerability and how this concept - because in human rights law it is intimately related to protection - can be used as a starting point in identifying vulnerable areas in need of legal protection contemplation. The Chapter further explains why the study of protection of environmental displacement needs to be approached from a human rights-based perspective and the entrenched relevance of a holistic approach to protection - in pre-in-post displacement phases. Later, *Chapter 3* proceeds to (de)construct the meaning of EDPs not only by outlining its increased recognition within the wider international protection agenda, but also analysing the concept and its various academic and institutional understandings and ultimately providing the reader with a working, descriptive and flexible definition which is, embedded in this study.

Part II, which plunges into the dogmatic, critical, and strategic legal analysis, starts by discussing to what extent people facing threats from the environment are currently protected under international human rights law and related instruments, and the corresponding home and host states' obligations. It does so by relying on the interpretative dynamics deriving from the analysis of relevant treaties and (quasi) judicial decisions of international and regional human rights bodies. While *Chapter 5* gives the reader an analysis, as a point of comparison, of the status and protection of environmental displacement under CRSR and its Additional Protocol, outlining host states obligations (which are predicted on the lack of national state protection), *Chapter 4*, obliges us to take a necessary step back in order to analyse the protection obligations

of the country of origin or home state. This is because the home state has the primary duty for the protection of persons and their human rights (respect, protect, fulfil) in its territory or subject to its jurisdiction or control, affected during a disaster, or potentially affected before a disaster occurs. This dual-axis approach provides the basis for understanding the holistic approach to protection claimed for environmental displacement (in particular from and after cross-border displacement, which gains an arguable pragmatic ground in Part III).

After a survey of illustrative examples with regards to states' obligations under international human rights law, *Chapter 4* makes a further analogy of the protection obligations of states with regards to environmental displacement. It builds on one of the principal content of states' obligations: the underlying duty to prevent human rights violations by preventing and reducing environmental risk and - by extension - protect people from cross-border displacement. It identifies the minimum scope of protection that should be afforded by states, which is not totally dependable on states' financial resources. The manifestation of a preventative dimension in the role of the law is further sustained by surveying a number of interconnected normative texts and operational frameworks that - explicitly or implicitly - place obligations on states to prevent cross-border environmental displacement and the violation of people's human rights an obligation of increasing customary character. By contrast, and as previously mentioned, *Chapter 5* gives not only an account of host states' obligations under refugee law, but further enlightens the realities and limits of states' obligations under this framework. It highlights the evolution of the law of protection of the human person that stems from regional instruments, which can arguably be interpreted to encompass situations of environmental distress and *inter alia* enhanced protection obligations of the host state. The extension of protection obligations may also derive from other obligations deriving from human rights law that states may have. The principle of *non-refoulement*, as one of the strongest limitations to states' sovereignty, forbids the return of individuals to an area where she or he will face persecution, torture, or serious ill-treatment, and constitutes a fundamental principle in international law. Despite its potential, the principle does not confer a right of residence or any specific legal status in a foreign country, and this gives considerable discretion to states in how they treat foreigners in their countries. Therefore, the scope of additional complementary regimes - like the EU - are considered.

Against this background, *Part III*, which includes *Chapter 6*, attempts to devise pragmatic protection strategies and narrow the legal protection gap for EDPs by testing the EU's regionally orientated protection regime. The objective is to highlight protection – as a way of reflecting human rights obligations of states – by way of a process of consolidation of existing proactive and reactive protection measures. In this context, it first seeks the interpretative added protection value of the Seasonal Workers Directive and Mobility Partnerships to deal with the predicted effects of environmental

change (protection from cross-border displacement); and second seeks the interpretative added protection value of temporary protection and subsidiary protection of the Temporary and Qualification Directive, respectively (protection after cross-border displacement). It offers an analysis of existing pragmatic solutions to (re)conceptualise protection for environmental displacement within the EU and even beyond its borders, and helps the global polity of states to consider protection as a dynamic guiding concept in the wake of new protection challenges. Finally, **Part IV**, which contains *Chapter 7*, wraps up the major conclusions of this research and reflects on the main findings of the foregoing chapters culminating in the assertion towards a new human rights-based protection paradigm for environmental displacement.

Part I - Setting the Scene: The Protection Paradox

Chapter 2. From Environmental Change to Human Displacement

1. Introduction

Human mobility is nothing new. However, human mobility, which is forced and exacerbated by environmental factors, blurs the traditional distinctions between refugees, internally displaced people, and international immigrants. At the same time it opens what scholars have called a “legal protection gap” in the international protection regime, which was not specifically built to cater to the needs of those who will cross a border due to environmental factors.

This chapter aims at setting the scene for this thesis by clarifying the concept of environmental change and the impact of environmental change on human displacement in particular by outlining the regions of the world that are/will be mostly affected and highlight what we call their *vulnerability layers*. Here, we examine not only the environmental displacement estimates and realities, but also the driving forces behind displacement, sketching the different environmental displacement scenarios that are relevant to further conceptualising the notion of EDP, which will be carried out in the next chapter. Importantly, we highlight why environmental displacement needs to be approached from a human rights-based perspective. The focus on the human person protection needs as opposed to the reason, which led them to leave their home, is of paramount importance. Significantly, this focus helps us build a holistic approach to protection to environmental displacement during, from, and after displacement occurs, which is seen as an essential cornerstone in this study.

2. People on the Move

People have been moving for years. One of the largest and most persistent characteristics of humanity is migration. Movement is also critical in our daily lives. Indeed, changes in the environment have been key a catalyst for forced human migration. It has influenced the global spread and impact of *Homo sapiens*.¹

While the decision to migrate may be a result of interconnected factors (e.g., economic, political, and social), the sobering implications of human transformation to one's surroundings or environment are provoking challenges to the long-held assumption about unlimited economic growth, the unavoidability of amplified inequities, and the inviolability of territorial borders. All these factors are intertwined with movement in complex ways. Globalisation and the expansion of global capitalism are prompting many people to leave their homes in search of better lives. Environmental change will further exacerbate such

¹ See Stringer, C. & Mckie, R. (1996) “African Exodus: The Origins of Modern Humanity” (Henry Holt and Company) for more on the so-called “African exodus.”

trends. The transformation of or impact on the earth by humans may have generated what some are calling - “the “Anthropocene” - a stage in human history marked by such profound human impact on Earth’s ecosystems and climate as to be considered a new geological age. Migration [particularly forced human displacement] is one of the foundations of this age.”²

As early as 1990, the Intergovernmental Panel on Climate Change (IPCC)³ observed that the largest single impact of environmental change could be on human “migration and resettlement outside the national boundaries,”⁴ with millions of people being forcibly dislocated by coastal flooding, agricultural disruption and shoreline erosion.⁵

2.1 The ‘Legal Protection Gap’

Over most of the last century, population movements remained compartmentalised as a political phenomenon. *Strictu sensu* international law only offers protection to a few categories of forced displaced refugees, stateless persons, and those in need of complementary protection. However, the extent of human mobility today is blurring traditional distinctions between refugees, internally displaced people, and international immigrants. There is a general legal scholarly argument that international law is currently ill-equipped to provide protection to displaced people stemming from environmental factors. In this context, cross-border movement due to environmental stressors has been identified as a “legal protection gap”⁶ in the international protection regime. Nevertheless, in order to develop more law and more effective law- if necessary- it is essential to focus first, on the question of how much law exists. In other words, what are the rights of the environmentally displaced and the protection obligations of states exploring the reinterpretation or revision of current international protection standards to that effect? In this context, the evolution of the law of protection of the human persons in particular at the regional level may provide solutions for the assistance and protection of people (potentially) displaced by environmental factors beyond their territorial borders. Before embarking on such a challenging journey there is a need to outline the particular context of environmental displacement by clarifying the understanding of environmental change; the human impact and geography of environmental change and the scenarios, the numbers, and the intrinsic value of a human rights approach.

² Ho, C. & Loucky J. (2012) “Humane Migration, Establishing Legitimacy and Rights for Displaced People” (Kumarian Press) p.2.

³ The Intergovernmental Panel on Climate Change (IPCC) is the leading scientific international body for the assessment of climate change under the auspices of the United Nations. It was established in 1988 by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) to provide the world and governments with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts. It reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change *available from: <http://www.ipcc.ch/>* [accessed 20 July 2015].

⁴ Watson, R. *et al.* (eds.) (1997) “IPCC Special Report: The Regional Impacts of Climate Change: An Assessment of Vulnerability: Summary for Policymakers” (IPCC November 1997) part 6.8.

⁵ IPCC (1990) “Climate Change: The IPCC Scientific Assessment Final Report of Working Group I” (Cambridge University Press).

⁶ United Nations High Commissioner for Refugees (2010) “Statement by António Guterres, United Nations High Commissioner for Refugees’ Nansen Conference on Climate Change and displacement in the 21st Century” (Oslo, 06 June 2011) *available from: <http://www.unhcr.org/4def7ffb9.html>* [accessed 12 June 2012].

3. On the Concept of Environmental Change

Undoubtedly the human environment is facing many challenges, mostly as a result of human activity. But what do we mean by environmental change? The term “environment” generally means one’s surroundings, but the concept is relatively new in many languages. While one can trace it back to the 12th century in France from the verb *environner* in other languages new words were formulated during the 1960’s (e.g. *umwelt* in German, *milieu* in Dutch, *meio ambiente* in Portuguese, *medio ambiente* in Spanish, *Al.biah* in Arabic *kankyo* in Japanese).⁷ The term environment is also process-driven it includes water, air, and land and their interrelationships as well as relationships between them and human beings. The later relates to the impact of human activity on the environment in a particular time and space. The United Nations Declaration on the Human Environment, adopted in Stockholm in 1972, states precisely that: “Man is both creature and moulder of his environment, which gives him physical substance and affords him the opportunity for intellectual, moral, social and spiritual growth.”⁸

The processes of environmental change, while giving opportunities to mankind to develop its abilities of what might be regarded as transformation or development, has also increasingly produced negative effects in the form of environmental detriment.⁹ Glantz classifies these problems as “creeping environmental problems,” which include air pollution, acid rain, global warming, ozone depletion, deforestation, droughts, famines, and the accumulation of nuclear and solid waste all are the result of “low-grade, long-term, and cumulative processes.”¹⁰ Such problems are interconnected, cross-disciplinary, and cross-boundary. Indeed, there are many reasons for the deterioration of the environment. Some can be the result of natural causes (storms, tornados, volcanic eruptions, earthquakes), while others are human- induced (environmental pollution, construction of river dams, logging of tropical forests, chemical warfare). However, as observed by former UN Secretary General Kofi Annan, “the term ‘natural disaster’ has become an increasingly anachronistic misnomer. In reality, human behaviour transforms natural disasters into what should really called unnatural disasters.”¹¹

Indeed, there is a fine line between what is natural or human-induced because very often a disaster can be a blend of both factors (e.g., floods or droughts can be attributable to extreme weather, climate events, global warming, or development issues). This dichotomy of natural/human influence on the environmental conditions over time has been clearly

⁷Chandrappa, R. *et al.* (2011) “Coping with Climate Change” (Springer) p.45.

⁸ UN General Assembly (1972) “United Nations Conference on the Human Environment” (Stockholm, 15 December 1972) U.N. Doc. A/RES/2994 (1972) para. 1.

⁹ See Glantz, M. H. (1994b) “Creeping Environmental Problems, Natural Science Essay” *The World and I* pp. 218-225. The author explains that while the destruction of a small part of a mangrove forest in Southeast Asia to create a shrimp pond might be seen as transformation and will not destroy the forest ecosystem the proliferation of ponds and many human interventions can become a problem after a threshold is crossed over a certain period of time which leads to degradation.

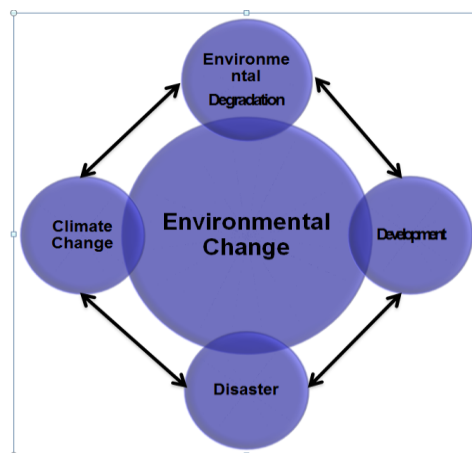
¹⁰ *Ibid.* pp. 218-222.

¹¹ U.N. Secretary General (1999) “Report of the Secretary General to the United Nations General Assembly on the Work of the Organisation U.N. Doc. No. A/54/1 (1999) para.11.

pinpointed by the United Nations Convention on Climate Change (UNFCCC)¹² under Article 2, when it refers to climate change as (emphasis added) “a change of climate which is attributed *directly or indirectly to human activity* that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”

Understanding the environmental change dynamic process is realising that all environmental factors, whether natural and/or man-made (climate change, disasters, development, and environmental degradation), are interconnected and interdependent. This holistic view of environmental change is essential in the context of this work and is exemplified below (Figure1). For purposes of convenience, we will be using the term environmental change and climate change interchangeably. The wording natural and man-made disaster will also be used to the extent that it is enshrined in international instruments even though we recognise it is a misnomer.

Figure 1. Environmental Change Interdependence



(Source : Author's Own)

3.1 Coping with Risk and Uncertainty

It is not easy to identify clear and objective indicators or thresholds to cope with environmental problems because, as previously mentioned, environmental change is a result of low-grade, slow, and cumulative processes.¹³ Furthermore, if one takes the view that modern societies are necessarily “risky societies,” human beings must be able to live within this risky environment. In the debate over the idea of “risky society” Beck highlights that modern societies deal with hazards and insecurities that are introduced by the very conditions

¹² United Nations Convention on Climate Change (UNFCCC) adopted on 09 May 1992, in force since 21 March 1994, 1771 UNTS.

¹³ See Glantz (1994b) *Op. Cit.* p.219. He suggests that one can identify several kinds of thresholds (which cannot be of an objective but of a subjective nature) with regards to “creeping environmental problems”: the first is *problem awareness*, which relates to awareness that an ongoing environmental transformation has become a problem; the second is *crisis awareness* which relates to the realisation that the problem has reached a crisis stage and the third, threshold, *action*, which relates to the concerted effort to cope with the problem.

of modernity in a systematic way.¹⁴ Historical accounts have provided ample evidence of how human beings have always been at risk of environmental changing conditions.¹⁵ However, the author underscores that modern risks are different because they are “manufactured risks,” a product of human agency.¹⁶ Environmental change clearly illustrates this idea of modernisation of risk (Figure 2).

Figure 2. Environmental Change and Modernisation of Risk



(Source: Author's Own)

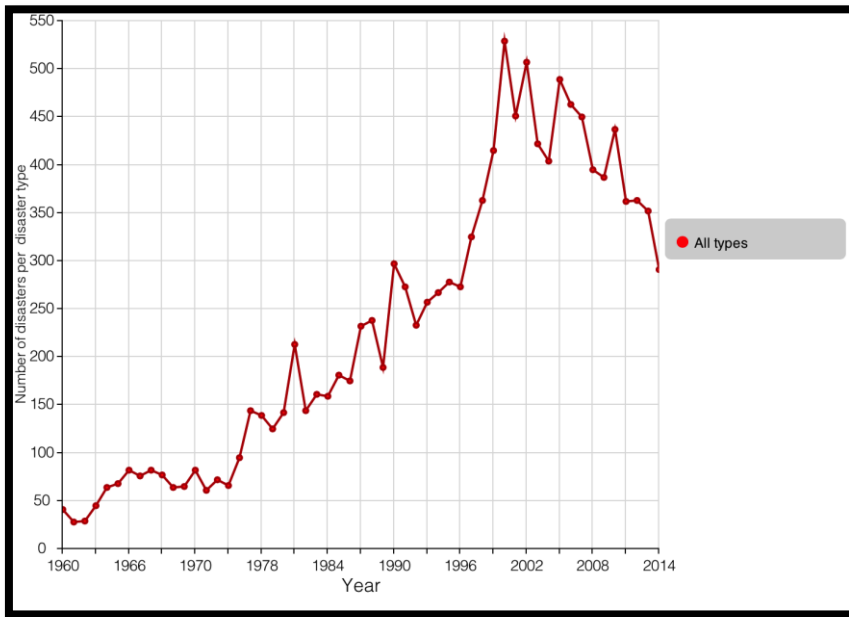
Studies show that the number of disasters reported around the globe has been gradually increasing (Figure 3) while the number of people killed by these events has decreased since the mid 1970's (Figure 4). Of relevance, is that the number of people affected (i.e., those in need of assistance comprising those people who are displaced or need evacuation) by environmental stresses has been on the rise.

¹⁴ See Beck, U. (1992) “Risk Society” (Sage) p. 21.

¹⁵ See Khondker, H. (2010) “Globalisation, Disasters and Disaster Purpose” in Turner B. (ed.), *The Routledge International Handbook of Globalisation Studies* (Routledge) p. 231. Social scientists and philosophers have long questioned the discussion of the “nature-centric approach” of disasters. The Lisbon earthquake of 1755 (90,00 fatalities) became the subject of the enlightenment philosophical discussions who considered the meaning of the earthquake within the context of human reason, divine intention, and human evil. Similar discussions also took place after the earthquake in Japan in 1923 (claiming 143, 00 lives); Turkey in 1999 (over 1,700 deaths); Pakistan in 2005 (death toll of 86, 00).

¹⁶ See Beck, (1992) *Op. Cit.* p. 21; Giddens, A. (1999) “Risk and Responsibility” 62 *Modern Law Review* 1 pp.1-10.

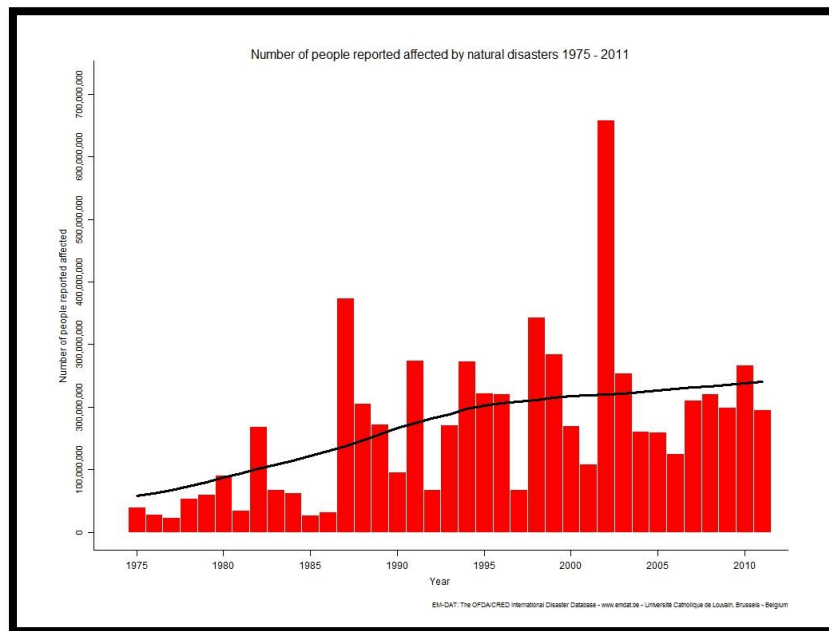
Figure 3. Number of Natural Disasters Reported Worldwide (1960-2014)



(All types of disasters: earthquakes, flood storms, droughts, epidemics and other types)

Source: Emergency Events Database (EM-DAT), Office of U.S. Foreign Disaster Assistance (OFDA)/ World Health Organisation Collaborating Centre for Research on the Epidemiology of Disasters (CRED), International Disaster Database. www.emdat.be/natural-disasters-trends

Figure 4. Number of People Affected by Natural Disasters Worldwide (1975-2011)



(All types of disasters: earthquakes, flood storms, droughts, epidemics and other types)

Source: Emergency Events Database (EM-DAT), Office of U.S. Foreign Disaster Assistance (OFDA)/ World Health Organisation Collaborating Centre for Research on the Epidemiology of Disasters (CRED), International Disaster Database. www.emdat.be/natural-disasters-trends

Climate change is expected to increase, and the amount and intensity of disasters (in particular floods, storms, and heat waves) will exacerbate these trends. In the Fourth Assessment Report the IPCC tabled scientific evidence of the clear relationship between

human activity and temperature rise,¹⁷ and noted that global warming is *unequivocal* and is *very likely* due to *man-made* (anthropogenic) greenhouse gas emissions.¹⁸ The expression *very likely* means that global warming is caused (between 90 to 99%) by human activity. The IPCC experts in the first tranche of the Fifth Assessment Report recently reconfirmed this.¹⁹ Because there will always be some degree of scientific uncertainty surrounding many environmental issues²⁰ one has to operate, even in the context of this work, against the “backdrop of uncertainty” - coping with risk and how to manage it. “A probability risk management framework is the most appropriate one for analysing, the link between climate change and extreme weather events, since it enables policymakers to better understand how risk is changing so that prevention and adaptation strategies can be prioritised.”²¹

4. The Human Impact of Environmental Change

4.1 The Geography of Environmental Change

The implications of environmental change are affecting all of us, whether we are conscious of that or not. However, environmental change impacts are not uniform and will never be uniform all over the world. Environmental change is unevenly distributed. While the developed world is in a better position to cope with environmental changing conditions, least developed countries (LDCs)²² are on the whole at risk and the most likely to be affected. Today, LDCs are and probably will continue in the future to engage in activities, that are highly prone to environmental variations (agriculture and fishing). LDCs also suffer from economic dependency, high poverty rates, low education levels, and meagre financial resources and lack the corresponding institutional, human and technical resources. Therefore, the challenges of environmental adaptation are higher for LDCs than for developed countries with adequate human capital and financial resources.

¹⁷ See generally, IPCC (2007) “Summary for Policymakers” in M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds.) “Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,” (Cambridge University Press) 7-22.

¹⁸ See IPCC (2007) “Climate Change. Synthesis Report” *Op. Cit.* p.72 notes (emphasis added): “Warming of the climate system is *unequivocal*, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level (...) Most of the global average warming over the past 50 years is *very likely* due to *anthropogenic GHG increases* and it is *likely* that there is a discernible human-induced warming averaged over each continent” *available from:* http://www.ipcc.ch/publications_and_data/ar4/syr/en/mains6-1.html [accessed 12 June 2012] and http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf [12 June 2012].

¹⁹ See IPCC (2013) “Fifth Assessment Report Climate Change 2013: The Physical Science Basis” Working Group I Contribution to the IPCC. Summary for Policymakers *available from:* http://www.climatechange2013.org/images/uploads/WGIAR5-SPM_Approved27Sep2013.pdf [accessed 20 September 2014].

²⁰ See Glantz (1994b) *Op. Cit.* p.223.

²¹ See McAdam, J. (2012) “Climate Change, Forced Migration, and International Law” (Oxford University Press, 2012) p. 24.

²² See LDCs are a group of 48 countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People’s Democratic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Niger, Republic Nepal, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen, Zambia. This list is *available from:* http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf [accessed 21 April 2014].

There are some geographical areas where the effects of environmental change are most acute and it is here that the movement of people is/will be particularly felt: the Arctic, as predictions of global warming are high on ecosystems and human communities; Africa, because of their low level of adaptation capacity and high risk of predicted environmental impacts and small islands,²³ because of their high exposure of population and infrastructure stemming from environmental factors particularly, in the Asian and African mega deltas, where populations are mostly at risk from sea level rise, flooding and storms.²⁴

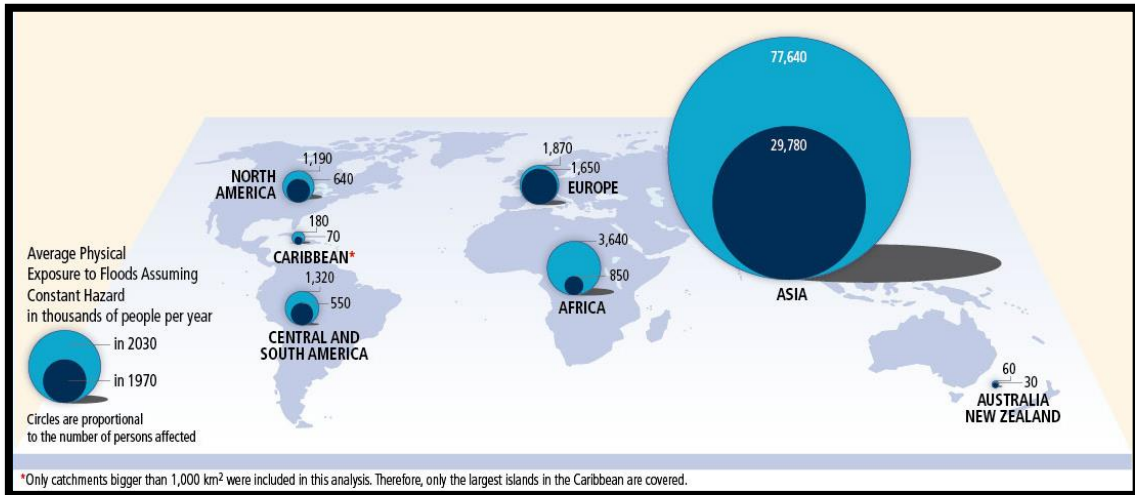
Looking at the affected or most vulnerable areas can be useful, as it can provide us a reference point as to the number of people who currently are affected or are likely to face displacement²⁵ stemming from environmental factors. These “environmental hotspots” show how many people will be affected by disaster-prone areas, given population growth trends. For example, the following maps (Figures 5 and 6) below points out the number of people that will be affected in flood and cyclone-prone areas. The dark blue and dark yellow circles represent respectively the population affected 43 years ago and the light blue and light yellow circles represent the population that will be affected in 17 years.

²³ The location of Small Island Developing States (SIDS) are namely, the Caribbean, the Pacific and the Atlantic, Indian Ocean, Mediterranean and South China *available from*: <http://unohrlls.org/about-sids/> [accessed 21 April 2014].

²⁴ See IPCC (2007) *Op. Cit.* Synthesis Report *available from*: http://www.ipcc.ch/publications_and_data/ar4/syr/en/mains6-2.html [accessed 12 June 2012] emphasizing what systems and regions that are most at risk from the impacts of climate change; See U.N. Human Rights Council (UNHRC) (2008) “Resolution 7/23 Human rights and climate change” 28 March 2008, Preamble *available from*: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf [accessed 12 June 2012]; Robinson, M. (2006) “Barbara Ward Lecture” Chatham House (London, 11 December 2006): “All human beings are born free and equal in dignity and rights. However [...] it is poor communities who are suffering most from the effects of climate change, and it is rich countries that are contributing to the problem [...] *available from*: <http://pubs.iied.org/pdfs/G00101.pdf> [accessed 07 July 2015]; McInerney-Lankford, S., Darrow, M. & Rajamani, L. (2011) “Human Rights and Climate Change: A Review of the International Legal Dimensions” (World Bank) p. 11.

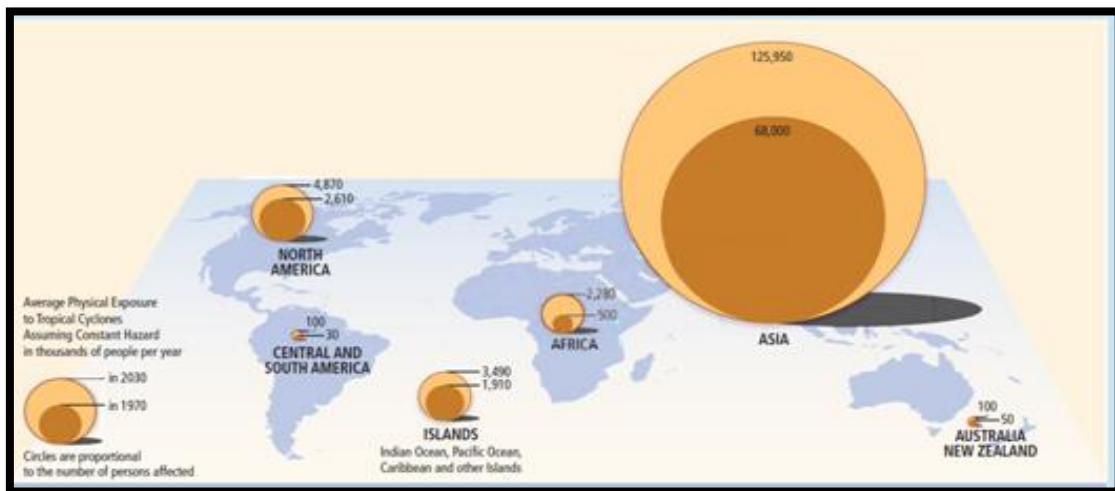
²⁵ The term *displacement* in this context encompasses people that move involuntary and not from their own free will.

Figure 5. Average physical exposure to floods assuming constant hazard (in thousands of people per year)



Source: Peduzzi, P., B. Chatenoux, H. Dao, C. Herold, and G. Giuliani (2011) "Preview Global Risk Data Platform" (UNEP/GRID & UNISDR) preview.grid.unep.ch/index.php?preview=tools&cat=1&lang=eng

Figure 6. Average physical exposure to tropical cyclones assuming constant hazard (in thousands of people per year)



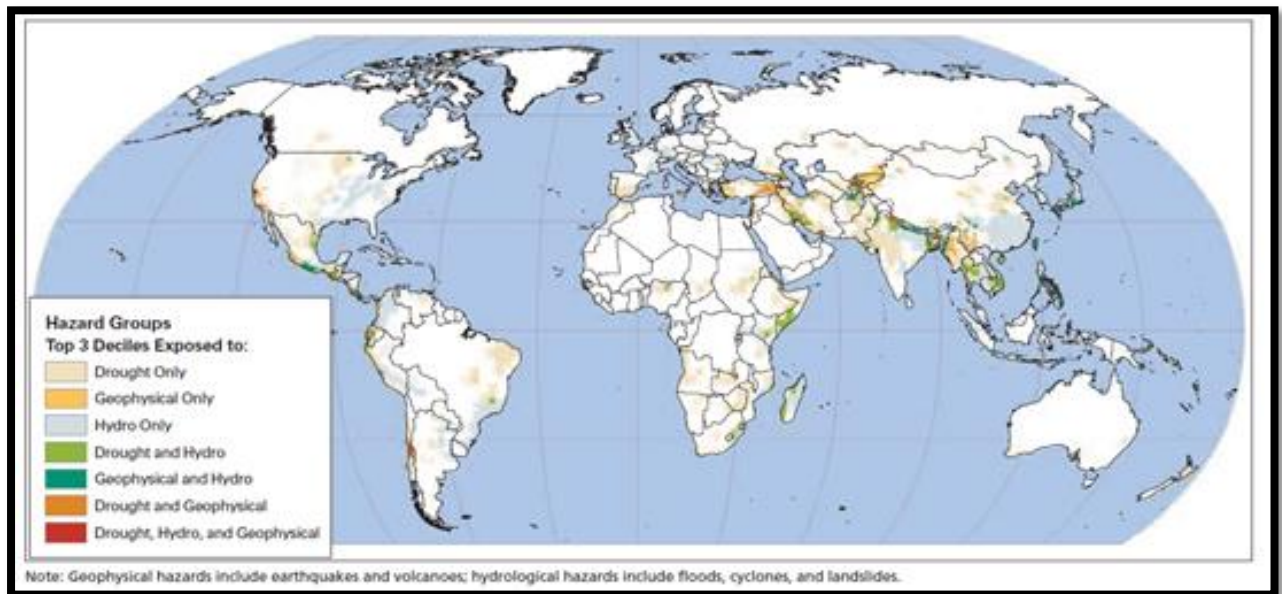
Source: Peduzzi, P., B. Chatenoux, H. Dao, C. Herold, and G. Giuliani (2011) "Preview Global Risk Data Platform" (UNEP/GRID and UNISDR) preview.grid.unep.ch/index.php?preview=tools&cat=1&lang=eng

A global risk analysis report carried out by the World Bank on disasters shows that about 25 million square kilometres and 3.4 billion people (more than half of the world's population density) are exposed to at least one hazard while circa 105 million people are relatively highly exposed to three or more hazards (Figure 7).²⁶ Hydrological hazards (floods, cyclones and landslides) are of particular concern in eastern coastal areas of all major continents as

²⁶ Dilley, M. *et al.* (2005) "Natural Disaster Hotspots, A Global Risk Analysis" 5 Disasters Management Series (World Bank) p. 3.

well as inland areas of the Americas, Europe and Asia. Drought is widespread as well, but mostly concentrated in semi-arid tropics.

Figure 7. Global distribution of areas highly exposed to one or more hazard, by hazard type



Source: Dilley, M. et al. (2005) Natural Disasters Hotspots, A Global Risk Analysis 5 Disasters Management Series (World Bank) p. 3.

However, densely populated and developed areas of South and East Asia, Central America and western South America are exposed to both geophysical (earthquakes and volcanoes) and hydrological hazards.²⁷ The table below (Table 1) shows the countries where large percentages of the population live in hazard-prone regions.

²⁷ *Ibid* at p. 2.

Table 1. Countries Most Exposed to Multiple Hazards

a) Three or more hazards (top 15 based on land area)							
Country	Percent of Total Area Exposed	Percent of Population Exposed	Max. Number of Hazards	Country	Percent of Total Area Exposed	Percent of Population Exposed	Max. Number of Hazards
Taiwan, China	73.1	73.1	4	Vietnam	8.2	5.1	3
Costa Rica	36.8	41.1	4	Solomon Islands	7.0	4.9	3
Vanuatu	28.8	20.5	3	Nepal	5.3	2.6	3
Philippines	22.3	36.4	5	El Salvador	5.1	5.2	3
Guatemala	21.3	40.8	5	Tajikistan	5.0	1.0	3
Ecuador	13.9	23.9	5	Panama	4.4	2.9	3
Chile	12.9	54.0	4	Nicaragua	3.0	22.2	3
Japan	10.5	15.3	4				

b) Two or more hazards (top 60 based on land area)							
Country	Percent of Total Area Exposed	Percent of Population Exposed	Max. Number of Hazards	Country	Percent of Total Area Exposed	Percent of Population Exposed	Max. Number of Hazards
St. Kitts and Nevis	100.0	100.0	2	Mexico	16.5	9.6	4
Macao, China	100.0	100.0	2	Korea, Dem. People's Rep. of	16.4	13.5	3
Antigua and Barbuda	100.0	100.0	2	Lao People's Dem. Rep. of	15.2	12.6	3
Hong Kong, China	100.0	100.0	2	Turkey	15.1	11.3	3
Taiwan, China	99.1	98.9	4	Panama	15.0	12.6	3
Vanuatu	80.8	75.6	3	Swaziland	14.3	14.2	2
Costa Rica	80.4	69.2	4	Nicaragua	12.4	49.8	3
Philippines	62.2	73.8	5	Afghanistan	11.1	29.5	3
Nepal	60.5	51.6	3	Myanmar	10.7	10.4	4
Guatemala	56.6	83.4	5	India	10.5	10.9	4
Korea, Rep. of	53.0	53.6	2	Lesotho	10.3	3.7	2
Ecuador	47.6	74.6	5	Iceland	9.4	4.8	2
Reunion	45.7	45.7	2	Colombia	8.9	7.5	3
Vietnam	45.1	38.7	3	China	8.4	15.7	3
Somalia	43.1	53.8	2	Kyrgyz Rep.	8.3	5.8	2
South Africa	43.1	46.9	2	Dominica	8.1	6.2	2
Japan	38.1	48.4	4	Peru	7.4	26.3	3
Cayman Islands	36.8	45.6	2	Iraq	7.3	9.6	3
Bangladesh	35.6	32.9	4	Cuba	6.6	4.3	2
El Salvador	32.4	39.7	3	Papua New Guinea	5.9	6.4	3
Cambodia	27.9	4.4	3	Jamaica	5.7	7.2	2
Chile	26.2	62.6	4	Pakistan	5.6	18.2	2
Thailand	25.2	17.7	2	Indonesia	4.5	14.1	3
Fiji	23.2	29.0	2	New Zealand	4.3	1.7	3
Tajikistan	23.2	9.5	3	United Arab Emirates	4.1	6.8	2
Solomon Islands	22.8	16.6	3	Armenia	3.1	1.5	3
Madagascar	20.2	9.9	2	Mongolia	2.8	0.7	2
Eritrea	20.1	29.2	4	Nigeria	2.7	6.7	2
Georgia	17.4	5.9	3	United States	2.6	11.2	4
Iran, Islamic Rep. of	17.1	22.2	4				
Kenya	16.9	8.8	2				

Source: Dilley, M. et al. (2005) "Natural Disasters Hotspots, A Global Risk Analysis" 5 Disasters Management Series (World Bank) p. 4.

4.2 The Vulnerability Token

One can generally affirm that environmental change makes some areas of the globe geographically vulnerable.²⁸ Attempts to define vulnerability abound and there is no one

²⁸ See U.N. International Strategy for Disaster Risk Reduction (2004) "Living with Risk: A Global Review of Disaster Risk Reduction Initiatives" p. 36. Human vulnerability is now widely recognised as a major element of what turns a natural hazard (e.g. rainstorm) into a disaster with enormous consequences (such as a flood-related displacement situation). The UN's International Strategy for Disaster Risk Reduction expresses the concept of human vulnerability as a formula "Risk = Hazard x Vulnerability" noting that "[t]he negative impact – the disaster- will depend on the characteristics, probability and intensity of the hazard, as well as the susceptibility of the exposed elements based on physical, social, economic and environmental conditions."

definition of the term. Within legal scholarship, the concept has been defined as confusing,²⁹ complex,³⁰ vague,³¹ and ambiguous.³² The relationship between vulnerability and human rights is a contested terrain.³³ However, the concept of vulnerability is important in the context of environmental change and human displacement. The concept of vulnerability can have a reflective use, as a “starting point” in framing vulnerable areas where individuals are in need of legal protection.

4.2.1 Meaning(s) of Vulnerability

There is a central paradox attached to the concept of vulnerability because it relates both to the universal and the particular.³⁴ These features arise as a result of our embodiment.³⁵ In other words, as human beings, we are all vulnerable, but we experience this vulnerability in a unique, corporal way. The term’s etymology derives from the Latin *vulnus*, which means “wound.”³⁶ Unsurprisingly, harm and suffering are central features in most interpretations of vulnerability.³⁷ Neal gracefully summarizes the literature:

“[V]ulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) (...) Second, I am vulnerable because I am penetrable; I am permanently opens and exposed to hurts and harms of various kinds.”³⁸

Essentially, vulnerability is a “relational” concept because people are manifestly dependent on the cooperation of others. This relational approach places “attention to the individual subject by placing him/her in social context.”³⁹ This contextual approach to vulnerability is important in our analysis both from an environmental change and human rights perspective.

²⁹ Solbakk J. H. (2011) “Vulnerability: A Futile or Useful Principle in Healthcare Ethics?” In R. Chadwick, H. ten Have & E. M Meslin (eds.) (The SAGE Handbook in Healthcare Ethics) p. 228 pp. 228-239,

³⁰ *Ibid.*

³¹ Ruof, M. C. (2004) “Vulnerability, Vulnerable Populations, and Policy” 14 Kennedy Institute of Ethics Journal p. 411 pp. 411-425.

³² Fineman, M. (2008) “The Vulnerable Subject: Anchoring Equality in the Human Condition” 20 Yale Journal of Law and Feminism pp.1-23.

³³ The scholarly debate has progressively increased see for e.g. Bergoffen, D. (2011) “Contesting the Politics of Genocidal Rape: Affirming the Dignity of the Vulnerable Body” (Routledge); Chapman, A. R. & Carbonetti, B. (2011) “Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the U.N. Committee on Economic, Social and Cultural Rights” 33 Human Rights Quarterly pp. 682-732; Gear, A. (2010) “Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity” (Palgrave Macmillan); Turner, B. S. (2006) “Vulnerability and Human Rights” (Essays on Human Rights).

³⁴ Peroni, L. & Timmer A. (2013) “Vulnerable groups: The Promise of an Emerging Concept in European Human Rights Convention Law” 11 International Journal of Constitutional Law 4 p. 1058 pp. 1056-1085.

³⁵ Fineman (2008) *Op. Cit.* p.9

³⁶ Turner (2006) *Op. Cit.*

³⁷ Fineman, M. (2012) “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility” 20 The Elder Law Journal 1 pp. 71-112, p. 101. Recently however we can see a move towards a more positive understanding of vulnerability. Fineman describes the capacity of vulnerability as “it presents opportunities for innovation and growth, creativity, and fulfillment. It makes us reach out to others, form relationships, and build institutions.”

³⁸ Neal, M. (2012) “ ‘Not Gods but Animals:’ Human Dignity and Vulnerable Subjecthood” 33 Liverpool Law Review pp. 177-200 pp. 186-187.

³⁹ Fineman (2008) *Op. Cit.* p. 13.

4.2.2 Vulnerability and Environmental Change

A primary meaning of vulnerability can often imply that human society is in a particularly endangered situation, is susceptible to being harmed or is unable to cope with adverse factors of environmental change. In a secondary meaning, the concept relates to the sensitivity and the adaptive capacity of a system or society to adapt to environmental changing conditions. Both meanings do not exclude one another but are interactive and complementary.

O'Brien *et al.* have attempted to conceptualise the meaning of vulnerability to environmental changing conditions.⁴⁰ One of the key outcomes from their studies has found that vulnerability is asymmetrically distributed across and within countries, and some individuals or groups (children, older people, disabled people and women, among others) are likely to be disproportionately affected by environmental change. In addition, they have found that vulnerability is also influenced by a complex intermix of social, economic, political, and environmental factors that operate at different levels and, combined, influence vulnerability.

The 2011 IPCC Third Assessment Report defines vulnerability as

“the degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude and rate of climate change, and the degree to which a system is exposed, along with its sensitivity and adaptive capacity.”⁴¹

Vulnerability can generally be conceptualised as a juggling result of levels of exposure, sensitivity, and the adaptive capacity of a system/society to environmental change. Adger reviews the development of diverse conventional approaches of vulnerability to environmental change and frames these elements as “the state of susceptibility of harm from exposure to stresses associated with environmental and social change and from the absence of capacity to adapt.”⁴² In other words vulnerability is a result of - *exposure* – the extent to which a system/society experiences environmental or socio-political stress (their intensity, duration, rate of recurrence and geographical scope of the hazard), – *sensitivity* - degree to which it is modified or affected by those impacts and - *adaptive capacity*⁴³ - its coping

⁴⁰ See O'Brien, K. *et al.* (2008) “Disaster Risk Reduction, Climate Change Adaptation and Human Security. A Commissioned Report for the Norwegian Ministry of Foreign Affairs”(University of Oslo).

⁴¹ IPCC (2001) Third Assessment Report “Climate Change 2001: Impacts, Adaptation and Vulnerability” available from: http://www.grida.no/publications/other/ipcc_tar/ [accessed 20 June 2012].

⁴² Adger, W. N. (2006) “Vulnerability” 16 *Global Environmental Change* p.268 pp. 268-81.

⁴³ IPCC (2007) Fourth Assessment Report “Climate Change 2007: Working Group II: Impacts, Adaptation and Vulnerability” available from: https://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html [accessed 20 June 2012]. The IPCC defines adaptive capacity as “the ability of a system to adjust to climate change (including climate variability and extremes), to moderate potential damages, to take advantages of opportunities or to cope with the consequences.”; Adger (2006) *Op. Cit.* defines adaptive capacity as “the ability of a system to evolve in order to accommodate environmental hazards or policy change and to expand the range of variability with which it can cope.”

capacity or capacity to respond⁴⁴ to environmental change (accommodation of human and physical infrastructures and policy change).⁴⁵

The adaptive capacity is not only dependent on development levels, but also on other important determinants, such as social cohesion and governance.⁴⁶ For example, “[i]n some situations, the ability to migrate will be part of the adaptive capacity, and migration itself will be an adaptation strategy. In other cases, arguably more frequent, migration will be the result of an adaptive capacity unable to cope with climate impacts in situ.”⁴⁷ This is why it is important to refer to vulnerability from a relational or contextual perspective. Contextual vulnerability means looking holistically at all the vulnerability elements in a context-specific matter; i.e., that variations exist across (those geographical areas most at risk to the impacts of environmental change), between (LDCs, SIDS, and African states) and within (particularly vulnerable communities and groups, including women, children, and older people that need special attention) regions and countries, from community to community and over time. While there will certainly be broad social, economic, political, and environmental conditions that will impact systems or societies (exposure, sensitivity, and adaptive capacity), these elements are/will be exhibited at individual and community level in different ways.⁴⁸

Vulnerability is not easily measured, and it is not our intention to do it here, as it something beyond the scope of this work. But generally, “[a] vulnerability assessment identifies who and what is exposed and sensitive to change. A vulnerability assessment starts by considering the factors that make people susceptible to harm, i.e. access to natural and financial resources; ability to self-protect; support networks and so on.”⁴⁹ Reducing vulnerability to a quantifiable metric does diminish its impact and hides its complexity. The map below (Figure 8), from the World Bank, indicates the “hotspot countries”; i.e., it lists borrowing countries that have significant levels of vulnerability to two or more natural hazards. Vulnerability here is expressed as “high” (when 50% GDP or more is at risk) or “medium” (30% to 50% GDP at risk). Because the map uses metrics it tells us little about contextual vulnerability. When we look at these metrics, one needs to apply a contextual vulnerability lens. In other words, within the context of environmental change, some of the vulnerability determinants are known, but some will not be completely known *a priori*. Vulnerability applied to environmental change needs to deal with this dichotomy of known and unknown

⁴⁴ Capacity to respond means the institutional framework and measures such as urban and environmental planning; human capacity and the expertise of local authorities. Other measures can include socio-political ones such as public awareness, information and participation and education.

⁴⁵ Smit B. & Wandel J. (2006) “Adaptation, Adaptive Capacity and Vulnerability” 16 Global Environmental Change p. 286 pp.282-292. These authors do not distinguish between exposure and sensitivity. They argue that “exposure and sensitivity are almost inseparable properties of a system (or community) and are dependent on the interaction between the characteristics of the system and on the attributes of the climate stimulus.”

⁴⁶ See generally, Tubiana, L. Gemenne, F. & Magnan, A. (2010) “Anticiper Pour s’Adapter. Le Nouvel Enjeu du Changement Climatique” (Pearson).

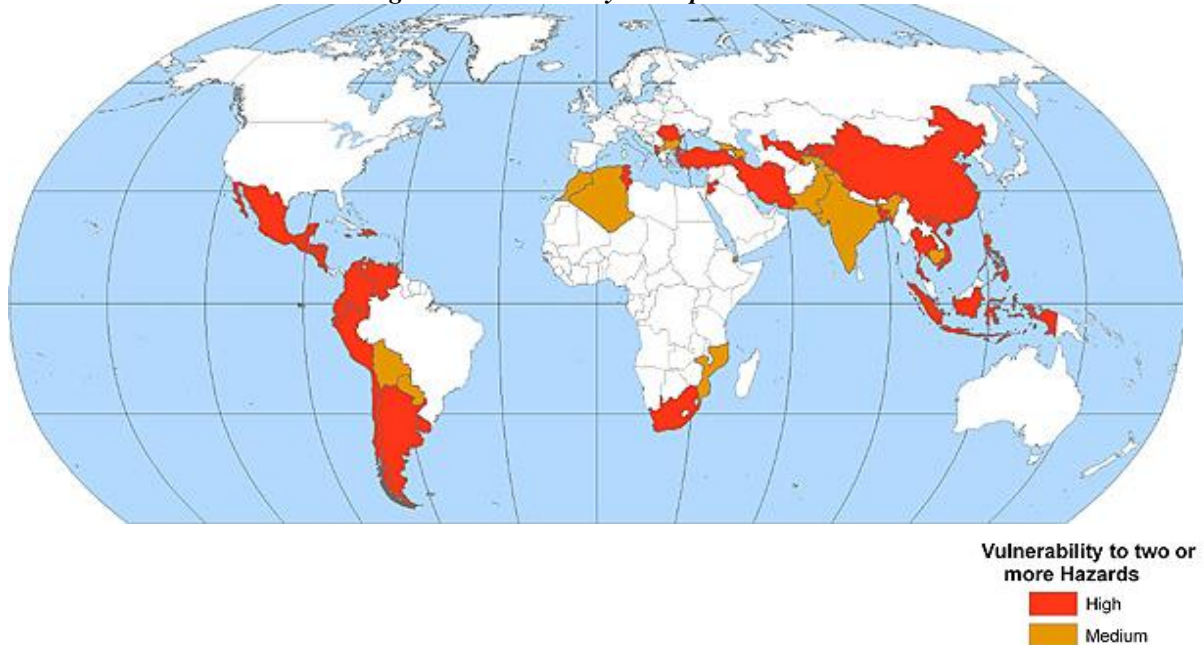
⁴⁷ Asian Development Bank (2012) “Addressing Climate Change and Migration in Asia and the Pacific.” (Asian Development Bank) p. 12.

⁴⁸ Smit B. & Wandel J. (2006) *Op. Cit.*

⁴⁹ Tompkins, E. *et al.* (2005) “Surviving Climate Change in Small Islands – A Guidebook” (Tyndall Centre for Climate Change Research) p. 101.

determinants. This view allows us to frame vulnerable areas where people are/can be potentially displaced by environmental stressors that need legal protection contemplation.

Figure 8. Vulnerability “Hotspot Countries”



Note: "Hotspot Countries" lists borrowing countries that have significant levels of vulnerability to two or more natural hazards. Vulnerability is expressed as "high" (when 50% GDP or more is at risk), or "medium" (30% to 50% GDP at risk). Source: Dilley, M. et al. (2005) "Natural Disasters Hotspots, A Global Risk Analysis" 5 Disasters Management Series (World Bank) and <http://worldbank.org/ieg/naturaldisasters/maps/>

4.2.3 Vulnerability and Human Rights

Within the legal sphere in particular within human rights law, scholars have challenged the concept of vulnerability.⁵⁰ Peroni and Timmer have noted the tension that exists between group-based and universality-based deployment of vulnerability. This seems due to the puzzling nature of the concept. The authors acknowledge that while the courts⁵¹ have generally used the term to analyse specific populations (capturing the particular), other scholars have proposed to use vulnerability as a “universal, inevitable, enduring aspect of the human condition”⁵² (capturing the universal) and suggest that the adequate role of the state is to be actively responsive to this. In reality, they say:

“there is no inherent impediment reconciling these two approaches on a conceptual level – on the contrary that would fit the concept’s paradoxal nature as well. When we asked a Strasbourg judge about the Court’s reasoning,

⁵⁰ Despite the human rights commitment to protecting fundamental rights of vulnerable and disadvantaged individuals or groups, human rights lacks a central theory of framework for doing so. There are no general criteria established for identifying vulnerable or disadvantaged populations, nor there is an agreed definition of vulnerability or a standard list of such groups.

⁵¹ Peroni & Timmer (2013) *Op. Cit.* The authors focus their analysis on the case law of the European Court of Human Rights.

⁵² Fineman (2008) *Op. Cit.* p. 8.

he replied: “All applicants are vulnerable, but some are more vulnerable than others.” The judge neatly merged the universal approach with the group-based approach.”⁵³

Vulnerability in human rights law is intimately related to protection.⁵⁴ Ever since the *Chapman v United Kingdom*,⁵⁵ judgement the Strasbourg court, for example, has broadened and refined the content and scope of group vulnerability. This is of particular importance for those forcibly displaced by environmental factors. Based on a close reading of the case law on the concept of group vulnerability, as used by the ECtHR, Peroni and Timmer located three main characteristics: *relational*; *particular*; and *harm-based*.

First, group vulnerability is *relational*. In other words, the court tends to locate vulnerability not in the individual alone but rather in the “wider social circumstances.”⁵⁶ Vulnerability is context-specific and shaped by certain social, historical, and institutional forces, including political and environmental forces. The IPCC has been conclusive in establishing which areas of the world will be mostly affected by the impacts of environmental change. The UN General Assembly has too emphasised “the need for the international community to maintain its focus beyond emergency relief and to support medium- and long-term rehabilitation, reconstruction and risk reduction, and stresses the importance of implementing and adapting long-term programmes related to the eradication of poverty, sustainable development and

⁵³ Peroni & Timmer (2013) *Op. Cit.* p.1060.

⁵⁴ Within the human rights framework the commitment to protection of fundamental rights of the most vulnerable and disadvantage populations has been translated in various forms in the United Nations system. For example, the establishment of specialised human rights instruments the Convention on the Rights of Persons with Disabilities (CRPD), adopted on 13 December 2006, in force since 3 May 2008, 2515 UNTA 3; Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted on 21 December 1965, in force since 4 January 1969, 660 UNTS 195; Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), adopted on 18 December 1979, in force since 3 September 1981, 1249 UNTS 14; Convention on the Rights of the Child (CRC), adopted on 20 November 1989, in force since 2 September 1990, 1577 UNTS 3; Convention on the Protection of All Migrant Workers and Members of Their Families (Migrant Workers Convention), adopted on 18 December 1990, in force since 1 July 2003, 2220 UNTS 3 or mechanism that include the appointment of special rapporteurs and independent experts on topics such as child prostitution, child pornography, violence against women, torture and other inhuman, and degrading punishment, contemporary forms of slavery, trafficking in persons, human rights of migrants, human rights and extreme poverty, among others.

⁵⁵ ECtHR, *Chapman v United Kingdom*, Application No. 27238/95 (18 January 2001) Mrs. Chapman, a Gypsy, alleged a violation of her right to private life as she was refused planning permission to station caravans on her land, and in respect of enforcement measures implemented as a consequence of the occupation of her land. The ECtHR asserted that there was no violation of Article 8. Interference was pursued through the legitimate aim of protecting the “rights of others” through preservation of the environment. The importance of the court’s reasoning in this case is that extended the concept of vulnerable group: “The Court considers that the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle.” (para.73) “The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraphs 55-59 above, in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.” (para.93).

“Although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented.” (para.96)

“As intimated in Buckley, the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle“ (para.96).

⁵⁶ This will also be discussed in Chapter 7.

disaster risk reduction management *in the most vulnerable regions, particularly in developing countries prone to natural disasters.*” People living in these areas are particularly vulnerable to environmental stresses and are more and more recognisable in society as in need of protection. The inherent common immutable characteristic is one that unites them in a particular territory, and in a particular society making them predominantly vulnerable to external environmental impacts. It is not a single event that affects more strongly a certain part of society that creates a need of protection, but the shared past, current, and even predictions of ongoing characterised environmental experiences that unite them and makes them vulnerable.

Secondly, both authors acknowledge that that vulnerability may be *particular*. This understanding does not contradict the above-mentioned universal account of vulnerability. It is claimed that there are particular groups who because they are marginalized by society such as women, children, older and disabled people, and indigenous populations including “the poor,” will suffer the most from the impacts of environmental change. “In fact, the court tends to talk of “particular social groups” rather than just “vulnerable groups.” The inclusion of the word “particularly” underlines the idea that people belonging to these groups are simply more vulnerable than others.”⁵⁷ The World Disasters Report 2007, which focused on discrimination in emergency disaster situations, makes it clear that there are groups (minorities such as Roma, older and disabled people, and women) mostly at risk because not only of already-embedded discrimination by society but also by governments, as well as aid agencies, even if this can be unintentional.⁵⁸ Recent figures from the Pakistan flooding in 2010 also note that more than seven million people were affected, especially in the rural population. Approximately 350,000 homes were destroyed and 1.5 million people were made homeless triggering mass displacement. The province of Sindh was the hardest hit; 49 % of displaced persons were women. Reports state that women in remote areas experienced many challenges, including a lack of access to food, health services, and clean water.⁵⁹

Finally, as previously highlighted, vulnerability has centred its gravity on *harm*. This has been confirmed by the court’s formulation of vulnerability in particular, vulnerable group.⁶⁰ Most recently, the understanding of the nature of harm has been linked to social disadvantage and material deprivation in the context of Articles 3 and 8 of the ECHR.⁶¹ Foster has argued that being poor makes one vulnerable to persecutory types of harm.⁶² Being poor can be an immutable state if governments do not take action or if they deliberately bar individuals from rising above their poverty. States must enable change and offer alternatives and these must be

⁵⁷ Peroni & Timmer (2013) *Op. Cit.* p. 1064.

⁵⁸ International Federation of the Red Cross and Red Crescent Societies (2007) “World Disasters Report: Focus on Discrimination” (International Federation of Red Cross and Red Crescent Societies) p. 12; *See also* International Federation of the Red Cross and Red Crescent Societies (2012) “World Disasters Report: focus on Forced Migration and Displacement” (International Federation of Red Cross and Red Crescent Societies).

⁵⁹ Internal Displacement Monitoring Centre (IDMC) (2011) “Briefing paper on flood-displaced women in Sindh Province, Pakistan” Norwegian Refugee Council p.6.

⁶⁰ Peroni & Timmer (2013) *Op. Cit.* pp. 1064-1065.

⁶¹ *See later* Chapter 7.

⁶² Foster, M. (2007) “International Refugee Law and Socio-Economic Rights Refuge from Deprivation” (Cambridge Studies in International and Comparative Law) pp.308-310.

available not only at a theoretical level. The Committee on Economic Social and Cultural Rights (CESCR) has noted that women and girls bear unequally the burden of poverty and children raised in poverty are frequently permanently deprived.⁶³ A number of jurisdictions have also acknowledged that the poor may constitute a particular vulnerable group⁶⁴ even though, one could argue that being poor is neither innate nor unchangeable.

Environmental disasters and climate change does however, not only create new situations of poverty but exacerbate the endemic structural poverty problem in developing countries.⁶⁵ The combination of different factors, such as age or gender, together with being poor and the human exposures adjacent to environmental change, can put an individual in a particularly vulnerable situation at a “disproportionate risk of harm.” Thus, vulnerability is a particular dynamic concept that encompasses this inherent “universal, inevitable, enduring aspect of the human condition”⁶⁶ but also transcends it.

4.2.4 Vulnerability Layers

In the context of this work, it is not our intention to use vulnerability as a victimising or stigmatizing (negative) or even paternalistic (imposing protection and denying agency) label. Our approach is rather to take into account these different “vulnerability layers.”⁶⁷ The focus is on the various circumstances that render those displaced by environmental factors vulnerable. In other words, the usage of vulnerability as a reflective concept enables us to expose those vulnerable areas affected by environmental change, where people’s human rights are at risk and therefore, in need of legal protection contemplation. Whereas all of us are generally vulnerable to the effects of environmental change (first vulnerability layer), there are *localized vulnerabilities* of collective entities that are obvious (second vulnerability layer). Moreover, that vulnerability may also be a result of the characteristics of a person, age, sex or group (third vulnerability layer), the circumstances or the context and their capacity to

⁶³ CESCR (2001) “Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights” ESC Res E/C. 12/2001/10, UN ESCOR, 25th session, Agenda Item 5, para.4 and 5, U.N. Doc. E/C. 12/2001/10 (2001). The CESCR has stated that: [p]overty is not confined to developing countries and societies in transition, it is a global phenomenon experienced in varying degrees by all States. Many developed Sates have impoverished groups, such as minorities or indigenous people, within their jurisdictions. Also, within many rich countries there are rural and urban areas where people live in appalling conditions – pockets of poverty amid wealth. In all States, women and girls bear a disproportionate burden of poverty, and children growing up in poverty are often permanently disadvantaged.

⁶⁴ In Canada for example, *Sinora v Minister of Employment and Immigration* [1993] FCJ No. 725 the Federal Court of Appeal stated that the applicant, a national from Haiti, was claiming refugee status on the basis of particular social group “the poor”. Other decisions have acknowledged the “poor campesinos” of El Savador WBT (Re), No V98-00787, [1997] CRDD No 119, 4 June 1999 and poor young women from the former Soviet Union recruited for the purposes of international sex trade YCK (Re), No. V95-02904, [1997] CRDD No 26, 26 November 1997 as members of a particular social group. Ammer, M. (2009 “Climate change and Human Rights: The Status of Climate Refugees in Europe” (Ludwig Boltzmann Institute of Human Rights) p. 52. The author notes: “In this regard, it could be said that those marginalized groups within the poor form a social group (e.g. “women affected by the impacts of climate change”, “children affected by the impacts of climate change”, the disabled affected by climate change”).”

⁶⁵ U.N. Human Rights Commission (2011) “Report of the Expert Seminar on Human Rights and Extreme Poverty” U.N. Doc. E/CN.4/2001/54Add.1 (7-10 February 2011) para. 20.

⁶⁶ Fineman (2008) *Op. Cit.* p. 8

⁶⁷ Luna, F. (2009) “Elucidating the Concept of Vulnerability: Layers Not Labels” 2 *The International Journal of Feminist Approaches to Bioethics* (1), pp. 121-139. The concept is taken from the author.

resist and/or recover from environmental hazards (*fourth vulnerability layer*). The more layers of vulnerability one has the more vulnerable one will be to environmental changing conditions and (potential) forced displacement.

4.3 Driving Forces of Environmental Displacement: The ‘Push’ and ‘Pull’ Factors

To better understand vulnerability in general and environmental displacement in particular, it is relevant to explore the drivers of displacement. The work carried out by Black and his colleagues under the Foresight study⁶⁸ offers a conceptual framework to comprehend human mobility in the context of displacement. They outline five main factors that influence human mobility: economic, social, political, demographic, and environmental. Labour market imbalances and financial and economic crises allied with labour market opportunities, may lead to population movement. At the same time, the existence of family ties in a particular geographical area and the urge to pursue and obtain a better education may also constitute an incentive to migrate. Other inter-related factors, such as age, sex, education, wealth, marital status, ethnicity, religion, and language, may interfere with people’s related mobility. The urge to move can also be a consequence of direct discrimination or persecution, governance factors, conflict and security situations, direct coercion, or even policy incentives. With regard to environmental factors, they acknowledge that exposure to hazards such as floods and earthquakes may also lead to pronounced displacement situations. This is because ecosystem services, such as land productivity, habitability, food and energy and water security, may be compromised as a result of environmental stressors. In some areas of the globe there are particular geographical areas and groups of the population that have a special attachment to their land, sea, and forest, and thus are vulnerable to variations that occur in these.

Indeed, ecosystems provide a number of services to society from products (e.g., food, fuel, wood and fibre) and legislation (e.g., climate change, flood regulation) to cultural (e.g., aesthetic, education, recreation) advantages.⁶⁹ The United Nations Millennium Ecosystems Assessment outlines **direct** “push factors” (climate change, overexploitation of natural resources, land transformation that leads to livelihood change, pollution, disease outspread and plague species) and **indirect** “pull factors” (economic inequalities, socio-political instability, and religious, cultural, technological, and demographic differential factors) that intermingle with each other, establishing the types of services they are able to provide.⁷⁰ When ecosystems are curtailed, the provision of services becomes compromised which can serve as a (push and pull) *trigger* for forced displacement.

⁶⁸ The Government Office for Science (2011) “Foresight: Migration and Global Environmental Change (2011) Final Project Report” (The Government Office for Science, United Kingdom) *available from:* <https://www.gov.uk/government/publications/migration-and-global-environmental-change-future-challenges-and-opportunities> [accessed 12 July 2015]. *See also for a summary* Black, *et al.* (2011) “The Effect of Environmental Change on Human Migration 21S Global Environmental Change pp.S3-S11.

⁶⁹ Millennium Ecosystem Assessment (2005) “Ecosystems and Human Well-being: Current State and Trends“ Vol. 1 (Island Press) p. 28.

⁷⁰ *Ibid.* The gap between the North and South of the world is becoming larger in income levels and life expectancy. Whereas the life expectancy in the developed world is 78 years in the developing world it is 48.

Some authors have mentioned that the terms *push* and *pull* may undermine or underestimate the role of agency, but this is not totally true.⁷¹ While acknowledging the multicausality of displacement, the distinction serves two purposes. First, it serves to acknowledge that environmental stressors over a period of time will be more exacerbated for the environmental driver and second, that environmental factors may constitute an autonomous force of displacement where people are forced to leave through leaving them with a “no choice option.”

4.4 Environmental Displacement Settings

There are a number of displacement settings or scenarios that can be devised depending on the types and degrees of environmental change that are likely to trigger human movement: internally (within one’s country) or externally (across the border). These movements can be of immediate or of mediate nature and involve only a few individuals or large crowds. These are people that would not have moved if the environment was not damaged or destroyed by gradual environmental degradation (due to climate change and overexploitation of natural resources), sudden environmental disruption (together with natural and technological disasters), and calculated damage of the environment.⁷² Many other scenario framings have been put forward at both the institutional and scholarly levels; are more and less in line with the one presented below.

4.4.1 Gradual Environmental Degradation

While the size of the affected population is difficult to forecast, it is commonly accepted that people affected by environmental change and biodiversity loss will be the hardest hit, as this will lead to, among others, sea level rise and extreme desertification.⁷³ Sea level rise is quite easily forecasted and is a gradual process with enormous potential for displacement since it is

⁷¹ Kolmannskog, V. (2013) “We Are in Between- Securing Effective Rights for Persons Displaced in the Context of Climate Change and Natural Hazard-Related Disasters” Doctoral Thesis, Department of Criminology and Sociology of Law (University of Oslo) p.34.

⁷² Typologies are adapted from De Moor, N. & Cliquet, A. (2009) “Environmental Displacement: A New Challenge for European Migration Policy” Proceedings of Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World p. 3 available from: <https://biblio.ugent.be/input/download?func=downloadFile&recordOID=761954&fileOID=784741> [accessed 20 April 2013] and Kálin, W. (2008) “The Climate Change-Displacement Nexus Representative of the Secretary General on the Human Rights of Internally Displaced Persons, Panel on disaster risk reduction and preparedness: addressing the humanitarian consequences of natural disasters” ECOSOC Humanitarian Affairs Segment, (16 July 2008) available from: http://www.brookings.edu/speeches/2008/0716_climate_change_kalin.aspx [accessed 20 April 2013].

⁷³ Williams, A. (2008) “Turning the Tide: Recognising Climate Change Refugees in International Law” 30 Law and Policy 4 pp.504-508 pp. 502-529; Myers, N. (2005) “Environmental Refugees an Emergent Security Issue 13th Economic Forum (Prague 23-27 May); Conisbee, M. & Simms, A. (2003) “Environmental Refugees, The Case for Recognition” (New Economics Foundation) pp. 14-19; Bates, D. (2002) “Environmental Refugees? Classifying Human Migrations Caused by Environmental Change” 23 Population and Environment 5 p. 474 pp.465-477; Cooper, J. B. (1998) “Environmental Refugees: Meeting the Requirements of the Refugee Definition. 6 New York University Environmental Law Journal pp. 480-484 pp. 480-488; Myers, N. (1997) “Environmental Refugees” 19 Population and Environment: A Journal of Interdisciplinary Studies, 2 pp. 167-182.

irreparable.⁷⁴ It is estimated that that a one-metre rise in sea level will affect 360,000 kilometres of coastline worldwide. When the country can no longer sustain human life, internal migration will no longer be an option. The option will be to flee to another country (or countries) as the territory disappears. This scenario is the one that most probably affect SIDS (in particular South Pacific island states: Carteret Islands, Kiribati, the Maldives, the Marshall Islands, Palau, the Solomon Islands, Tokelau, Tuvalu,⁷⁵ and Vanuatu), which have been commonly known as “sinking islands.”⁷⁶ These areas are particularly vulnerable not only because of their reduced territory but also because of their limited natural resources, high population density and poor infrastructures. If predictions are correct, several of these areas will disappear by the end of the century.⁷⁷ This is why some of these governments are currently considering permanent as opposed to temporary relocation of their populations.⁷⁸ The first official “environmental refugees” were displaced in 2005 from the Carteret Islands (Papua New Guinea) due to sea level rise.⁷⁹ In 2014 the relocation of people from Taro, a town in the Solomon Islands, to the adjacent mainland was carried out with the help from Australian and British engineers. Last year too, the government of Kiribati bought 20 sq km of land in Vanua Levy, one of the Fiji islands in case people cannot be moved internally as part of their “migration with dignity” policy in case the 33 coral atolls become inhabitable.⁸⁰

Sea level rise can put at risk those people who live in low-lying areas and areas near the coast. This is the case of Bangladesh, a country at risk of loss of coastal area due to rise of sea level, common floods, and drought affecting 35 million people (one quarter of its entire population). The flood of 1998 was considered to be one of the most devastating with a death toll of 10,000 people, left 30,000 left homeless, and more than 10% of crops lost.⁸¹ In the same continent, Vietnam is also considered to be a very a vulnerable country to environmental

⁷⁴ Ammer (2009) *Op. Cit.* p. 13 “Sea level rise can be located – and predicted – rather easily. Coastal area with low altitudes make up approx. 2.2% of dry land, which is home for 10.5% of the world population (602 million persons). 75% of the endangered population lives in South and East Asia”; See Piguet, E. (2008) “Climate Change and Forced Migration” New Issues in Refugee Research Research Paper No. 153 (United Nations High Commissioner for Refugees) p. 7.

⁷⁵ The island of Tuvalu for example, is currently affected by flooding and loss of territory or salinisation of previous productive land.

⁷⁶ See generally, Gillepsie, A. (2004) “Small Islands in the Face of Climatic Change: The End of the Line in International Environmental Responsibility” 22 *UCLA Journal of Environmental Law & Policy* p. 175 pp.175-218.

⁷⁷ IPCC (2007) *Op. Cit.* Fourth Assessment Report, “Summary for Policymakers, Climate Change 2007: The Physical Science Basis” (Cambridge University Press), p. 21.

⁷⁸ See Cameron-Glickenhau, J. Palau (2008) “Coral Reef Protections” 31 *Forced Migration Review: Climate Change and Displacement* pp.52-53; Loughry, M. and McAdam J. (2008) Kiribati- Relocation or Adaptation, 31 *Forced Migration Review: Climate Change and Displacement* pp. 38-39; Ferris, E. (2014) “Planned Relocations in the Context of Climate Change: The Time to get Ready is Now” (The Brookings Institution) available from: <http://www.brookings.edu/blogs/planetpolicy/posts/2014/06/18-relocations-climate-change-ferris> [accessed 20 June 2014].

⁷⁹ IRIN Humanitarian News and Analysis (2008) “Papua New Guinea The World’s First Climate Change “Refugees” (28 June 2008) available from: <http://www.irinnews.org/report/78630/papua-new-guinea-the-world-s-first-climate-change-refugees> [accessed 20 April 2013]

⁸⁰ The Guardian (2015) UN Drops Plan to help move climate-change affected people (07 October 2015) available from: <http://www.theguardian.com/environment/2015/oct/07/un-drops-plan-to-create-group-to-relocate-climate-change-affected-people> [accessed 28 October 2015].

⁸¹ Pardel, O. (2012) “Desplazados Medioambientales Una Nova Realidade” 66 *Cuadernos Deusto de Derechos Humanos* p. 29.

changing conditions. Being a low-lying coastal region, the Mekong Delta is particularly susceptible to floods resulting from rises in sea level. Predictions from the Climate Change Research Institute at Can Tho University have shown that many provinces in the area, besides suffering from seasonal drought due to decrease in rainfall, will be flooded by the year 2030.⁸²

Desertification concerns, allied with the steady decline of soil quality abound in particular over the whole North of Africa. When areas that were once habitable become hostile as a result of complete desertification, there will be permanent and forced displacement as people are unable to adapt to the shifting conditions in their surroundings. Water shortage contributes to the displacement an increased death population trend. It is estimated that, by 2025 around three billion people will have to live amid water stress. The main affected areas will be India and Pakistan, the Middle East, and much of Africa. Droughts are expected to increase from 5% to 50% frequency by 2050.⁸³ Of particular concern is the African Sahel region, where millions of potential displacees now live as they try to escape from northern areas as a result of drought and lack of access to drinking water.⁸⁴ Currently almost two million children die each year due to water shortage, poor hygiene, and inadequate sanitation.⁸⁵ Environmental degradation is also a consequence of erosion, salinization and water logging.⁸⁶

An aspect contributing to environmental degradation and displacement is the mismanagement of natural resources, which has curtailed human life, provoking severe erosion of land,

⁸² See Reliefweb Government Report "Viet Nam: Mekong Delta - More Flood and Drought" (19 March 2009). The most serious cases are predicted to be the provinces of Ben Tre and Long An, of which 51% and 49%, respectively, are expected to be flooded if sea levels rise by one meter *available from:*

<http://reliefweb.int/report/viet-nam/viet-nam-mekong-delta-more-flood-and-drought> [accessed 20 April 2013]

⁸³ IPCC (2007) *Op. Cit.* Fourth Assessment Report, foresees water scarcity in Africa and Asia estimating that 74 to 250 million could be affected by 2020: "Freshwater availability in Central, South, East and Southeast Asia particularly in large river basins is projected to decrease due to climate change which along with population growth and increasing demand arising from higher standards of living, could adversely affect more than a billion people by 2050's" *available from:* http://www.ipcc.ch/publications_and_data/ar4/syr/en/spms3.html [accessed 20 April 2013]

⁸⁴ Drought has had catastrophic consequences in the Sahel region, which has led to the death and starvation of over half a million people over the last 20 years. More than 10 million people are at risk of hunger. See on this Hens, L. (2007) "Environmentally Displaced People" Regional Sustainable Development Review Africa *available from:* <http://www.eolss.net/ebooks/Sample%20Chapters/C16/E1-48-51.pdf> [accessed 20 April 2013]; Schwartz, M. (1993) "International Legal Protection for Victims of Environmental Abuse" 18 Yale Journal of International Law pp. 355-365. According to the author, "About half of the people most threatened by desertification live in the Sahel, a semi-arid zone stretching across the entire continent in Africa, from Mauritania in the West to the Horn of Africa in the East. Droughts in the area can last for years, or even decades. Over the past few decades, intensive farming and rapid deforestation have led to massive soil depletion and erosion. Ground cover not clear for cultivation is harvested for cooking fuel, frequently in violation with local laws." See Legum C. (1998) "Africa Contemporary Record" 17 Annual Survey and Documents (Africana Publishing) p. 95; Bryson, R. & Murray T.J. (1977) "Climates of Hunger. Mankind and the World's Changing Weather" (University of Wisconsin Press).

⁸⁵ See generally, United Nations Development Programme (UNDP) (2006) "Human Development Report 2006. Beyond scarcity: Power, poverty and the global water crisis. (Palgrave Macmillan).

⁸⁶ Hens (2007) *Op. Cit.* The author points out that, in 2007, an estimated 6, 070,500ha of land each year lost its fertile capacity and that 20% of vegetated land in Asia was degraded since 1945, in Africa 22%, and in South America 14%.

deforestation, air and water pollution, and desertification, with the full awareness and complicity of national governments. Financing by international organisations (e.g., the World Bank) has to some extent also contributed to the displacement problem.⁸⁷ Examples include the development of hydroelectric projects in Brazil, India, Ghana, and China⁸⁸ and resource extraction in Papua New Guinea, Ecuador, Indonesia, the Niger Delta in Nigeria, and the Amazon in Brazil. Others include over exploitation of land, industrial pollution, and overgrazing in former Soviet states of Central Asia and deforestation in Cambodia.⁸⁹

4.4.2 Sudden Environmental Disruption

The term *natural disasters* generally encompasses drought, volcanic events, earthquakes, cyclones, floods, and any kind of calamity, which are an outcome of an unbalanced natural environment. Historically, natural disasters have been one of the key causes of displacement. While the results of disasters can be of an immediate nature and provoke displacement of populations they are often a result of gradual environmental processes.⁹⁰ The United Nations has described disaster as “a serious disruption of the functioning of a society, causing widespread human, material, or environmental losses, which exceed the ability of the affected society to cope using its own resources.”⁹¹

Estimates show that, per year, natural disasters impact 144 million people.⁹² The people most affected by natural catastrophes are those living in Africa, Asia, and South America (Mozambique, Angola, Botswana, Lesotho, Madagascar, Malawi, Zambia, Peru, Brazil, Japan, etc.); some of these countries have poor levels of income and deficient infrastructures.⁹³ The intensification of disasters such as in the Caribbean states, have affected thousands of people and provoked several million dollars in damages.⁹⁴ In Bangladesh, cyclone Aila in 2009 left 500,000 people temporarily homeless while each year more than a million people are forcibly displaced because of the erosion of the banks of rivers.⁹⁵

⁸⁷ See Schwartz (1993) *Op. Cit.* p. 378 noting that international finance institutions such as the World Bank have contributed to the people displacement problematic since most of the policies to mitigate the effects of environmental displacement have been ignored by host governments. The government of China is building dams not only within their country but is also currently responsible for 289 dams overseas. Evidence of this is available from: <http://www.internationalrivers.org/en/node/3110>

⁸⁸ *Ibid.* The author acknowledges that 80,000 people have been displaced in Ghana due to the Volta river dam in Ghana. Similar effects have been felt with the Narmada project in India. In Brazil the government’s Hydropower Company Eletrobras is expected to build 80 dams in the Amazonia by the year 2020. In China (Falstrom 2001 *Op. Cit.*), the Three Gorges Dam Project has displaced and will continue to displace millions of people in the near future.

⁸⁹ Hong, J. (2001) “Refugees of the 21st Century: Environmental Injustice” 10 Cornell Journal of Law & Public Policy pp. 336-337 pp. 323- 348.

⁹⁰ See Section 3 in this Chapter on the concept of environmental change.

⁹¹ U.N. Disaster Relief Organization (1992) “An Overview of Disaster Management” (New York) p. 14

⁹² See International Federation of the Red Cross and Red Crescent Societies (1999) *Op. Cit.*.

⁹³ See U. N. Office for the Coordination of Humanitarian Affairs (OCHA), available from www.releifweb.int (last visited Apr. 29, 2011).

⁹⁴ See Pardel (2012) *Op. Cit.* p. 27. In 2004 in Granada, a island that is not considered to be in the hurricane-prone zone was devastated by Hurricane Ivan, which destroyed more than 90% of the infrastructures and housing in the area, with damages ranging in 800 million dollars range the equivalent of 200% of the Gross Domestic Product of the island.

⁹⁵ *Ibid* p. 35.

Unsurprisingly, it is the developing world that has the highest death rate (96%) as a result of natural disasters.⁹⁶ It is also where 80% of the world population is expected to live by 2025.⁹⁷

Perhaps the most interesting aspect to salient, as part of sudden environmental disruption, is how industrial progress or transformation, allied with technological development and human error (or inherent complicity), is somewhat part of permanent human displacement. Industrial and chemical disasters are a consequence of activities that lead to pollution, explosions, fires, or leakage of hazardous materials. There is a plethora of cases where technological accidents have led to the displacement of people. The most notorious example is the Chernobyl nuclear accident where up to 100,000 people had to be relocated by the Soviet government.⁹⁸ A similar event had previously occurred in Three Mile Island in Pennsylvania in the United States, where the partial destruction of a nuclear reactor temporarily dislocated over 100,000 people and permanently dislocated 10,000.⁹⁹ Another historic deadly chemical accident event was in Bhopal, India, where more than 1,000 people died and more than 200,000 people were displaced.¹⁰⁰ More recently, the Fukushima Dai-ichi nuclear meltdown and radioactive material crept into the air, soil, and sea at the Fukushima I Nuclear Power Plant following the Tōhoku earthquake and tsunami on 11 March 2011: this is considered to be the largest nuclear accident since Chernobyl displacing 50,000 households.¹⁰¹

4.4.3 Calculated Damage of the Environment

People can be forcibly displaced when their territory is used for different purposes other than for their residence.¹⁰² This includes armed conflicts, which can be at the core of environmental degradation.¹⁰³ The environment can also be used as a “weapon of war”¹⁰⁴ where the government rarely tends to people’s relocation needs. Generally the categorisation of armed conflicts and the detrimental impact on the environment are threefold:¹⁰⁵ either the

⁹⁶ International Federation of the Red Cross and Red Crescent Societies (1999) *Op. Cit.* p.88.

⁹⁷ *ibid.*

⁹⁸ Ebel, R. (1994) “Chernobyl and Its Aftermath” (The Centre for Strategic and International Studies) p. ix. According to the author the radiation contamination of land and water as well as the health impacts of the local population made it inhabitable for the next 25,000 years.

⁹⁹ McCue, G. (1993) “Environmental Refugees: Applying International Environmental Law to Involuntary Migration” 6 *Georgetown Environmental Law Review* p.162 pp. 151-190.

¹⁰⁰ Keane, D. (2004) “The Environmental Causes and Consequences of Migration: A search for the meaning of ‘Environmental Refugees’” 16 *Georgetown International Law Review* p. 212 pp. 209-223.

¹⁰¹ Bloomberg “Fukushima Reterie to Lead Anti-Nuclear Motion at Tepco AGM (27 June 2011) *available from:* <http://www.bloomberg.com/news/2011-06-26/fukushima-retiree-to-lead-anti-nuclear-motion.html> [accessed 20 April 2013]

¹⁰² Bates, D. C. (2002) “Environmental Refugees? Classifying Human Migration Caused by Environmental Change” pp. 471-472 pp. 465-477.

¹⁰³ See Weinstein, A. H. (2005) “Pioneer on the Environmental Impact of War” (Springer); Popovic, N. (1996) “In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment” 27 *Columbia Human Right Law Reveiw* p. 487-603.

¹⁰⁴ Weinstein, T. (2005) “Prosecuting Attacks That Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?” 17 *Georgetown Immigration Law Journal* pp. 697-722. The author illustrates that the environment is a war technique as well as a root cause of war conflict.

¹⁰⁵ Keane, D. (2004) “The Environmental Causes and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’ ”16 *Georgetown International Law Review* p. 213 pp. 209-223; Bates, D. C. (2002) “Environmental Refugees? Classifying Human Migration Caused by Environmental Change” p. 472 pp. 465-477; Hong, J. (2001) “Refugees of the 21st Century: Environmental Injustice” 10 *Cornell Journal of Law &*

damage is intentionally pursued for military objectives, for economic reasons (typically involving usage of natural resources), or as subsidiary damage.¹⁰⁶

Weinstein illustrates that, historically, there are widespread examples in Asia, Europe and North America of purposeful modifications of the environment as a tool of war. Among others, she enumerates the “sailing of the soil of Carthage; the scorching of Confederate land in the U.S. civil war; the blowing-up of the Huayankow Dam of the Yellow River by the Chinese, which flooded millions of acres of crops and soil; the destruction of Verdun by poison gas in World War I; and the burning of Norwegian lands during World War II.”¹⁰⁷ More recently, the war tactics used in El Salvador in the 1980’s, where the government actively destroyed the forests to eliminate guerrilla’ bases, or by the United States during the Vietnam War, where the destruction of the environment was a way to force rural population movements into the city can exemplify this. The 1991 Gulf War led to the destruction of oil tanks, along with fires polluting the air and massive spillages into the sea to deter the entrance of seaborne allied forces in Kuwait City, an example of what can be qualified as *ecocide*.¹⁰⁸ The usage and destruction of the environment for economic purposes has been alleged by the U.N. Security Council (UNSC) which has condemned the looting of countries such as the Democratic Republic of the Congo, Sierra Leone, Liberia and Côte d’Ivoire among others of their natural resources, highlighting the concerns of the international community that the illegal exploitation of natural resources is driving conflict situations.¹⁰⁹ The wide spreading of landmines after the withdrawal of armed forces or rebels in Cambodia, or as a result of the Rwandan war, has led to collateral damage on the environment, impacting the use of farmland and livestock, as well as access to shelter and water and severe delays in the reconstruction of essential infrastructure, injured people, and lost life.¹¹⁰

Public Policy pp. 335-336 pp. 323- 348. Popovic, N. (1995) “Humanitarian Law, Protection of the Environment and Human Rights” 8 Georgetown International Environmental Law Review p. 68-69 pp. 67-89.

¹⁰⁶ See Popovic (1995) *Op. Cit.*

¹⁰⁷ Weinstein (2005) *Op. Cit.* p. 700.

¹⁰⁸ See Popovic (1995) *Op. Cit.* and Roberts, A. (1992) “Environmental Destruction in the 1991 Gulf War” 32 International Review of the Red Cross 291 pp. 538-553. This can be exemplified by the war tactics used in El Salvador in the 1980’s where the government actively destroyed the forests to eliminate guerrilla’s bases or by the United States during the Vietnam War where the destruction of the environment was a way to force rural population movements into the city. The 1991 Gulf War led to the destruction of oil tanks along with fires polluting the air and massive spillages into the sea to deter the entrance of seaborne allied forces in Kuwait City, an example of what can be qualified as *ecocide*.

¹⁰⁹ United Nations Press Release (2007) “Security Council Underscores need for peacemaking mandates to consider helping states prevent illegal exploitation of natural resources from fuelling conflict” (25 June 2007) available from: <http://www.un.org/press/en/2007/sc9060.doc.htm> [accessed 20 April 2015].

¹¹⁰ See Lopez, A. (2007) “The Protection of Environmentally-Displaced Persons in International Law” 37 Environmental Law p. 375 pp. 365- 409; Augst, R. (2003) Note “Environmental Damage Resulting from Operation Enduring Freedom: Violations of International Law?” 33 Environmental Law Reporter News and Analysis 9 10668 (September 2003) available from file:///Users/isabelmota/Downloads/article_2011_10_33.10668.htm [accessed 20 April 2015].

5. Between ‘Guesstimates’ and Realities

Currently, it is not possible to completely quantify and predict with exact detail how much displacement and migration environmental change will cause. Until now, no form of environmental displacement has been officially accepted, and no official definition exists to describe the movement of people stemming from environmental factors.¹¹¹ Often, it is difficult to distinguish an “economic pull” from an “environmental push” factor that leads to the movement of people.

Figures and scenario building also vary depending on particular parameters,¹¹² assumptions,¹¹³ and social values. Depending on favourable or unfavourable conditions, even high estimates might be considered too low.¹¹⁴ Some authors have questioned the sources and methods that provide the statistical number of environmental displacees. They dispute the argument of increased flows of people related to the environment, stating that the phenomenon is not unique to modern times and thus not a basis for concern.¹¹⁵

The absence of conceptualisation by the international community of an accurate definition of what constitutes a person displaced by environmental factors has indeed resulted in the incapacity of exactly measuring the number of existing and potential displacement flows.¹¹⁶ Estimates that have become an accepted figure in relevant publications (see Table 2) range from 150 million to 200 million environmental displacees or migrants as a result of environmental change alone by 2050.¹¹⁷

¹¹¹ This is further developed in Chapter 3.

¹¹² IPCC (2007) Fourth Assessment Report “Climate Change 2007: Impacts, Adaptation and Vulnerability. Contributions of Working Group to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change” p. 365.

¹¹³ The above scenario-building is based on the most conservative predictions of environmental changes, especially of global warming in the level of 2 degrees, but other authors have examined scenarios taking into account higher levels. See for e.g. Gemenne, F. (2011) “Migrations et déplacements de populations dans un monde à + 4°C” 414 *Etudes* pp. 723-738.

¹¹⁴ See generally, Brown, O. (2008) “Migration and Climate Change” International Organization for Migration 31 *Migration Research Studies* (International Organization for Migration).

¹¹⁵ Black, R. (2001) “Environmental Refugees: Myth or Reality?” *New Issues in Refugee Research Working Paper No. 34* (United Nations High Commissioner for Refugees) pp. 2-3.

¹¹⁶ The conceptualisation of what constitutes an environmentally displaced person will be explored in the next Chapter.

¹¹⁷ Stern, N. (2005) “The Economics of Climate Change: The Stern Review” (Cambridge University Press) p. 3.

Table 2. Selected Estimates and Projections on the Extent of Environmental Migration Worldwide

Source	Estimations on the number of "environmental refugees" at time of publication	Projections of the number of future "environmental refugees"
Global Humanitarian Forum 2009: The Anatomy of a Silent Crisis. Geneva, pp. 48-49	26 million "climate refugees"	72 million "climate refugees" by 2030
Environmental Justice Foundation (EJF) 2009: No Place Like Home. Where Next for Climate Refugees. London, p. 4		200 million "environmental refugees", which 150 million are "climate refugees" by 2050
United Nations University - Institute for Environment and Human Security 2007: Control, Adapt or Flee. How To Face Environmental Migration? Bonn, pp.15-18	10 million "environmental refugees"	50 million "environmental refugees" by 2010
Friends of the Earth 2007: A Citizen's Guide to Climate Refugees. Amsterdam, p. 8		200 million "climate refugees" by 2050
Greenpeace 2007: Klimaflüchtlinge. Die verleugnete Katastrophe. Hamburg, pp. 1-2, 27	20 million "climate refugees"	150-200 million "climate refugees" in the course of the next 30 years
Nicholas Stern 2007: The Economics of Climate Change. The Stern Review. Cambridge, pp. 128-130		150-200 million "climate refugees" by 2050
Christian Aid 2007: Human Tide: The real Migration Crisis. London, p. 5-6	25 million "environmental refugees"	50 million "environmental" and 250 million "climate" refugees by 2050; plus a possible 645 million more people displaced by development projects like dams
United Nations 2005: Millennium Ecosystem Assessment Report. Washington.	20 million "environmental refugees"	50 million "environmental refugees" by 2050
United Nations High Commissioner on Refugees (UNHCR) 2002: Environmental Migrants and Refugees. Refugees No.127. Geneva, p. 12	24 million "environmental refugees"	
International Federation of Red Cross and Red Crescent Societies: World Disaster Report 2001, Focus on recovery. Geneva, p.11	25 million "environmental refugees"	
WorldWatch Institute 1988: Environmental Refugees: A Yardstick of Habitability. Washington, p. 38	10 million "environmental refugees"	
United Nations Environmental Program (UNEP) 1985: Environmental Refugees. Nairobi, p. 8	30 million refugees, of which many are "environmental refugees"	

Source: Aufenvenne, P. & Felgentreff, C. (2013): *Umweltmigranten und Klimaflüchtlinge – zweifelhafte Kategorien in der aktuellen Debatte. IMIS-Beiträge*, p. 44 pp. 9-44 & Olmer, J. (2013) "Which effects do global environmental change have for migration?" *Bundeszentrale für Politische Bildung* (10 September 2013) available from: <http://www.bpb.de/gesellschaft/migration/kurzdoessiers/168682/environmental-changes> [accessed 10 January 2014].

These "guesstimates" are hindered by the fact that one cannot clearly demonstrate at present the immediate connection between environmental change and displacement. Indeed it can be conceptually problematic and empirically flawed to link a particular climate event to movement.¹¹⁸ Scholars have emphasised that the causes of displacement are so complex and

¹¹⁸ McAdam, J. (2012) "Climate Change, Forced Migration, and International Law" (Oxford University Press) p. 24

compound that they cannot be solely attributed to environmental reasons.¹¹⁹ Others have asserted that perhaps the key problem is not environmental change itself but the ability of different parts of the world and communities to cope with it. This, in turn, maybe closely related to the problems of underdevelopment and North and South Relations.¹²⁰ The issue of causality of displacement or migration has been much debated because the decision to migrate is often classified as a *subjective* one and induced, as previously seen, by a cluster of economic, social, political, demographic and environmental factors.¹²¹

Authors may rightly highlight the multicausality of the displacement or migration phenomena and challenge the exact number of environmentally displaced persons. Despite the different levels of interpretation, the reality is that figures over the years show that there are more people displaced by environmental-related disasters than by armed conflicts.¹²² In this context, it is relevant to acknowledge the words of Norman Myers: “Although it is difficult to calculate the exact number of people for whom environmental degradation is a primary cause of forced migration, it assuredly is a factor for the majority of non-traditional refugee-seekers.”¹²³

In this day and age, 9 out of every 10 natural disasters are linked to environmental change; over the last 20 years, the number of disasters has doubled (from ca. 200 to over 400 per year).¹²⁴ In 2009, the former Global Humanitarian Forum noted that 300,000 people die per year of climate change-related reasons, foreseeing the deaths of half a million by 2030.¹²⁵ In the last six years, for example, eight countries in South Asia (Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka) have accounted for 36% (342,000,000) of the total number of people reported to have been displaced by disasters

¹¹⁹ Black (2001) *Op. Cit.* p. 2

¹²⁰ Castles, S. (2002) “Environmental Change and Forced Migration: Making Sense of the Debate”, New Issues in Refugee Research Working Paper No. 70 (United Nations High Commissioner for Refugees) p. 3.

¹²¹ See Mayer, B. (2013) “Climate Change and International Law on the Grim Days” 24 *The European Journal of International Law* 3 p. 963 pp. 947-970.

¹²² See Internal Displacement Monitoring Centre (IDMC) (2012) “Global Estimates 2011 People Displaced by Natural Hazard-Induced Disasters” (June 2012) p. 5 *available from:* <http://www.internal-displacement.org/assets/publications/2012/2012-global-estimates-2011-global-en.pdf> [accessed 02 January 2013]. “Estimates show that in 2010 alone 42 million people displaced by sudden-onset natural disasters and that 90 per cent of them were climate related such as floods and storms; IDMC (2014) “Global Estimates 2014 People Displaced by Disasters” (September 2014) p. 15 *available from:* <http://reliefweb.int/sites/reliefweb.int/files/resources/201409-global-estimates.pdf> [accessed 26 September 2014]. In 2013 nearly 22 million people were displaced in at least 119 countries by natural disasters, almost 3 times as many as were displaced by conflict and violence; IDMC (2015) “Global Estimates 2015 People displaced by Disasters” *available from:* <http://www.internal-displacement.org/assets/library/Media/201507-globalEstimates-2015/20150713-global-estimates-2015-en-v1.pdf> [accessed 23 July 2015]. Latest figures from IDMC in 2015 estimate that more than 19.3 million people were forced to flee their homes by disasters in 100 countries in 2014 whilst hundreds of thousands more are still displaced following disasters in previous years.

¹²³ Myers, N. (1997) *Op. Cit.* p. 167.

¹²⁴ UNHCR (2008) “Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective” (23 October 2008) p.2 refers to Holmes J., Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordination, Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition “DIHAD 2008 Conference *available from:* <http://www.unhcr.org/refworld/type,RESEARCH,UNHCR,,492bb6b92,0.html>

¹²⁵ Global Humanitarian Forum (2009) “Human Impact Report Climate Change, The Anatomy of a Silent Crisis” p. 1 *available from:* <http://www.ghf-ge.org/human-impact-report.pdf> [accessed 02 January 2011].

(616,000,000). This reflects the vulnerability of these people exposed to hazards in this region.¹²⁶ The impacts of environmental change are now not only predictions, but they are realities happening already today.

It is therefore necessary to deal, at the same time, with immediate displacement realities and future predictions even if the standards of analysis are variable. One can learn from current displacement situations, and governments and the international community can be better prepared to help populations in the future. As later emphasised in this work, dealing with the present and the future of displacement allows governments and the international community at large as well as people themselves, to better understand protection as a process: on the one hand enabling the development of preventative legal standards to avoiding displacement, and/or on the other hand devising the development of legal protection standards if displacement occurs.

5.1 The Binary Typology: Voluntary or Forced?

The environmental displacement debate has underestimated the binary typology of “voluntary” and “forced” movement. While not all movements are due to environmental factors alone,¹²⁷ it is important to consider the environment as an objective and autonomous factor that leads to displacement (threat multiplier). For this reason, it is important to distinguish between those who voluntarily move and those for whom relocation does not mean the manifestation of a hazard or deteriorating living conditions (environmental migrants) and those people who are forced to leave their homes due to the presence of a serious environmental threat to their lives or normal functioning (EDPs).¹²⁸ The scope of this work relates to the latter, and further key factors signalled here will be developed in the subsequent chapter. This forced movement implies the disenfranchising of the person from its community, family, and livelihood, and implies a great level of powerlessness where moving is not a choice, either to stay or to go,

¹²⁶ Ginneti, J. & Lavell, C. (2015) “The Risk of Disaster-Induced Displacement in South Asia” Technical Paper (IDMC April 2015) p. 18 *available from:* <http://www.internal-displacement.org/assets/publications/images/2015/201504-ap-south-asia-disaster-induced-displacement-risk-en.pdf> [accessed 28 April 2015]; Burke, J. & McCurry, J. The Guardian “Nepal's PM says earthquake death toll could reach 10,000” (28 April 2015). <http://www.theguardian.com/world/2015/apr/28/nepal-earthquake-anger-among-survivors-as-food-and-water-in-short-supply> [accessed 28 April 2015] The earthquake on 25 April, which struck an area in central Nepal between Kathmandu and the city of Pokhara, has had a far-reaching impact, highlighting the vulnerability in this area. More than 10,000 people may have lost their lives, along with victims in Bangladesh, India and Tibet.

¹²⁷ This includes those displaced due to persecution, armed conflict, generalised violence (communal, ethnic, political, and criminal violence) or human rights violations. Forced displacement also includes those who are displaced by environmental stressors (natural or environmental disasters, human-made chemical or nuclear disasters, famine, and/or development projects). It should be noted that, in many instances, it might be difficult to identify a single cause for moving and to determine whether movement is voluntary or forced and sometimes the flows may be mixed. However, as previously pointed out, it is important to acknowledge that environmental stressors over a period of time will be more exacerbated for the environmental driver.

¹²⁸ *See generally*, Terminski, B. (2012) “Environmentally-Induced Displacement. Theoretical Frameworks and Current Challenges” p. 3 *available from:* <http://www.cedem.ulg.ac.be/wp-content/uploads/2012/09/Environmentally-Induced-Displacement-Terminski-1.pdf> [accessed 12 January 2013]; Hugo, G. (2008) “Migration, Development and Environment” Immigration Research Series 35 (International Organisation for Migration).

but it becomes the “no choice option.” As previously highlighted, there are particular regions of the world where large groups of persons are in a vulnerable situation where they will not have a choice but to leave, and therefore, deserve protection.

5.2 Causality Re-Visited: Focusing on the Rights of Environmentally Displaced Persons and the Protection Obligations of States

The above analysis has shown that the actual and potential impacts of environmental change makes visible a wide range of human-rights related challenges, forced human displacement¹²⁹ being the most notable, as a reactive measure.¹³⁰ The lack of “adaptive capacity” or “vulnerability” of the least developed countries (especially of particular groups such as women, children, disabled, indigenous, and older people) will contribute to the snowball effects of actual and predictive trends of human displacement. In this context, we argue that the causality argument has to be re-visited.

Rather than focusing on causality (what drives displacement), the focus should rather be on the rights of the environmentally displaced and *inter alia* the protection obligations of states, exploring the (re)intepreattion or revision of current international protection structures to that effect in a proactive and reactive manner. The emphasis on the causality of movement has blurred the essential core of forced environmental displacement, i.e., people’s human rights. Focusing too much on causality can be a barrier to research, but most importantly it can be seen as an impediment to helping, to devising legal protection mechanisms, or to outlining policy strategies to protect those who are facing displacement situations as a result of environmental factors. From this perspective, environmental displacement needs to be approached as a human rights issue.

6. Enviromental Displacement as a Human Rights Issue

To situate environmental displacement within the human rights realm it is important to highlight that it is only after the 1980’s that human displacement *per se* began to be recognised as a human rights issues by scholars, the United Nations, and non-governmental organisations. Until then, the forced movement of people was largely treated in a reactive manner focusing on humanitariain aid and technical assistance for those displaced.¹³¹ The shift from a charity approach to a human rights-based approach was gradually implemented during the 1980’s and 1990’s. Scholars and the international community at large, including non-governmental organisations, started to focus on addressing the “root causes” of

¹²⁹ See generally, International Council on Human Rights Policy (ICHRP) (2008) “Climate Change and Human Rights: A Rough Guide” ICHRP.

¹³⁰ Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) (2009) “The impact of Climate Change on the Development Prospect of Least Developed Countries and Small Islands Developing States” available from: <http://www.unohrlls.org/UserFiles/File/LDC%20Documents/The%20impact%20of%20CC%20on%20LDCs%20and%20SIDS%20for%20web.pdf> p. 5 [accessed 12 February 2013]. According to the UN-OHRLLS around 860 million people in the developing world and SIDS will be afflicted by environmental change and many will become “environmental refugees.”

¹³¹ See Morel, M. (2014) “The Right Not to Be Displaced Under International Law” (Intersentia) p. 22.

displacement and embrace a more human rights-based approach increasingly integrating both proactive and reactive views to assistance and protection in their discourses.¹³²

It is true, however, that issues of legal protection of those displaced have remained focused on specific types or forms of displacement (e.g., displacement of indigenous populations, development-induced displacement, internal displacement, forced relocation, mass expulsion, and population transfer, among others), and this can lead to situations of a “potential waste of resources and a serious danger of conflicting standards being developed.”¹³³ Nevertheless, focusing on a type of displacement from environmental change can be particularly useful in this context, paving the way to understand the complexity of environmental displacement *per se*, to developing an adequate legal protection framework, including the search for durable solutions.

6.1. A Rights-Based Approach to Environmental Displacement

What might be gained from focusing on a human rights framework in the context of environmental displacement? Perhaps one of the most logical but sometime overlooked feature of human rights standards is that it allows us to speak of people as humans, i.e., as individuals, as members of a community, or families, not as numbers, units, or percentages. This “is far more likely to produce sensible responses to vexing yet unavoidable dilemmas, such as those relating to social well-being, family reunification, and the best interest of future generations.”¹³⁴ Departing from this perspective permits governments and the international community to advance common agendas prioritising “common sense” and “common interests.”

Furthermore, rights-based approaches assert the idea that the human person is also a rights holder (this includes a more holistic perspective of human beings in terms of their civil, political, social, economic, and cultural roles) that is empowered to claim rights against the duty-bearers. In other words, it considers that individuals are entitled to – and not merely morally – assistance and protection when required. “Human rights thus go beyond the notion of physical needs by triggering obligations and responsibilities, identifying duty-bearers and ensuring accountability.”¹³⁵ Human rights-based approaches look at the whole picture not only addressing the immediate causes of displacement but also addressing them in a more structural manner, focusing on people’s needs, problems, and potentials.¹³⁶

¹³² See Stavropoulou, M. (1994) “The Right Not to Be Displaced 9” *The American University Journal of International Law and Policy* 3 pp. 706-717; pp. 689-749. The author highlights various reports, studies, and statements by the UN bodies as well as scholarly articles addressing the “root causes” of displacement and the increasing emphasis on a human rights based perspective.

¹³³ Stavropoulou, M. (1998) “Displacement and Human Rights. Reflections on UN Practice” *20 Human Rights Quarterly* 3 p.520 pp. 515- 554.

¹³⁴ Ho, C. & Loucky J. (2012) *Op. Cit.* p.10.

¹³⁵ Morel (2014) *Op. Cit.* p. 23

¹³⁶ Boesen, J. & Martin, T. (2007) “Applying a Rights-Based Approach – An Inspirational Guide for Civil Society” (Danish Institute for Human Rights) p. 10.

From this perspective, a rights-based approach in the context of displacement is characterised by a relationship between the state and the individual. This relationship is always a power-imbalanced one because the state will always be a strong party against a weak individual, which is in need of protection. A rights-based approach in the context of environmental displacement seems to be the most useful approach for a number of reasons.

Overall, the focus on international human rights law may fill a gap where protection standards are currently missing because they can be a reference point for for new laws and even help with the harmonisation of regional and national standards. Then, international human rights law outlines “minimum standards of treatment” that must be afforded to every human being. The substantive content of this “minimum core” is constantly being elaborated in particular, by the (quasi) judicial decisions of regional human rights courts and under the CESCR in a way that is adapted to national conditions and resources constraints.¹³⁷

The international human rights legal framework displays a permanent concern for discrimination and the vulnerability of individuals whose rights are most at risk. While there is no specific human rights instrument concerning environmental displacement per se, the international human rights regime includes numerous treaties protecting the rights of individuals and groups who may be vulnerable to the adverse impacts of environmental change, including women, children, indigenous peoples and older and disabled people, among others. International human rights legal standards help establish normative foundations and essential guarantees for active and meaningful participation processes including ensuring that those rights affected or potentially affected by environmental change have a say in setting national and international mitigation targets and policies and claim ownership of the design and implementation of adaptation initiatives.¹³⁸

International human rights law also enables the creation of a universal legal framework with legally binding obligations for states and enforceable rights for individuals, thus offering clear guidelines for all stakeholders involved in displacement in general and environmental displacement in particular. Furthermore, it allows the creation of common conceptual criteria or frameworks, both to measure states obligations and, when they do not respect their obligations, to allow individuals to hold them accountable (redress and reparation) before official institutions. The universality of human rights means that, even if there are changes with a state’s political landscape, human rights remain intact and apply to everyone, and everyone should enjoy their protection. Importantly, a human rights-based approach helps

¹³⁷ CESCR (1990) General Comment No. 3: The Nature of State Parties Obligations U.N. Doc. E/C.3/1991/3 (14 December 1990). Under the ICESCR there is an immediate obligation to “take steps” (concrete, deliberate and targeted) that is not dependent upon available resources to meet the obligations enshrined in the Covenant. The “minimum core” has been defined by the CESCR as immediate obligations at a minimum level to meet people’s survival needs (“essential minimum levels”). Beyond this threshold, the rights in the ICESCR are to be realised progressively according to national resources and tailored standards. For illustrations on the “minimum core content” see CESCR (1999) General Comment No. 12: The Right to Adequate Food U. N. Doc. E/C.12/1999/5 (12 May 1999) and CESCR (2000) General Comment No. 14: The right to the highest attainable standard of health U.N. Doc. E/C.12/2000/4 (11 August 2000).

¹³⁸ McInerney, Darrow & Rajamni (2011) *Op. Cit.* p. 30.

“foster an inclusive, unifying model”¹³⁹ based on common human rights values and sometimes found on international standards or other or regional or national protection standards (which may have potential international replication).

Notwithstanding the argumentation in favour of a human rights-based approach to environmental displacement, there may be some inherent challenges in particular from an implementation point of view. First, states may not have incorporated international human rights standards into their national legislation or may even lack an operative judicial system. Then individuals may not be aware of their rights and entitlements under international legal standards, and this can be due to a lack of information per se but also a lack of financial means to approach judicial institutions at the international or even regional levels. Furthermore, the international system for supervising and implementing human rights is intrinsically restricted by national sovereignty.¹⁴⁰ Therefore, some authors assert the weakness of legal approaches in general and rights-based approaches in particular: “[t]he utilisation of legal approaches to address fundamental disparities of political and economic power within and between states, let alone redressing these, represent a frustrating, often futile and in many countries a dangerous understaking.”¹⁴¹ Employing a broader argument Posner¹⁴² contends that human rights in general are too ambitious, utopian, and vague, arguing in favour of a replacement of the unenforceable human rights treaty model to a charity-driven foreign aid model for poverty reduction and with quantifiable indicators. While all outlined perspectives may be seen as valid, it seems that there is a fundamental misunderstanding in that a rights-based approach should ideally not be disenfranchised from other political and social approaches. In this context, protection for the environmentally displaced should be seen through a “lens of combined forces.” This study highlights the value of one of those forces -the human rights perspective,- without necessarily disregarding the other political, social, and even moral forces. While the law, in particular international human rights law, may be weak or insufficient to tackle the issue of environmental displacement, the reasoned value of human rights previously highlighted is of unequivocal importance.

The issue of environmental displacement is not merely a charity or humanitarian problem and needs, therefore, to be discussed within this wider human rights context. Consequently, an analysis of the current mechanisms of protection or what they can offer (either through interpretation or revision) for the environmentally displaced must be seen from this human

¹³⁹ See Morel (2014) *Op. Cit.* pp. 24-25; Centre for Housing Rights and Evictions & The National Law Centre on Homelessness and Poverty (2007) “Housing Rights for All: Promoting and Defending Housing Rights in the United States” (The National Law Centre on Homelessness and Poverty) pp. 15, 16, 18; Centre for Housing Rights and Evictions (2007) “Fair Play for Housing Rights – Mega Events, Olympic Games and Housing Rights” (Centre for Housing Rights and Evictions) p. 30.

¹⁴⁰ *Ibid.*

¹⁴¹ Leckie, S. (1995) “When Push Comes to Shove: Forced Evictions and Human Rights” (Habitat International Coalition) pp. 35-36.

¹⁴² Posner, E. A. (2014) “The Twilight of Human Rights Law” (Oxford University Press).

rights prism. The International Law Commission (ILC)¹⁴³ synthesizes this idea by vividly saying (emphasis added):

“a rights-based approach deals with situations *not simply in terms of human needs*, but in terms of *society’s obligations to respond* to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed.”¹⁴⁴

6.2 The Relevance of a Holistic Approach to Protection: Pre-In-Post Displacement Phases

When supporting a rights-based approach to the protection of environmentally displaced persons the concept of protection gains centre stage. The Oxford Dictionaries online defines protection as “The action of protecting someone or something; the fact or condition of being protected; shelter, defence, or preservation from harm, danger, damage, etc.; guardianship, care; patronage.”¹⁴⁵ Interestingly, the term embodies a holistic meaning, not only the provision of physical security to an individual and its environment, but also the prevention from harm. The term is not defined in any international or regional refugee or human rights instrument. Protection itself is a concept that has various subjacent meanings from active to passive protection, to legal protection, physical protection, and so on.¹⁴⁶

For this reason, some argue that it is a word of art.¹⁴⁷ When it comes to the protection of persons displaced by environmental factors, this may lead to developing another type of “specialized conceptualization of protection.”¹⁴⁸

Part of the problem of dealing with environmental displacement is the conceptualization of protection. Generally within the legal realm, protection is a recognised responsibility of states towards their citizens. Governments are responsible for the human rights of their citizens as part of the essence of statehood.¹⁴⁹ When states are unwilling or unable to provide protection, international responsibility arises to protect vulnerable individuals. This responsibility is codified in international law (in particular international humanitarian law, international human rights law and refugee law). From an institutional level, for example, no international body currently exists with a specific mandate to protect the environmentally displaced. The

¹⁴³ The International Law Commission (ILC) is a body of experts established by the United Nations General Assembly in 1948 for the promotion of the progressive development of international law and its codification available from: <http://legal.un.org/ilc/ilcintro.htm> [accessed 6 March 2013].

¹⁴⁴ ILC (2008), “Preliminary Report on the Protection of Persons in the Event of Disasters by Mr Eduardo Valencia-Ospina, Special Rapporteur”, 60th Session, UN Doc A/CN.4/598 (5 May 2008) para. 174.

¹⁴⁵ Oxford English Dictionaries Online (2013) available from:

<http://www.oxforddictionaries.com/definition/english/protection?q=protection> [accessed 06 March 2013].

¹⁴⁶ Phuong, V. (2004) “International Protection of Internally Displaced Persons” (Cambridge University Press) p. 11.

¹⁴⁷ Goodwin-Gill, GS (1989) “The Language of Protection” 1 International Journal of Refugee Law (1) p. 6 pp.6-19.

¹⁴⁸ International Law Commission (2007) “Protection of persons in the event of disasters” ILC U.N. Doc. A/CN.4/590 (11 December 2007) p. 149.

¹⁴⁹ However, protection can also be provided by other non-state actors including international organisations controlling the state or a substantial part of its territory or even private enterprises operating in a territory with the state’s consent.

two main international organisations dealing with (forced) displacement/migration, the UNHCR¹⁵⁰ and the IOM,¹⁵¹ in theory have different functions and focuses, but in practice both organisations have raised the issue of environmental displacement, contributing to their enhancement in wider international fora. Organisations like the UNHCR, have been crucial, for example, in providing humanitarian assistance in cases of displacement caused by environmental disasters.

Paradoxically, although international law makes reference to protection the contours of its definition is not clear. For this reason, it is interesting to look at Article 8 of the UNHCR statute¹⁵² and Principle 1 of the Guiding Principles on Internal Displacement (GPID)¹⁵³ for our purpose.

The first lists what activities should be carried out to promote protection. While the UNHCR has claimed that people displaced by environmental factors are not within the remit of their mandate, they have been at the forefront of promoting protection for them and highlighting a much-needed government intervention. In comparison, the second articulates what protection potentially entails: full equality, the same rights and freedoms under international and domestic law, and non-discrimination in the enjoyment of any rights and freedoms as do other persons in their country. In reality, this principle does not clarify what protection is, but it seeks holistically to enunciate standards of protection for each stage of displacement.¹⁵⁴ While the GPID are laid down in a non-legal (soft law) instrument, they reflect and are consistent with existing human rights and humanitarian law instruments (and by analogy refugee law), which are binding.¹⁵⁵

¹⁵⁰ See Loescher, G. Betts, A. & Milner, J. (2008) "The Politics and Practice of Refugee Protection in the Twenty-First Century" (Routledge). The main functions of the UNHCR are the protection of the rights of refugees, the provision of material assistance, and search for durable solutions.

¹⁵¹ The International Organization for Migration is an intergovernmental organisation to promote worldwide humane and orderly migration by providing services and advice to governments and migrants *available from*: <https://www.iom.int> [accessed 07 July 2015].

¹⁵² See U.N. General Assembly (1950) "Statute of the Office of the United Nations High Commissioner for Refugees" U.N. Doc. A/RES/428(V) (14 December 1950) Article 8: "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities; d) Endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement; e) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States; f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them; g) Keeping in close touch with the Governments and inter-governmental organizations concerned; h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions; i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees."

¹⁵³ Guiding Principles on Internal Displacement (GPID) U.N. Doc. E/CN.4/1998/53/Add.2 (22 July 1998)

"Principle 1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced."

¹⁵⁴ Phuong (2004) *Op. Cit.* p. 119

¹⁵⁵ See Kälin, W. (2000) "Guiding Principles on Internal Displacement - Annotations" Studies in Transnational Legal Policy No. 38 (ASIL & The Brookings Institution). For the detailed legal analysis of the Principles, many

The GPID covers situations of those who are forcibly displaced but have not crossed international borders however, there is no impediment to re-articulating this logical framework to the cross-border environmental displacement context. This is because the GPID look at displacement as a process, taking a holistic stock to what protection entails: before, during, and after displacement.

In the pre-displacement phase, it looks at protection as prevention from displacement - ensuring that (emphasis added):

“All authorities and international actors *shall* respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to *prevent and avoid conditions* that might lead to the displacement of persons” (Principle 5 GPID).

It goes on to affirm that states’ duties entail the respect for the right not to be displaced by avoiding carrying out arbitrary displacement, as well as the duty to protect people from particular circumstances, such as natural or human-made disasters (Principle 6 (1) (2 d)). In this context, states might consider the development of new protection statuses. This may include, for example, fostering labour migration as a legitimate strategy to prevent environmental displacement. The GPID do foresee that, in some cases, displacement of the population (e.g. through evacuation) might be permissible, but this must be seen as a last resort measure when all alternatives have been explored to avoid displacement altogether (Principle 7 (1)). It must be seen as a temporary solution, obey adequate procedural standards and is never to be carried out in a way that violates the rights to life, dignity, liberty and security of those affected (Principle 6 (3); Principle 7 (2) (3); Principle 8). This is a critical phases in the protection process of environmentally displacement, as it requires considerable political will and resources to protect individuals and the environment.

In the subsequent stages of displacement it looks at protection after displacement occurs whether internally and by extension cross-border environmentally displaced. In the context of this study, it relates to their status and stay in the host country but also to their rights and entitlements. For those who cross an international border due to environmental stressors, the role of international refugee law is put into the equation. Emphasis may be further placed on existing regional complementary protection standards and the protection of human rights (not only civil and political but also economic and social rights).¹⁵⁶

Interestingly, the framework also highlights that humanitarian assistance in case of environmental stressors must be carried out in accordance with the principles of humanity

are modelled on the text of human rights and humanitarian law provisions before tailoring them to the specific needs of the internally displaced (examples include GPID, Principles 12, 14, 17, 20).

¹⁵⁶ Examples include: GPID, Principle 10 right to life; Principle 11 right to dignity and physical, mental and moral integrity; Principle 12 right to liberty and security; Principle 14 right to freedom of movement; Principle 17 right to respect of his or her family life; Principle 18 right to an adequate standard of living; Principle 21 right to property.

and impartiality and without discrimination.¹⁵⁷ This embraces the notion that assistance and protection are inextricably interlinked and complementary to each other. However, it may be reasonable to keep both concepts separate so that they are not confused. Distributing humanitarian goods and services does reinforce the protection of the persons assisted and is instrumental to the enjoyment of human rights but is not per se a protection activity: “They become so insofar as they specifically aim at preventing future, stopping on-going and redressing past violations of such rights.”¹⁵⁸ This operational meaning of the protection of human rights is enshrined in the Inter-Agency Standing Committee’s revised version of the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters.¹⁵⁹

Ultimately, of great importance for the environmentally displaced is the fact that, once they have crossed an international border, durable protection solutions are sought upon voluntary return to their country of origin.¹⁶⁰ Furthermore, that resettlement and reintegration mechanisms are adequately carried out in the host country. All these means of protection must be underpinned by enabling conditions and funding by all “competent authorities” (states and other international actors) and guided by the principles of dignity, participation, access, and compensation.¹⁶¹

Sensu stricto, we borrow the notion that protection encompasses “all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law (i.e., human rights law, international humanitarian law and refugee law)”¹⁶² but we cannot neglect its *sensu lato* meaning. Protection must be seen as a holistic concept, action-oriented and a dynamic balancing exercise intimately linked to social and environmental conditions. “It is something oriented to results and involves a whole spectrum of complementary activities embracing both policy and operational concerns and carried out in co-operation with States and other partners, with the goal of enhancing respect for the rights of (...) [environmentally displaced] and resolving their [potential] problems.”¹⁶³ It embraces a holistic approach to environmental displacement, where rights and needs enter the equation, complementing each other where appropriate.

¹⁵⁷ GPID, Principles 24 et seq.

¹⁵⁸ IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (2011) Brookings-Bern Project on Internal Displacement *available from*: http://www.brookings.edu/~media/research/files/reports/2011/1/06-operational-guidelines-nd/0106_operational_guidelines_nd.pdf [accessed 20 March 2012] p. 6 (originally issued as IASC Operational Guidelines on Human Rights and Natural Disasters (2006) Brookings-Bern Project on Internal Displacement).

¹⁵⁹ UN Inter-Agency Standing Committee (2011) revised version of the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (January 2011).

¹⁶⁰ This can be inferred from Principle 28 of the GPID.

¹⁶¹ GPID, Principles 28 and 29.

¹⁶² Inter-Agency Standing Committee (1999) “Protection of Internally Displaced Persons, Inter-Agency Standing Committee Policy Paper” (December 1999) p. 4. The definition was originally adopted by the International Committee of the Red Cross in a 1999 workshop on Protection.

¹⁶³ Deschamp, B. Azorbo, M. & Lohse, S. (2010) “Earth, wind and fire: A review of UNHCR's role in recent natural disasters” (United Nations High Commissioner for Refugees June 2010) pp. 26-27 *available from*: <http://www.unhcr.org/4c1228e19.html> [accessed 10 July 2015]. See for example, where the operational meaning of human rights in delivering assistance during disasters by humanitarian agencies participating in the IASC (which are enshrined in the recently revised version of the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters) is highlighted.

The relevance of a holistic approach to protection of environmental-induced displacement means absorbing this dynamic notion of protection from the application of “a subjective criterion of qualification of the individuals, according to the reasons which have led them to abandon their homes, to an objective criterion centred rather on the needs of protection.”¹⁶⁴

7. Conclusion

This chapter sets the scene on how the changing environment affects human displacement. It particularly highlights that, while people have been on the move for years, the transformation of or the impacts by humans on the environment are leading us to a new geological age, “the Anthropocene” where forced human displacement is one of the foundations of this age.

The chapter also aims to clarify the understanding of environmental change as a holistic and dynamic process of natural and/or human-made factors that include climate change, disasters, development, and environmental degradation, which are all interdependent and interrelated. This view also helps us understand today’s “risky society,” which is mostly a product of manufactured human risks and the need to cope and manage them, including displacement .

Importantly, it was noted that while all of us all are vulnerable to the effects of environmental change, the geography of the impact of environmental change is unevenly distributed. LDCs, because they are highly prone to environmental variations, also suffer from economy dependency, low education levels, and high poverty rates. Therefore, as illustrated by the various authoritative figures, we can easily identify “environmental hotspots” and looking at these effected or most vulnerable areas is a useful reference point to the number of people who are currently displaced or likely to face displacement. In this context, it was suggested that the usage of “vulnerability layers” as a reflective concept enables us to expose those vulnerable areas, which are affected by environmental change, where people’s human rights are at risk and in need of legal protection contemplation. It was asserted that whereas all of us are generally vulnerable to environmental change, vulnerability layers are added depedening on the location, characteristics of a person, age, sex, group, and the capacity to resist and/or recover from environmental stressors.

While recognising the multicausality of human mobility (stemming from economic, social, political, demographic, and environmental factors) in the context of displacement the chapter asserted that the environmental displacement debate has generally underestimated the binary “voluntary” and “forced.” In other words, while not all flows are generally due to environmental factors alone, it is important to consider the enviroment as an autonomous factor that leads to displacement. First, because environmental stressors over a period of time will be more exacerbated for the environmental driver, and second, those people will be forcibly displaced (where moving is not an option it is a “no choice option”).

¹⁶⁴ Cançado Trindade (2010) *Op. Cit.* p. 512.

In this context, this study situates the environmental displacement debate beyond the causes of human mobility and concentrates on the protection of the human person. The human rights-based approach concentrates on the rights of the environmentally displaced and the protection obligations of states, exploring the application, (re)interpretation, or revision of current international protection standards to that effect. As protection gains centre stage, the study departs from a holistic understanding of protection increasingly codified in international law, which is based on the needs of the individual in all stages of displacement (before, during, and after displacement occurs).

Chapter 3. (De)Constructing Environmentally Displaced Persons

1. Introduction

This chapter establishes the working parameters of what constitutes an environmentally displaced person and explains how the study inherently needs to cope with what we call the environmental displacement protection paradox. In order to achieve this, it (de)constructs the concept and analyses the myriad of typology dynamics having as a common denominator the terms: *refugee*, *migrant* and *displaced person* and the scholarly debates behind them. As a point of departure, the chapter highlights the gradual recognition of environmentally induced displacement, together with the changes of discourse at the institutional level and how the topic has increasingly gained ground in the wider international protection agenda.

2. Recognising Environmentally Displaced Persons

The suggestion of an “ecological refugee” can be traced back to 1948¹ but gained momentum in 1985 by El-Hinnawi in a UNEP Report.² The term *environmental refugee* was used to portray the idea of the devastating impacts of the mismanagement of resources, pollution, and biodiversity and livelihood loss. In the 1990’s, scholarship discussions about the theme started to build up.³ Today, the climate change-dominated agenda -politicians, media and civil society included - uses the same term to advance political agendas, reach the masses, and draw attention to the negative impacts of greenhouse gas emissions and the consequences of environmental degradation.

Whereas previously the discussions mainly concentrated on the scientific and environmental value of the issue, the debate evolved in the 2000s to a more social and humanitarian

¹ See Voght, W. (1948) “Road to Survival” (William Sloan Associates).

² El-Hinnawi, E. (1985) “Environmental refugees” (United Nations Environment Programme).

³ See the works of Jacobson, J. (1988) “Environmental Refugees: a Yardstick of Habitability” World Watch Paper, no. 86, World Watch Institute; Suhrke, A. & Visentin, A. (1991) “The Environmental Refugee: A New Approach” 2 *Ecodecision* (September 1991) pp. 73-74; Myers, N. (1993a) “Tropical Forests: the Main Deforestation Fronts” 20 *Environmental Conservation* 1 pp. 9-16; Myers, N. (1993b) “How Many Migrants for Europe?” 2 *People and the Planet* 3 p. 28; Myers, N. (1993c) “Environmental Refugees in a Globally Warmed World,” 43 *Bioscience*, pp. 752-61; Myers, N. (1993d) “Ultimate Security: the Environmental Basis of Political Stability” (W.V. Norton); McCue, G. (1993) “Environmental Refugees: Applying International Environmental Law to Involuntary Migration” (1993) 6 *Georgetown Environmental Law Review* pp. 151-190; Suhrke, A. (1994) “Environmental Degradation and Population Flows,” 47 *Journal of International Affairs* 2 pp. 473-496; Myers, N. & Kent, J. (1995) “Environmental Exodus: an Emergent Crisis in the Global Arena” (The Climate Institute); Myers, N. (1996). “Environmentally-Induced Displacements: the State of the Art” in IOM, UNHCR and Refugee Policy Group (eds.) “Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration” (International Organization for Migration) pp. 72-73; Hugo, G. (1996) “Environmental Concerns and International Migration” 30 *International Migration Review* 1 pp. 105-131; Kibreab, G. (1997) “Environmental Causes and Impact of Refugee Movements” 21 *Disasters* 1 pp. 20-38; Hartmann, B. (1998) “Population, Environment and Security: a New Trinity” 10 *Environment and Urbanization* 2 pp. 113- 127; Cooper, J.(1998) “Environmental Refugees: Meeting the Requirements of the Refugee Definition” 6 *New York University Environmental Law Journal* pp. 483-533; Lonergan, S. (1998) “The Role of Environmental Degradation in Population Displacement” 4 *Environmental Change Security Project* (Spring 1998) pp.5-15.

approach of the consequences of environmental change on the human being.⁴ Today, this path has also evolved to considerations on the value of a human rights approach highlighting the needs of protection of EDPs. For this reason, as highlighted in the previous chapter, it calls for the conceptualisation of the environmentally displaced problematic to be angled in a wider human rights context. Considerations of protection of environmentally displaced people continue “in the making” but are now looked upon not only in the short but also in the long term, (where normative frameworks cannot be divorced from policy making and the search for pragmatic solutions) if true protection is to be granted.

This change of attitude is also a result - in part - of the change of discourses at the institutional level.⁵ As stated earlier in the 1990’s, the IPCC highlighted that human displacement was likely to occur as a result of coastline erosion, flooding, and agriculture stagnation, and that relocation across borders would most likely be an option. In 2002, the International Federation of the Red Cross and Red Crescent also created an environmental change hub to “better understand and address the risks of climate change, in particular in the context of disaster reduction, disaster management and health and care programs, with a focus on the most vulnerable people.”⁶ The adoption of a resolution entitled “The Legal Implications of the Disappearance of States and Other Territories for Environmental Reasons, including the implications for the Human Rights of their Residents, with particular reference to the Rights of Indigenous People’s” by the UN Sub-Commission on the Promotion and Protection of Human Rights called upon the Human Rights Council to appoint a Special rapporteur to elaborate a study on the legal impacts of the disappearing States and other territories for environmental causes including looking at the human rights impacts on their residents.⁷ Even though this study never materialised, it does show the growing importance of human rights and environmental displacement within institutional settings.

2.1 Grounding in the Wider International Protection Agenda

The Office of the U.N. High Commissioner for Human Rights (OHCHR) has scrutinized the linkages between human rights and environmental change, including displacement consequences.⁸ In 2007, the High Commissioner for Refugees was the first one to raise concerns about environmentally induced displacement,⁹ as he regarded this as a “duty to alert

⁴ McAdam (2011) “Climate Change, Forced Migration and International Law” (Oxford University Press) pp.4-5.

⁵ Hall, N. (2010) “Climate Change and Institutional Change in UNHCR” UNU-EHS Summer Academy Conference on Protecting Environmental Migration: Creating New Policy and Institutional Frameworks (25-31 July 2010) available from: <http://www.bonn-dialogues.com/file/get/5404> [accessed 05 July 2014].

⁶ International Federation of the Red Cross and Red Crescent Societies “Climate Change Centre” available from: <http://www.climatecentre.org/site/about-us> [accessed 05 July 2014].

⁷ McAdam (2011) *Op. Cit.* p.6.

⁸ See for e.g. the U.N. Human Rights Council (2009) “Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights” U.N. Doc A/HRC/10/61 (15 January 2009) paras. 55-60 available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>

⁹ However, according to Schwartz, M. (1993) “International Legal Protection for Victims of Environmental Abuse” 18 Yale Journal of International Law pp.355, 379; pp. 355-365 a UNHCR Working Group on Solutions and Protection within the Executive Committee noted in 1991 of the “need to provide international protection to

states to these problems and help find answers to the new challenges they represent,”¹⁰ even though he sidelined any responsibility or formal involvement in the matter due to limitations on legal mandates. Nevertheless, the UNHCR has become active in not only commissioning research and network engagements, but also highlighting the “legal protection gap” of environmentally displaced persons.¹¹

Most notably, the United Nations Convention to Combat Desertification (UNFCCC)¹² had earlier officially acknowledged human displacement stemming from environmental factors (emphasis added): “desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty, poor health and nutrition, lack of food security, and those arising from *migration, displacement of persons and demographic dynamics*.”¹³ Further, it emphasises that states parties to the Convention are under the obligation to take into consideration the particular socio-economic conditions of Africa and other variables that lead to internal, regional and international migrations.¹⁴

Formal recognition of environmentally displaced persons at the international level, in particular cross-border movement, was made in Cancun in December 2010 with Article 14 (para. f) of the Cancun outcome agreement on long-term cooperative action under the UNFCCC,¹⁵ inviting states to enhance action on adaptation measures by undertaking, inter alia, the following:

“(f) Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels.”

persons outside the current international legal definition of refugee [to the extent that they were] forced to leave or prevented from returning to their homes because of human made-disasters.”

¹⁰ United Nations High Commissioner for Refugees (2007) “Opening Statement by António Guterres, United Nations High Commissioner for Refugees, at the Fifty-eighth Session of the Executive Committee of the High Commissioner’s Programme” (1 October 2007) *available from*: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4700eff54> [accessed 12 July 2012].

¹¹ McAdam (2011) *Op. Cit.* p. 7.

¹² Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), adopted on 17 June 1994, in force since 26 December 1996, 1954 UNTS 3

¹³ *Ibid.* Preamble

¹⁴ *Ibid.* For e.g., Art. 3(e) regarding particular conditions of the African region states that: “In carrying out their obligations under the Convention, the Parties shall, in the implementation of this Annex, adopt a basic approach that takes into consideration the following particular conditions of Africa (...) (e) the difficult socio-economic conditions, exacerbated by deteriorating and fluctuating terms of trade, external indebtedness and political instability, which induce internal, regional and international migrations”. In addition, Art. 17 (e) on research and development states must “take into account, where relevant, the relationship between poverty, migration caused by environmental factors, and desertification.”

¹⁵ See UNFCCC (2010) Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010 “Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention” U.N. Doc. FCCC/CP/2010/7/Add.1 (15 March 2011). The Cancun Agreements are decisions of the Conference of the Parties (COP) under the UNFCCC and of the Parties to the Kyoto Protocol (CMP). As COP decisions, the Cancun Agreements are not legally binding unlike a new Protocol or an amendment to the UNFCCC or the Kyoto Protocol *available from*: http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf [accessed 12 July 2013].

It recognises the human impact of the effects of climate change, such as displacement and migration. It further sees protection of cross-border displaced persons as a triangulation of efforts that are needed at international, regional, and national levels, and planned relocation as part of protection and assistance measures. In the same vein the Nansen Principles¹⁶ on climate change and displacement, launched at an international conference in Oslo June 2011, further recognised under principle IX that “A more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally.” The issue of protection of persons displaced by environmental change has also become more prominent on the international agenda since the publication of the Foresight Report on Migration and Global Environmental Change.¹⁷

The International Organisation for Migration (IOM)¹⁸ has also contributed to the debate and development agencies, such as the World Bank¹⁹ and the Asian Development Bank,²⁰ have been involved in research on the issue. The Geneva meeting of the Global Forum on Migration and Development (GFMD) in 2010 served as an important occasion for the

¹⁶ See Nansen Principles on Climate Change and Displacement (11 June 2011) are available from: http://www.regjeringen.no/upload/UD/Vedlegg/Hum/nansen_prinsipper.pdf The Principles contain a broad set of recommendations: “to guide responses to some urgent and complex challenges raised by displacement in the context of climate change and other environmental hazards” (Preamble).

¹⁷ The Government Office for Science (2011) “Foresight: Migration and Global Environmental Change (2011) Final Project Report” (The Government Office for Science, United Kingdom) available from: <https://www.gov.uk/government/publications/migration-and-global-environmental-change-future-challenges-and-opportunities> [accessed 12 July 2015].

¹⁸ See for e.g. Laczko F. & Aghazarm C. (2009) Migration, Environment and Climate Change Assessing the Evidence (International Organization for Migration); Brown, O. (2008) “Migration and Climate Change” 31 Migration Research Studies (International Organization for Migration).

¹⁹ The World Bank leads the Global Knowledge Partnership on Migration and Development (KNOMAD), which is envisaged to be a global hub of knowledge and policy expertise on migration and development issues. KNOMAD draws on experts from all parts of the world to synthesize existing knowledge and generate new knowledge for use by policy makers in sending and receiving countries. KNOMAD works in close coordination with the Global Forum on Migration and Development (GFMD) and the Global Migration Group (GMG). The GFMD is a recent initiative of the United Nations Member States to address the migration and development interconnections in practical and action-oriented ways. It is an informal, non-binding, voluntary and government-led process that reflects the progressive acknowledgement of the limits of a strictly national approach to migration questions and implications at a global level in an intergovernmental framework. In view of the societal implications of these issues, civil society representatives have also been involved from the outset in this process. More information on GFMD is available from: <http://www.gfmd.org/process/background> [accessed 12 July 2015]. The GMG is an inter-agency group bringing together heads of agencies to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better-coordinated approaches to the issue of international migration. More information is available from: <http://www.globalmigrationgroup.org/what-is-the-gmg> [accessed 12 July 2015]. The World Bank has established a multi-donor trust fund to implement the KNOMAD. The Swiss Agency for Development and Cooperation (SDC) and the Federal Ministry of Economic Cooperation and Development (BMZ) are the largest contributors to the trust fund. In 2014, we had the opportunity to take part in a Symposium on Environmental Change and Migration held at the World Bank in Washington, DC 28 -29 May 2014. The goal of the symposium was to examine current knowledge about the interconnections between the environment and migration, discuss policy implications of what is known, identify issues and methods to fill gaps of knowledge, and develop a research agenda to improve evidence-based policymaking in this area. More about KNOMAD is available from: <http://www.knomad.org/about-us> [accessed 12 July 2015].

²⁰ See University of Adelaide, Flinders University, University of Waikato (2009) “Climate Change and Migration in Asia and the Pacific” (Asian Development Bank) pp. 25-27.

advancement of discussion of the issue.²¹

Following the 2005 the “Appeal of Limoges”²² in France on environmental and ecological refugees, aimed at “making the international community, states and the wider public aware of environmental degradation and its migratory consequences as well as launch the bases for legal thinking towards the development of an international status of an “ecological refuge””²³ the debate around environmental displacement has been progressively put on the European political agenda at the European Parliament²⁴ but also institutionally at the European Commission,²⁵ the European Council,²⁶ and at the Council of Europe.²⁷

²¹ See Global Forum on Migration and Development (2010) “Report of Proceedings, Fourth Meeting of the Global Forum on Migration and Development” Roundtable 3, Policy and institutional Coherence to address the relationship between migration and development, Assessing the relevance and impact of climate change on migration and development (Mexico, 8-11 November 2010) *available from*: <http://www.gfmd.org/docs/mexico-2010> [assessed 25 November 2014].

²² University of Limoges (2005) CRID Appel de Limoges sur les Réfugiés Écologiques [et Environnementaux] 12 June 2005 is *available from* : <http://www.cidce.org/pdf/Appel%20de%20Limoges.pdf> [accessed 02 November 2011]. The “Appeal of Limoges” Declaration was the outcome of an international academic conference held in France in 2005 that aimed at raising awareness of state and international and regional organisations including non-governmental organisations, civil society and other non-state actors to reflect about the issues surrounding environmental displacement.

²³ See Cournil, C. (2006) “Les Réfugiés Écologiques: Quelle(s) Protection(s), Quell(s) status?” 4 *Revue du Droit Public* p. 1039 pp. 1035-1066.

²⁴ At the EU parliamentary level, the Green Party has been at the forefront of raising the issue of recognition and protection of environmental migrants especially by Jean Lambert, Member of the European Parliament (MEP). In 2002 she launched a report entitled “Refugees and the Environment: the forgotten element of sustainability” where she outlined the need for recognition, protection and assistance of environmentally displaced persons. Her campaigning efforts have been to persuade the European Parliament to include reference in the Common Asylum Policy to environmental refugees. The report is *available from*:

http://www.jeanlambertmep.org.uk/DocumentStore/0206Ref_Env_Rep.pdf [accessed 02 November 2011]. See Later in 2004, in a joint action, both MEPs Anne Isler Béguin and Jean Lambert presented a declaration to the European Parliament of their intention to raise the issue next to the European Commission of globalization and the dangers of climate change. The objective of this declaration was also to raise public awareness regarding the issue. It suggested means of development and intervention at the European level in particular towards the populations most affected by the impacts of climate change and the necessity to put into action a community status of the “ecological refugee” and establish the conditions, rights and attached resources. European Parliament (2004) “Written declaration about the status of the ecological refugee” Doc. EP342.103 (09 February 2004). In September 2009, Andy Vermaut from Belgium was the first one to address a petition to the European Parliament on a legal recognition by the European Union of climate refugees, taking advantage of the right of petition to the European Parliament under Article 227 of the Treaty on the Functioning of the European Union. The petition was declared and the European Commission replied in 2011 and suggested its intention to carry out an analysis of the importance of climate change and movement of people under the Stockholm Programme. The Stockholm Programme was a five-year plan with guidelines for justice and home affairs of the member states of the European Union for the years 2010 through 2014. The programme contained guidelines for a common politics on the topics of protection of fundamental rights, privacy, minority rights and rights of groups of people in need of special protection, as well as citizenship of the European Union. European Parliament. European Parliament Committee on Petitions (2011) “Petition 1312/2009 by Andy Vermaut (Belgian), on behalf of the Pimpampoentje (Ladybird) Climate and Peace Action Group, on legal recognition by the European Union of Climate Refugees” Doc. EP462.644v01-00 (29 March 2011).

²⁵ The European Commission is one of the main institutions of the European Union. It represents and upholds the interests of the EU as a whole. It drafts proposals for new European laws. It manages the day-to-day business of implementing EU policies and spending EU funds *available from*: http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm [accessed 20 March 2010]. At the European Commission level, efforts have been made not only at dialogue and cooperation levels in relation to climate change where they have been key players in assisting climate adaptation measures in Small Islands Developing States and Least Developed Countries but also with regard to exploring the link between climate change and migration with the funding of several projects to give a better insight of the challenges, such as the two-year

Already in 1999, the European Parliament was the first European Union institution to issue a resolution relating to environmental change and migratory movements.²⁸ In 2008, the High Representative of the Union for Foreign Affairs and Security Policy together with the European Commission also issued a report to the European Council raising awareness of environmental change as a “threat multiplier,” including migratory pressures.²⁹ A year later, within the structure of the Stockholm programme,³⁰ the European Council requested of the European Commission “an analysis of the effects of climate change on international migration, including its potential effects on immigration to the European Union.” The 2013 Commission’s Staff working document on climate change, environmental degradation and migration³¹ was the result of this request. The document clearly highlights the dynamics of protection of the EU towards those people, which are most vulnerable to environmental changing conditions.³²

research project EACH-FOR (Environmental Change and Forced Migration Scenarios). The results of the project are *available from*: <http://www.each-for.eu/index.php?module=main> [accessed 02 November 2011]. In May 2011, the European Commission held an experts consultation on “climate change and migration” in order to examine this increasing EU challenge and to put forward new recommendations in the context of the upcoming Communication package on the Global Approach to Migration, which contained a Staff Working paper on Migration and Climate Change. This led to the European Commission Staff Working Document (2013) “Climate Change, Environmental Degradation and Migration”, SWD (2013) 138 Final (16 April 2013).²⁶ Council of the European Union (2008) “Climate Change and International Security” Doc. 7249/08 (03 March 2008). In 2008 the Council of the European Union issued a report drawing attention to the “increased migratory pressures” particularly from Africa due to environmental change and proposed a global European approach to migration that has been under discussion over the past years, which culminated in a new communication on a “global approach to migration.” The report *is available from*: <http://register.consilium.europa.eu/pdf/en/08/st07/st07249.en08.pdf> [accessed 02 November 2011].

²⁷ Council of Europe Parliamentary Assembly (2008) “Environmentally Induced Migration and Displacement: a 21st Century Challenge” Committee on Migration, Refugees and Population, Rapporteur Tina Acketoft Doc. 11785, (23 December 2008), where it is accepted that Europe will not be immune to the impacts of climate change, including migration. The Rapporteur asserts the need for an Additional Protocol to the ECHR regarding the establishment of a right to a healthy and secure environment. In the short term, however, Member States should apply the *non-refoulement*- prohibition (ECHR Articles 2, 3) in an “inclusive” way and manner and award complementary and temporary protection *available from*: <http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11785.pdf> [accessed 02 November 2011].

²⁸ European Parliament (1999) “Resolution on the Environment, Security and Foreign Policy” A4-0005/1999, (28 January 1999) *available from*: http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&SDOCTA=8&TXTLST=1&POS=1&Type_Doc=RESOL&TPV=DEF&DATE=280199&PrgPrev=TYPEF@A4%7CPRG@QUERY%7CAPP@PV2%7CFILE@BIBLIO99%7CNUMERO@5%7CYEAR@99%7CPLAGE@1&TYPEF=A4&NUMB=1&DATEF=990128 [accessed 02 November 2011].

²⁹ European Commission (2008) “Climate change and International Security paper to the European Council” (2008) Doc. S113/08, (14 March 2008) *available from*: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf

³⁰ See European Council (2010) “The Stockholm Programme – An Open and Secure Europe Serving and protecting citizens” Doc. 115/01 *available from*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF> As previously mentioned the Stockholm Programme set out the European Union’s priorities for the area of justice, freedom, and security for the period 2010-14. Building on its predecessors, the Tampere and Hague programmes, it aimed to meet future challenges and further strengthen the area of justice, freedom, and security with actions focusing on protecting citizens’ needs and interests.

³¹ European Commission Staff Working Document (2013) “Climate change, environmental degradation and migration” SWD 138 final, (16 April 2013).

³² *Ibid.* Interestingly, the European Commission’s staff working paper does not picture international migration as a threat to the security of the Union as it earlier did, but rather emphasises the role of the European Union in

More recently, gradual consensus building to address the challenges of cross-border displacement in the context of disasters and climate change has been the basis of the so called-“Nansen Initiative.”³³ Launched in October 2012 by the governments of Norway and Switzerland, it is a state-owned consultative process, outside the U.N., which has included a series of regional consultation meetings in environmental change-prone regions, such as the South Pacific, Central America and the Horn of Africa. It is hoped that this soft, state-driven, and bottom-up approach three-year programme will help develop not only a more coherent and consistent view at the international level to meet the protection needs of those forcibly displaced across borders by environmental change, but also help to develop a more effective normative and institutional approach in this regard.³⁴ Civil society has also progressively mobilised the discussion on this matter.³⁵ With these developments over the years at the international and regional levels, as well as within the academic sphere, the cross-border environmental displacement problem has gained ground within the wider international protection agenda.

3. (De)Constructing a Concept

Currently there is no agreed-upon definition or terminology that can describe those people who are forced to leave their home and territory due to environmental change. One of the excuses often given for the lack of conceptualisation is related to the aforementioned debate on the complexity of the cause of movement. This thinking works to some extent, as a barrier to solidify and use a unique term that can make reference to those that move due to environmental change factors. As a consequence, it results in various distinctive doctrinal constructions that will be analysed in the next section. Nevertheless, as McAdam has rightly highlighted, “[t]he absence of definition may allow for more flexible responses - ad hoc responses within a formalized framework. It may permit States a limited discretion, either by failing to define the term or by giving it a particular meaning in particular instruments. It is not yet clear whether a universally applicable definition of those displaced by climate change

building what we call “protection mechanisms” for people who are or potentially displaced by environmental factors. This is further developed in Chapter 7.

³³ As previously mentioned, the “Nansen Initiative” is an intergovernmental process that was launched in 2012 by Switzerland and Norway to address the challenges of cross-border displacement in the context of disasters and climate change. Its “Protection Agenda” builds upon consultative processes carried out in various regions of the world *available from*: <http://www2.nanseninitiative.org> [accessed 19 April 2015].

³⁴ Kälin, W. (2012) “From the Nansen Principles to the Nansen Initiative” 41 *Forced Migration Review* pp. 48-49.

³⁵ Noteworthy is the work carried out by the Environmental Justice Foundation (EJF), which over the years has raised awareness at the European and international levels on how climate change is already forcibly displacing people from their homes and lands. More information on their activities on this matter is available from: <http://ejfoundation.org/news/ejf-brings-issue-climate-refugees-european-parliament> [accessed 12 July 2015]. See also Environmental Justice Foundation (2014) “‘Falling Through the Cracks’ A Briefing on Climate Change and International Governance Frameworks.” (Environmental Justice Foundation). The UK Climate Change and Migration Coalition an alliance of refugee, human rights, development, and environmental organisations has also been at the forefront of how the rights of affected communities by environmental change must be central to the discussion of how the issue is addressed. The coalition aims at making the voices of those affected and civil society central to the debate. More information on their activities is *available from*: <http://climatemigration.org.uk> [accessed 12 July 2015].

is necessary or desirable.”³⁶

The current failure to reach a common understanding of the categorization of what constitutes an EDP might be due, most in part, to the international and academic community’s myopic view towards taking a holistic approach to environmental change, ignoring contextual vulnerability and their layers. This has consequently led to endless academic and policy discussions on what constitutes an EDP, rather than concentrating on the core of the problem itself; i.e. human beings suffering environmental change and needing protection. As a result, there is a proliferation of labels to describe people movement due to environmental stressors including: *environmental refugee*, *climate refugee*, *environmental migrant*, *environmental displacee*, *climate migrant*, *climate displacee*, *environmentally-induced displacement*, among others and “the differences between these are but narcissism of small differences.”³⁷

But while we may be against labelling people as an “undifferentiated mass - as molecules in a liquid,” conceptualising is still necessary or perhaps unavoidable altogether a concept, Turton explains, “is a mental representation which stands for, or represents something in the external world, such as a table. We need concepts in order to think about the world, to make sense of it, to interpret it and to act in relation to it. You can’t think with a table: you can only think with the concept or representation of a table.”³⁸

Realistically speaking, we could not write about this topic without conceptualising what constitutes forced displacement or in particular what we call an EDP within this study. It is not only about defining or describing it, since we can actually find it out in the real world, but most importantly, it is about “producing or constructing it as an object of knowledge.” We represent them metaphorically because we need to talk about it, think it, and study it in order to communicate it.

The legal landscape craves labels, uses, and perhaps abuses them. The core factor is that we realise that there is not a single correct concept, but that they are all context-specific.³⁹ For example, within the legal landscape, defining EDPs allows governments to know what they are talking about, making them aware of their obligations and deliver targeted legal and policy strategies for those who are affected. More importantly, “[t]hey require us, in other words, to consider who *we* are – what is or should be *our* moral community and, ultimately, what it means to be human.”⁴⁰

³⁶ McAdam, J. (2011b) “Environmental Migration” in A. Betts (ed.) “Global Migration Governance” (Oxford University Press) p. 4.

³⁷ Nicholson, C. (2012) “The Place of Epistemological Due Diligence in Relation to the Social and Political Science of Climate Change: the Case of ‘Environmental Migration’” Paper presentation ClimMig Conference on “Human Rights, Environmental Change, Migration and Displacement” Ludwig Boltzmann Institute Human Rights; IDDRI, SciencesPo. Vienna, Austria, (20-21 September 2012) p. 8 pp. 1-20.

³⁸ Turton, D. (2003) “Conceptualising Forced Migration” 12 Refugee Studies Centre Working Paper (October 2003), University of Oxford p. 2

³⁹ *Ibid.* at p. 6.

⁴⁰ *Ibid.* at p. 8.

3.1 What's in a Label?

While the various environmental displacement labels may be contested and the differences amongst them nearly inexistent, the reality is that scholarship, institutions, and governments have used them to raise attention to the subject, to study it from different perspectives, and to come up with solutions for those affected by environmental matters. This terminology dynamic is important. Demystifying terminology is deemed necessary so we can contextualise and build one for guidance within this research path. In this part, we first concentrate on analysing the most known typology dynamics, having as a common denominator the terms *refugee*, *migrant* and *displaced person* for the environmentally displaced. Then, in the second part, and for reasons of clarity, we outline the parameters of a working definition for cross-border environmental displacement under this study.

3.1.1 Environmental Refugees - The Limited Political and Institutional View

Environmental refugee is the most “catch-all” term within academia and the media.⁴¹ Its usage by prominent personalities is often cited as an indicator of the validity of the term.⁴² As previously stated, the term gained momentum with El-Hinnawi⁴³ as a special category of people in need of protection. The author defined *environmental refugee* as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life.”⁴⁴ Through *environmental disruption* he incorporated all physical, chemical, and biological changes in the environment (or resource base) that are unable to support human life temporarily or permanently. By focusing on the likeliness of people to return to their homes, three types of environmental refugees could be outlined: those who are temporarily displaced but can return to their home once the environmental harm is mended, those who are perpetually displaced and relocated elsewhere, and those who left their original residence in search of a better life because the level of environmental disruption was so high that living there no longer met their daily needs.

⁴¹ See generally, Boano, C. Zetter, R. & Morris, T. (2007) “Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration” Refugee Studies Centre (Oxford University) pp. 1-34. ; Lazarus, D. S. (1990) “Environmental Refugees: New Strangers at the Doors” 2 Our Planet 3 pp. 12-13. ; Leiderman, S. & Hall, J. (1995) “Environmental Refugees and ecological restoration” (Fourth World Project April 1995); Woehiche, M. (1993) “Environmental Refugees” Aussenpolitik III pp.115-143.

⁴² See Kibreab, G. (1997). “Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate”, 21 Disasters 1 p.21; pp. 20-38 referring to Myers on this point. As Kibreab points out, “prominent international personalities are irrelevant in determining the explanatory or predictive value of a term” but there are nevertheless, important in allowing the establishment of the term.

⁴³ It is generally accepted that the term “environmental refugee” was put forward by El-Hinnawi, E. (1985) “Environmental Refugees” (Nairobi, United Nations Environmental Programme). However, Kibreab (1997) *Op. Cit.* p.21 has highlighted that the concept was originally put forward by International Institute for the Environment and Development the previous year in a November briefing document. Conversely, Renaud F. Bogardi J. & Warner K. (2008) “Environmental Degradation and Migration” Berlin Institute für Bevölkerung und Entwicklung p. 1 pp. 1-16 argues its origin to an earlier date during the 1970's and coined by Lester Brown of the Worldwatch Institute.

⁴⁴ El-Hinnawi, E. (1985) “Environmental Refugees” United Nations Environmental Programme.

Jacobson,⁴⁵ Meyers⁴⁶ and Crisp⁴⁷ have also advanced definitions of what is an *environmental refugee* but the term is far from reaching an international consensus.

Generally, these definitions do not differentiate between those people who remain in the country and those who cross the border,⁴⁸ between voluntary and forced migration, or between different types of environmental conditions causing forced movement and if environmental change is a direct or indirect cause of displacement. This leaves great discretion in interpreting the term. Therefore, Castles sees the term *environmental refugee* as too “simplistic one sided and misleading. It implies a mono-causality which very rarely exists in practice (...) [Environmental changes] are part of a complex pattern of multiple causality, (...) which are closely linked to economic, social and political ones.”⁴⁹ What the author seems to suggest, in our view, is that we need to contextualise and emphasise the multi-causality of displacement so that a richer, consensual driven-term emerges.

The importance of differentiating types of movement resides in the question on whether entitlement to refugee protection could be granted under the Refugee Convention. Protection under this instrument is only granted on the basis of a number of criteria, which generally define the status of a refugee. Only those persons who have a well-founded fear of persecution due to their race, religion, nationality, membership of a particular social group, or political opinion are encapsulated as *refugees* with legal entitlements.⁵⁰ The level of potential

⁴⁵ Jacobson, J. (1988) “Environmental Refugees: a yardstick of Habitability” World Watch Paper No. 86, World Watch Institute. The author outlined different categories of environmental refugee such as: those who are displaced due to local environmental disturbances such as earthquake or avalanche, those who migrate since environmental degradation poses an unacceptable high level of health risk or has challenged their livelihoods, and those who resettle because of desertification as a result of land degradation or other permanent unsustainable changes in their home.

⁴⁶ Myers (1993c) *Op. Cit.* p. 752) defined environmental refugees as: “people who can no longer gain a secure livelihood in their erstwhile homelands because of drought, soil erosion, desertification, and other environmental problems. In their desperation, they feel they have no alternative but to seek sanctuary elsewhere, however hazardous the attempt. Not all of them have fled their countries; many are internally displaced. But all have abandoned their homelands on a semi-permanent if not permanent basis, having little hope of a foreseeable return.”

⁴⁷ Crisp, J. (2006) “Environmental Refugees: a UNHCR perspective” (United Nation High Commissioner for Refugees). The author defined environmental refugees as: “people who are displaced from or who feel obliged to leave their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events”

⁴⁸ See generally, Renaud, F. Bogardi, J. & Warner, K. (2008) “Environmental Degradation and Migration” (Berlin Institute für Bevölkerung und Entwicklung).

⁴⁹ Castles, S. (2002) *Op. Cit.* p. 8.

⁵⁰ Convention Related to the Status of Refugees (CRSR or Refugee Convention) adopted on 28 July 1951, in force since 22 April 1954, 189 UNTS 137, Amended by the Protocol relating to the Status of Refugees, adopted on 31 January 1967, in force since 4 October 1967, 606 UNTS 267, Article 1 defines refugee as (emphasis added): A. For the purposes of the present Convention, the term *refugee* shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfill the conditions of paragraph 2 of this section; (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and

protection afforded by this legal framework and subsequent developments of the law of protection of the human person for cross-border-induced displacement will be further explored in Chapter 5.

Kibreab argues that the invention of the term *environmental refugee* is partly “to depoliticise the causes of displacement, so enabling states to derogate their obligation to provide asylum.”⁵¹ The concept is one of convenience, serving the interests of states as a way to justify restrictive refugee policies.⁵² Others, such as Black, see no usefulness of the term and categorically reject it, as environmental change cannot be isolated as a single displacement or migration factor. Just like Castles, Black affirms that the environment is just one of many other factors (such as poverty and socio-political instability, among others) that may induce displacement and migration. From this point of view, Black reiterates that environmental refugees do not exist *per se*.⁵³ Not only the displacement numbers are based on estimates that cannot be relied upon, but also it is rather unlikely that an entire population will have to move because of environmental events. Even if this was to occur, the majority of the population will not cross the border but will be internally displaced. His reasoning lies with the consensus that exists among migration scholars, who affirm that it is not the poorest that are actually part of the international migration flow.

While the objection that environmental change is not the only reason for displacement can be accepted, it also has to be seen - from our perspective- as an autonomous factor contributing to forced displacement. When whole areas are destroyed by environmental disasters or islands-states are threatened to the verge of disappearance and people are forced to flee, denying the existence or protection to people facing these challenges seems naive.

In this context, it is relevant to acknowledge what Bogardi *et al.* did and defend the notion that environmental factors need to be considered as an element that forces people to move from their places of origin, even if such an element cannot be verified in isolation.⁵⁴ As a result, people should be given protection rights similar to refugees due to other factors. The terminology taxonomy that has been put forward within the academic and institutional circles, say the authors, does not have grounding on the CRSR and in no other subsequent international agreement. Millions of people cannot be left without material and legal protection by governments throughout the world. Alternatively, some scholars have suggested the wording *climate refugee*.⁵⁵ Yet climate change is only one element that cannot

being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, *without any valid reason based on well-founded fear*, he has not availed himself of the protection of one of the countries of which he is a national.

⁵¹ Kibreab (1997) *Op. Cit.* p.21

⁵² *Ibid.*

⁵³ See Black, R. (2001) “Environmental Refugees: Myth or Reality?” UNHCR Working Paper N°34.

⁵⁴ Bogardi, J. *et al.* (2007) “Control, Adapt or Flee. How to face Environmental Degradation?” UN Intersections No. 5 (United Nations University).

⁵⁵ Bierman, F. & Boas, I. (2008) “Protecting Climate Refugees: The Case for a Global Protocol” Environment (November-December) *available from:*

be easily singled out from the contextual approach to environmental change. The choice of words does not justify the usage of the term refugee, and (in)directly sidelines other components of environmental change. Separating climate-related movement can, however, be justified for funding purposes and to outline targeted measures, including the reduction of green-house gas emissions or responsibility allocation of human displacement situations.

The term *environmental refugee* has not gained support and has been challenged by international organisations, such as the UNHCR, the IOM, and the UN-Inter-Agency Standing Committee organisations. The verbosity is seen as inaccurate and implying cross-border movement, while environmentally induced displacement, in their view, occurs mostly within national state borders. They reiterate that limiting the refugee concept to the “crossing a border” element may be too simplistic and might dilute the magnitude of the problem. Furthermore, to justify the usage of the term *refugee* it would be necessary to demonstrate a well-founded fear of persecution, as per the Refugee Convention that cannot be attributed to the environment itself.⁵⁶ This makes the reference to the term inadequate and at the same time compromises the constructions of a universal concept for people who are forced to move due to environmental parameters.

All the aforementioned points may be valid, but such a reductionist view fails to cater to the protection needs of people displaced and the overall picture of the effects of human-induced displacement due to environmental factors. Thinking of the cross border element as a point of departure can help us see protection as a dynamic concept of developing both preventative (before displacement) and proactive measures (during and after displacement).

Indeed, there is a general apprehensiveness towards using the refugee conceptualisation for people who are displaced by environmental factors coming from developed countries. This fear is based upon two assumptions: the fear of developed countries of recognising *environmental refugees* that would oblige them to grant the same legal protection as political refugees under current international law, “a precedent that no country has yet been willing to set,”⁵⁷ and the induced fear that this will open doors for responsibility claims for environmental change not only on a moral but also legal basis. In addition, there is hesitance of the “refugee label” by island-states mostly at risk from the effects of climate change, as it may lead to uncoordinated, individual, and dispersed resettlement actions putting at risk cultural and family ties.⁵⁸ At the institutional level, while the question of having the right mandate can be raised, realistically it is the question of available funding that perhaps is the

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html> [accessed 20 May 2012].

⁵⁶ Bogardi J. *et al.* (2007) *Op. Cit.*

⁵⁷ Council of Europe Parliamentary Assembly (2008) Rapporteur Tina Ackefoft Doc. 11785 *Op. Cit.*

⁵⁸ See Barnett, J. (2001) “Security and Climate Change” Research Working Paper No. 7 (Tydall Centre for Climate Change) p. 9 and the discussion regarding the rejection by government officials of the Marshall Islands and Kiribati, about seeking refuge in other countries; Pearce, F. (2000) “Turning Back the Tide” 165 *New Scientist* 2225 (12 February 2000) pp.44-47; McAdam, J. & Loughry, A. (2009) “We Aren’t Refugees” *Inside Story* (29 June 2009) available from: <http://insidestory.org.au/we-arent-refugees> [accessed 20 July 2015].

most worrisome. Rights and budgets seem to go hand in hand with regards to the protection of EDPs.

The “politics of protection” at the different levels of the legal, institutional, and local discourse continue to be a barrier to not only devising satisfactory terminology but also considering existing legal frameworks that could potentially offer solutions for people displaced by environmental factors.

3.1.2 Environmental Migrants - The Limited Voluntary View

Migrants are usually referred to as those persons who voluntarily (rather than forcibly) move; i.e., a situation where other alternative options are available. From this perspective, no migration is an involuntary reflexive reaction because there always is a margin of discretionary power of the decision as to move or not.⁵⁹ The decision to leave may be taken in advance of worsening future environmental conditions and due to declining quality of life in the country of origin. “The category of environmental migration, identified when a person who faces loss of ecosystem services/slow onset hazards moves, will depend on how strongly the environmental signature emerges in the decision to move.”⁶⁰

In reality, the distinction between environmental migrants and ordinary migrants is not so evident because of the identification of the root cause of migration.⁶¹ The term environmental migration has been the one preferred by the Council of Europe and IOM, affirming that these:

“are persons or group of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad.”⁶²

The definition has been criticized mainly by international humanitarian agencies and in particular by UNHCR, as it will blur the definition of the currently established refugees and internally displaced persons.⁶³ Furthermore, one can question to what extent this voluntary decision is not - in reality - a forced one (“no choice option”).

Scholars like Kälin affirm that the legal characterization of the term *migrant* is mostly reserved to individuals who cross the border for work-related reasons. This “understanding is not only enshrined in the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,”⁶⁴ but it is also implicit in the definition of *migrant worker* in the European Convention on the legal status of Migrant Workers (ETS No.093).⁶⁵

⁵⁹ Turton (2003) *Op. Cit.*

⁶⁰ Renaud, F. *et al.* (2011) “A Decision Framework for Environmentally Induced Migration 49 International Migration (S1) pp. 5-29.

⁶¹ *Ibid.* p. 21

⁶² IOM (2007) “Discussion note: Migration and the Environment” Doc. MC/INF/288 (1 November 2007) p. 1.

⁶³ Council of Europe Parliamentary Assembly, Rapporteur Tina Acketoft (2008) *Op. Cit.* p. 16.

⁶⁴ U.N. International Convention the Rights of All Migrant Workers and Members of Their Families, adopted G. A. Res. 45/158 (18 December 1990) Article 2 (1) reads: “The term “migrant worker” refers to a person who is

It is true that the definition *environmental migrant* can be rejected because it aims to include all persons (internally and externally displaced) affected by environmental change. Nevertheless, its encompassing view is important. This view sees that there is no need to distinguish between sudden and slow onset changes in the environment. Further, this assessment focuses on the needs of the displaced people and environmental change as an autonomous and key driver of human mobility not overshadowing other relevant superseding factors of a political, economic, and social nature.

3.1.3 Environmentally Displaced - The Limited Internal View

The term *environmentally displaced* is mostly used within scholarly circles to characterise those people who are forced to leave to save their lives. The environment is here the trigger for displacement. The trigger of these movements is an outcome of both sudden onset and slow onset events, including sea level rise. Displacement in this context can be temporary or permanent. Importantly, these people are generally categorised by those who move within national borders and protected under the 1998 GPID⁶⁶ and the 2011 Operational Guidelines on Human Rights Protection in Situations of Natural Disaster.⁶⁷ This analogy comes from the definition outlined in the GPID of what is an “internally displaced person;” i.e.,

“persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”⁶⁸

The definition emphasis on environmental-induced displacement (deriving from natural or human made-disasters) in need of international protection is of relevance. Also worth mentioning is the inherent obligation within the GPID of the international community in satisfying those people’s needs (their rights and guarantees) when the state of origin is unable to do so.⁶⁹ Therefore, it can be assumed that according to the GPID, the international community’s interference in national sovereignty in cases of environmental change to protect

to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

⁶⁵ Council of Europe Parliamentary Assembly, Rapporteur Tina Acketoft (2008) *Op. Cit.* para. 70.

⁶⁷ Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights Protection in Situations of Natural Disaster were adopted in 2006 but revised in January 2011, Brooking –Bern Project on Internal Displacement *available from:* http://reliefweb.int/sites/reliefweb.int/files/resources/7AB64B7347B975424925781E001B9E72-Full_Report.pdf [accessed 20 July 2013].

⁶⁸ See Annex GPID, paragraph 2.

⁶⁹ Principle 25 (2) of the GPID states (emphasis added) “International humanitarian organizations and other appropriate actors have *the right to offer their services* in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith. *Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.*”

and provide assistance to those internally displaced can generally be accepted. In a way, it strengthens the capacities of the state and “reinforces sovereignty.”⁷⁰

Despite their potential, the GPID and the definition of what constitutes a displaced person is, however, limited, because the population they aim to reach is only the internally displaced. They protect those who live within the state’s remit and do not foresee the cases of those persons who live near to the border that for one motive or another⁷¹ cannot move within their own country (or even avail protection of their government) and are forced to cross the border to a third state. Over the years, however, the term *displaced persons* has endowed a new meaning. U.N. General Assembly resolutions allied with state practice, have broadened the class of those entitled to protection and assistance of the international community.⁷² In this context, the relevance of the term *displaced persons* within the GPID helps us recognise the dynamics of displacement; i.e., that internal displacement (especially in cases of environmental hazards) can potentially be sequenced or interwoven with cross-border displacement, equally deserving special legal attention under international law.

4. Working Definition

4.1 Environmentally Displaced Persons: The Objective Trump

Considering the previously debated aspects, the term *environmentally displaced persons* is adopted in order to avoid the above criticisms of the *environmental refugee* and *environmental migrant*. It also seems to be more realistic within the context of this study, especially when discussing issues of legal protection and obligations of states under international human rights law for people forced to move due to environmentally triggered conditions.

The scope of the term encompasses:

*Environmentally displaced persons are those individuals of a country who for compelling reasons of sudden disasters (in particular cyclones, storms surges and floods) or progressive environmental degradation (in particular drought, desertification, deforestation, soil erosion, water shortages and other climate change related conditions), natural and/or human-made, impacting in their lives or livelihoods are obliged to leave their country of origin temporarily or permanently to a third State.*⁷³

The definition is not intended to be a legal definition, which binds states but rather a descriptive one. It has an instrumental purpose because it can be tested and serve as a

⁷⁰ See Bennet, J. (1998) “Forced Migration Within National Borders: The IDP Agenda” 1 Forced Migration Review pp. 4-7.

⁷¹ As illustrative examples this can include those people that see themselves closer to a border of another country who are desperately in need of shelter due to facing sudden environmental challenges (floods, explosions, volcano eruptions, etc.) or those who face long-term/gradual environmental degradation (e.g., desertification) forces them to move as living there is now presumed impossible and a matter of life and death, being safer and more inexpensive just to cross the border.

⁷² Goodwin-Gill, G. (1986) “Non-Refoulement and the New Asylum Seekers” 26 Virginia Journal of International Law p. 900, pp.897-918.

⁷³ The definition includes some of the items that have been put forward by Myers and Kent (1995) *Op. Cit.* pp. 18-19.

benchmark for further development. Essentially, it builds on the need to take a holistic view to environmental displacement. Only a holistic approach to what constitutes an environmentally displaced person can really capture the current dynamics of human mobility resulting from environmental conditions. However, while some conceptualizations include internally and externally displaced people in their definition, we reserve the term *environmentally displaced person*, within the context of this study, to those people who cross the border especially due to environmental- change variables. The cross-border element helps states and the wider international community recognise displacement and protection as a dynamic process.

The definition also excludes - for limitation reasons and textual space - stateless persons with habitual residence (e.g., cases of submerging island states). However, both internally displaced persons and stateless people will be used as illustrative examples whenever necessary. By using the wording *in particular* we imply that the listing within the definition is not exhaustive but merely indicative. Other displacement dynamics (including conflict and/or development related displacement) can be further included within the scope of the definition. It is a flexible concept embedded in the bedrock of moral and empirical discourses. It is of a moral nature, because it suggests the existence of rights and obligations between the individual(s) and his/her country of origin, which are at risk or even broken when they cross the border to a third state due to environmental conditions. Furthermore, it also bolsters some sort of ethical claim to protection and assistance from third states. It is of empirical nature, because the environment is one of the key drivers that over time will have enhanced and recognised impact on human displacement, seriously threatening people's lives.

The definition includes many of the previously debated issues. The definition aims to fulfil the criteria previously put forward: 1) it is easily understandable, simply written, and provides examples; 2) it focuses not on forced internal displacement but on cross-border forced movement on a temporary or permanent basis, where wide levels of consensus exists with regard to a legal gap in protection and its emphasis is on forced movement ("no option") rather than on a voluntarily made decision and 3) it is - to some extent - measurable and easily documented since it provides a non-exhaustive list that can be applied by government agencies so that discretion can be minimized. New and similar examples of environmental stresses can be added. By avoiding the characterization of cross-border displaced persons as refugees or migrants we try to draw clear lines to assert the protection of environmentally displaced persons by existing international human right guarantees and the obligation of third states for providing an adequate level of protection. The cause for displacement, is therefore, an objective one; i.e., outside an individual's choice. This goes in line with the basic nature of international human rights, which obliges states to respect objective standards of human dignity as defined in universal terms.⁷⁴ The definition builds on this objective trump⁷⁵ throughout the study.

⁷⁴ Saario, V. & Cass, R. H. (1977) "United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation" 7 California Western International Law Journal p. 597, pp. 591-614. The authors assert that the 1948 Universal Declaration of Human Rights reflects the increasing consensus within the wider international polity of states on the nature of fundamental rights and freedoms belonging to each and every

4.2 Root Cause of Displacement

The verbosity of the term includes people that are forced to move across the border due to threatening situations to their life or livelihoods or who have experienced serious harm directly due to climate induced-change, environmental degradation or disasters.

The definition aims to look upon the vulnerability of the individual when their livelihood or life is affected, as well as the impacts on the individual's human rights core (civil and political, as well as economic and social). From the perspective of those displaced by environmental stressors, there is no forceful reason to differentiate between climate-related and other disaster-related causes. As previously mentioned, the concept of environmental change is - in reality - a holistic one (see Chapter 2 section 3). The definition aims to alert us to the fact that from a purely humanely perspective a distinction should perhaps not even be drawn between sudden or gradual displacement because, from the perspective of the individual, the requirement for relocation, assistance and protection, arises in all circumstances (even if different protection solutions can be foreseen). What really matters is the severity of the threat to life and to the person's livelihood or the seriousness of the harm of life or livelihood caused. Gradual or sudden environmental deterioration may lead to different human flows, some will be immediate and massive while others will be fewer and over time, but in both instances represent a serious threat or harm to life and people's livelihoods and a need of legal protection contemplation.

4.3 Type of Displacement

The definition refers to involuntary displacement as opposed to voluntary displacement typical of migratory movements. Migration scholarship describes the process to migrate as a continuum from individuals with no control over their relocation (involuntary) to individuals with absolute control (voluntary).⁷⁶ In this study, we essentially refer to forced movement as comprising a process taking place over time in a space within the context of social, political, economic, and environmental conditions, but where the impact of environmental change over the continuum of time is more enhanced for the environmental driver, where large groups of people become a critical mass and begin to flow across national boundaries into territories of adjoining or other states.

individual, as well as the unanimity of belief that in the general principle of the inherent dignity and worth of the human person requires the respect and protection of the individual's rights.

⁷⁵ See Christiansen, S. (2010) "Environmental Refugees- A Legal Perspective" (Wolf Publishers) p. 17. We borrow the term *objective trump* from the author, which essentially builds on Dworkin's works, who uses the term individual "right as a trump." Dworkin uses the term "right as trump" to imply that an individual may rely on this right and *inter alia* protection from state action.

⁷⁶ See for e.g. Bates, D. (2002) "Environmental refugees? Classifying Human Migrations Caused by Environmental Change" 23 Population and Environment 5 pp. 465-477.

4.4 Consequences of Displacement

The returnability criterion is an essential element to take into account to examine to what extent an environmentally displaced person can be protected against forced return in a third state when the conditions in their country of origin are destroyed. Displacement will be therefore temporary or, permanent if the environmental conditions in the country of origin of the individual affected can (or cannot) be restored.

5. The Environmental Displacement Protection Paradox

There will always be doubts about the impact of environmental change and human displacement. From the previous chapters, we can see that currently there is no certainty about the numbers of human displacement due to environmental factors or even what constitutes an EDP. This can primarily be explained due to two factors: a lack of current mechanisms and research that can account for this reality⁷⁷ on the one hand and the overall lack of certainty of the impact of environmental change (especially climate change). The protection of EDPs has to cope with what we call the *protection paradox* – a theme that appears throughout this study. It states that some of the dangers of environmental change are intangible and that its impact on human displacement are to some extent (in)visible in this day and age. Yet, there is a need to act and not to wait and see for forced displacement of populations to become more visible and acute. For what we know, the amount of people being displaced by environmental factors is becoming a reality and there is no way for the time being to get rid of the current greenhouse gases in the atmosphere. Furthermore, with the increased rate of environmental disasters, it is necessary to deal with those who are increasingly displaced not only within but also beyond borders. This is why the protection of those displaced by environmental factors needs to be seen not as a back-of-the-mind issue but rather a front-of-the-mind one.

Concomittantly, the environmental displacement *protection paradox* invites us to look backwards in order to move forwards. In other words, given the lack of a formalised framework for the environmentally displaced per se it addresses - in the following chapters- the existing legal protection frameworks and underlying principles of forced displacement, which are relevant *in context (de lege lata)* and how they can be utilised, (re)interpreted, revised, and consolidated to protect EDPs now and in the near future (*de lege ferenda*).

6. Conclusion

This chapter analysed the terminology debate behind what constitutes an environmentally displaced person. The chapter notices that there has been an increasing recognition of displacement due to environmental factors at the institutional level and a progressive grounding within the international protection agenda. This was a noteworthy consequence of

⁷⁷ Gradually being overcome by the “Nansen Initiative: Towards a Protection Agenda of People Displaced Across Borders in the Context of Disasters and the Effects of Climate Change” available from: <http://www.nanseninitiative.org> in general, and other relevant studies, -including this one- in particular.

the Cancun agreement on long-term cooperative action under the UNFCCC (Article 14, para.f), which recognised the need for protection of cross-border environmental displacement through a triangulation of efforts at the international, regional, and national levels, and through planned relocation as part of assistance and protection measures. Other regional efforts, in particular those made at the European Union and Council of Europe levels, have further exacerbated the protection debate for those facing environmental displacement. Of note, is the 2013 European Commission's staff working document on "climate change, environmental degradation, and migration" highlighting the dynamics of protection of the European Union legal protection framework towards those who are most vulnerable to climate change conditions. At the same time, other gradual consensus-building frameworks have also been operationalized through the so-called "Nansen Initiative" in particular, to address the challenges of cross-border environmental displacement.

While recognition of the environmental displacement problem within the international legal fora has gained ground, the same cannot be said with regards to the conceptualisation of environmental displacement. The myriad terms used to describe those displaced by environmental factors among scholarly works denotes the lack of a comprehensive approach to displacement in this context that could potentially translate in the development of conflicting protection standards and waste of resources. In reality, the differentiation between terms is but egocentric and minor terminology differences that aim at the same human being(s) in need of protection but that have nevertheless, the potential to halt and diverge the protection debate. This gives governments the opportunity not to tackle the issue of environmental displacement seriously, allowing them somewhat to depoliticise the causes of displacement and derogating from their general obligations to provide asylum.

By outlining a working and descriptive definition of what constitutes an environmentally displaced person within the remit of this study, we aim at not only delimiting the discussion to cross-border forced environmental displacement but most importantly to elaborating a flexible definition that is easily understandable with an instrumental purpose since it can be tested and serve as a benchmark for further development.

Finally, the chapter wished to highlight the environmental displacement paradox by inviting us to work against the backdrop on uncertainty not only related to environmental change predictions, but also those related to human displacement. Bearing this in mind, it proposes to look at the international protection regime *in context* – concentrating on the existing legal protection frameworks, the underlying principles of forced displacement, and the *inter alia* obligations of states through an exercise of (re)interpretation, revision, and consolidation of protection towards EDPs. This will form the basis for our discussion in the following chapters.

Part II - The Legal Protection of Environmentally Displaced Persons: Protection in Context

After setting the general scene of environmental change and human displacement and defining what constitutes an EDP within the context of this study, this part concentrates on “Protection in Context.” In other words, it scrutinises how people facing threats from the environment are currently protected under international human rights law. It does so by analysing the existing legal protection frameworks, together with the underlying principles of forced displacement and *inter alia* states’ obligations an exercise path of (re)interpretation, revision, and ultimately of consolidation of EDPs protection.

Traditionally, international protection is predicted on the lack of national state protection and the host state obligations towards refugees. The status and protection of EDPs under refugee law will be the scope of the analysis of Chapter 5. First however, the much needed holistic approach to protection of environmental displacement obliges us, to take a step back, i.e. to analyse the protection obligations of the country of origin or home states. Both chapters seem justified as a means to grasp the existing human rights legislation that offers protection to those facing threats from the environment and how or to what extent can we narrow the existing EDPs legal protection gap.

While the protection obligations of the home and host states are offered in two separate chapters, for presentation reasons, they must be seen as conflating rather than conflicting. This dual axis approach provides the basis for understanding the development of a comprehensive understanding of EDPs protection from and after cross border displacement occurs which gains an arguable, pragmatic ground in Part III.

Chapter 4. Protection Obligations of States under International Human Rights Law and Related Instruments

1. Introduction

Before looking at the third state obligations for protecting those who are displaced across an international border due to environmental factors, we explore the obligations of the home state. As previously mentioned, this exercise is essential for a better understanding of the holistic nature of protection. The country of origin has the primarily responsibility to *respect* (negative duty of non-violation) to *protect* (positive duty to prevent violation, including of private an international actors) and to *fulfil* (positive duty to take actions for improvement) the human rights of EDPs. This chapter concentrates on states’ obligations under international human rights law, in parallel scrutiny with regional and international jurisprudence. The aim is to establish which duties the state of origin has with regards to protecting human rights and ensuring a healthy and safe environment by avoiding environmental degradation. A further aim is to establish how existing state duties are transferrable in the environmental change context, in particular what protection obligations

states have towards EDPs. The analysis shows that home states have an underlying duty to prevent human rights violations and by analogy to protect first and foremost, EDPs from displacement. This duty is further consolidated in a number of other inter-connected normative texts that place obligations on states (explicitly and implicitly) to prevent environmental displacement, as well to ensure the protection of human rights.

2. The Human Rights Impacts of Environmental Change

Environmental degradation and the effects of environmental change have direct and indirect impacts on the effective enjoyment of human rights. The January 2009 the report of Office of the United Nations High Commissioner for Human Rights (OHCHR) describes the the implications of environmental change for a wide range of human rights, such as the right to life, health, food, housing, water, sanitation, and self-determination.¹ Countries where the effects of environmental change and degradation occur are mostly vulnerable to human displacement, due to the lack of available adaptation resources, poor human resource implementation capacity, and often a deficient human rights protection record.² These countries are also the ones least likely to proactively lobby governments at the national and international levels.

By 1968, the U.N. General Assembly (UNGA) acknowledged the continuing and accelerating degradation of the quality of the human environment and its “consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries.”³ The UNGA has also highlighted the evolving relationship between man and his environment in the wake of modern science and technological developments.

Undoubtedly, a new emerging approach to the environmental degradation problem and its human impacts was set for the first time, in the 1972 Stockholm Declaration which stated that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁴ A couple of years later, the Rio Declaration reiterated that “[h]uman beings [...] are entitled to a healthy and productive life in harmony with nature.”⁵ The influence of these -albeit soft law-

¹ U.N. Human Rights Council (2009), “Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights” U.N. Doc. A/HRC/10/61 (15 January 2009) Annex pp. 1-33 *available from*: <http://www.unhcr.org/refworld/docid/498811532.html> [accessed 6 February 2012].

² Humphreys, S. (2010) “Introduction: Human Rights and Climate Change” in S. Humphreys (ed.) “Human Rights and Climate Change” (Cambridge University Press) p. 1.

³ UNGA (1968) “Resolution 2398 (XXII)” U.N. Conference on the Human Environment (03 December 1968).

⁴ Declaration of the UN Stockholm Conference on the Human Environment (“Stockholm Declaration”), adopted on 16 June 1972, UN Doc. A/Conf.48/14/Rev 1, 31 ILM 874, Principle 1.

⁵ Declaration of the UN Rio Conference on Environment and Development (“Rio Declaration”), adopted 14 June 1992, UN Doc. A/Conf.151/5Rev 1, 31 ILM 874, Principle 1.

instruments linking both the environment and human well-being have had over the years their effects replicated in both regional⁶ and national⁷ legal frameworks.

A more explicit link between human rights and the environment was consolidated with the adoption of the 1998 Aarhus Convention.⁸ The document emphasises the need “to contribute to the protection of the right of every person of present and future generations, to live in an environment adequate to his or her health and well-being (...).” The Convention requires its forty-seven state parties (currently Europe and Central Asia)⁹ to protect the environment by gathering environmental data, ensure access to environmental information, promote public participation in decision making processes impacting upon the environment and ensure legal redress (both where public information is denied or for acts damaging the environment in infringement of national law).

More recently, the consolidation of the relationship between human rights and the environment comes from Prof. Knox, the Human Rights Council appointed Independent Expert on human rights and the environment. In his first preliminary report, he has acknowledged that, while a new right to a healthy environment has not been proclaimed within the international legal fora, some fundamental aspects of the relationship between the two areas are now “firmly established.”¹⁰ This includes substantive obligations of states to adopt legal and institutional frameworks against environmental harm that interferes with the

⁶ See for e.g. African Charter on Human and Peoples’ Rights (ACHPR or “Banjul Charter”) adopted 27 June 1981, in force since 21 October 1986, 21 ILM 58, Article 24 states: “All peoples shall have the right to a general satisfactory environment favourable to their development”; Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (“Protocol of San Salvador”, adopted on 17 November 1988, in force since 16 November 1999, OAS Treaty Series No. 69, 28 ILM 161 states under: “Right to a Healthy Environment” Article 11 (1) “Everyone shall have the right to live in a healthy environment and to have access to basic public services”; Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, adopted 11 July, in force since 25 November 2005 states under Article 18 women “shall have the right to live in a healthy and sustainable environment” and Article 19 “the right to fully enjoy their right to sustainable development”; Arab Charter on Human Rights (ArCHR) adopted by the Council of the League of Arab States in 2004, in force since 2008 under Article 38 includes right to a healthy environment as part of the right to an adequate standard of living that ensures well-being and a decent life.

⁷ See for e.g. the recognition of right to healthy environment under the 1958 Constitution of France which has included in their Preamble the 2008 Charter of the Environment Article 1; 1998 Constitution of Brazil Article 225; the 2005 Portuguese Constitution Article 66; the 2008 Constitution of Ecuador Article 66 (27); For more on the constitutionalisation of the right to the environment see Kiss A. (1989) “Definition et Nature Juridique d’un Droit de l’Homme à l’Environnement” in P. Kromarek (ed.) “Environnement et Droits de l’Homme” (Unesco 1989) pp. 13-28; pp. 22-23; UN Commission on Human Rights, Final Report prepared by Mrs Fatma Zohra, Special Rapporteur (1994) “Review of further Developments in fields with which the Sub-Commission has been concerned Human Rights and the Environment” UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994) pp. 87-97, Annex III; Boyd, D. (2012) “The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment” (UBC Press).

⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted on 25 June 1998, in force since 30 October 2001, 2161 UNTS 447.

⁹ See UN Economic Commission for Europe, Aarhus Convention, Status and Ratifications *available from* <http://www.unece.org/env/pp/ratification.html> [accessed 24 October 2014].

¹⁰ U.N. Human Rights Council (2012) “Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox” U.N. Doc. A/HRC/22/43, (24 December 2012) p. 1, 7.

enjoyment of human rights (including particular vulnerable groups of the population) and their corresponding procedural obligations (provide information, facilitate public participation, and redress mechanisms).¹¹

2.1 Determining a Link between Environmental Displacement and Human Rights

The linkage between environmental displacement and human rights has not been totally absent from the international arena. In 1990, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Fatma Zhora Ksentini as its Special Rapporteur on human rights and the environment. In her final report, she not only highlights the relationship of existing human rights to the environment, but also the linkage between human displacement and the barrier to an effective exercise of human rights. In her own words: “[d]rought and desertification cause massive displacement of peoples, social insecurity and widespread living conditions at a level not commensurate with human dignity.”¹² This emphasis on human dignity propels the author to indicate that, “at a minimum, such [environmentally] displaced persons have the right to life, the right to health, food and shelter, and the right not to be sent to any location where their lives or security is endangered.”¹³ This minimum level of protection of the dignity of a human person must be guaranteed by states and the international community.

The increasing number of disasters around the world in particular the on growing consciousness and evidence of the effects of climate change (sea level rise and disappearing islands states, food and water shortages, sanitary crises, displacement and loss of entire communities and human lives, including their culture) has been more and more visible in several other official texts.¹⁴ This has paved the way for a number of regional declarations

¹¹ U.N. Human Rights Council (2013) “Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox” U.N. Doc A/HRC/22/53, (30 December 2013).

¹² U.N. Commission on Human Rights, Final Report prepared by Mrs Fatma Zohra, Special Rapporteur (1994) *Op. Cit.* (U.N. Doc. E/CN.4/Sub.2/1994/9) p. 50 para. 178. Of note is that within the report itself there is a definition of the term *environmental refugee* that is rather holistic, encompassing “anyone forced to leave his or her normal habitat because of serious environmental disruption. This includes those who flee their homes temporarily and those forced to flee permanently, internally or across international borders.” para. 155.

¹³ *Ibid* p. 44 para. 154.

¹⁴ See U.N. Human Rights Council (2008) “Human Rights and Climate Change” U.N. Res. A/HRC/RES/7/23 (28 March 2008) “Concerned that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights” Para.1; U.N. Human Rights Council (2009) “Human Rights and Climate Change” U.N. Res. A/HRC/RES/10/4 (25 March 2009) “Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence” Para. 7.; Organization of American States General Assembly Resolution (2008) “Human Rights and Climate Change in Americas” AG/Res. 2429 (XXXVIII-O/08) (3 June 2008) paras 2-3 “2. To pursue and step up the efforts being made from within the OAS to counter the adverse effects of climate change, and to increase the resilience and the capacity of vulnerable states and populations to adapt to the phenomenon of climate change. 3. To express an interest in the progress made in other spheres, in the global efforts to face climate change, in particular with regard to the exploration of possible links between climate change and human rights.” See also Council of Europe General Assembly (2009) “Environmentally Induced Migration and Displacement: a 21st-Century Challenge” Recommendation 1862 (30

codifying the link between displacement and human rights. As a way of example, the 2007 Male Declaration¹⁵ on the Human Dimension of Global Climate Change adopted by SIDS recognized that “climate change has clear and immediate implications for the full enjoyment of human rights.”¹⁶ A year later, the Niue Declaration¹⁷ showed its deepest concern of the serious impacts of and growing threat posed by climate change to the economic, social, cultural and environmental well-being and security of the Pacific Island countries, highlighting as a matter of urgency measures of adaptation, including relocation.

Overall, and in agreement with Judge Weeramantry in its separate opinion regarding the Gabčíkovo-Nagymaros Project,¹⁸ “the protection of the environment is a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all human rights spoken of in the Universal Declaration and other human rights instruments.”¹⁹ A healthy environment is an essential component of human rights law, and particularly relevant for EDPs who are part of this global village of permanent emergencies of environmental degradation and change.

2.2 The Country of Origin as the Primarily Responsible Actor for Human Rights Protection

The OHCHR message on disaster risk reduction neatly summarises and provides an adequate context to the discussion on the protection of people facing threats from the environment and corresponding states obligations:

January 2009), para. 3 “The Assembly recalls the Council of Europe's duty to promote the universal protection of human rights for all vulnerable groups and to improve, whenever necessary, legislation to this end. It encourages member states to assume a pioneering role in standard setting in the field of protection of people compelled to leave their homes mainly or exclusively for environmental reasons” and Council of Europe General Assembly (2009) “Challenges posed by Climate Change” Rec. 1883 (22 September 2009) para. 4.2 “explore the linkages between climate change and human rights in Europe, including the implications of climate-change-related impact on the effective enjoyment of human rights, and the role that human rights obligations can play in strengthening international policy making in regard to climate change.”

¹⁵ Male Declaration on the Human Dimension of Global Climate Change, adopted 14 November 2007 by SIDS. It was presented to the UNFCCC (COP 13) in December 2007 *available from*: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf [Accessed 15 February 2013].

¹⁶ *Ibid.* Preamble para 12.

¹⁷ Niue Declaration on Climate Change, 39th Pacific Islands Forum, Forum Communiqué, Annex B (19 – 20 August 2008) *available from*: <http://www.forumsec.org/pages.cfm/newsroom/press-statements/2013/2008/final-communicue-of-39th-pacific-leaders-forum-matavai-resort-niue.html> [accessed 24 October 2014].

¹⁸ The Gabčíkovo Dams are a large barrage project on the Danube. It was initiated by the Budapest Treaty of 16 September 1977 between the Czechoslovak Socialist Republic and the People's Republic of Hungary. The project aimed at preventing catastrophic floods, improving river navigability and producing clean electricity. Only a part of the project has been finished in Slovakia, under the name Gabčíkovo Dam, because Hungary first suspended then tried to terminate the project due to environmental and economic concerns. Slovakia proceeded with an alternative solution, called "Variant C", which involved diverting the Danube, the border river. This caused an international dispute between Slovakia and Hungary. Both parties turned to the International Court of Justice for a ruling.

¹⁹ ICJ, Separate Opinion Judge Weeramantry (1997), “Gabčíkovo-Nagymaros Project” (25 September 1997), pp. 90, 92.

“All states have positive human rights obligations to protect human rights. Natural hazards are not disasters, in and of themselves. They become disasters depending on the elements of exposure, vulnerability and resilience, all factors that can be addressed human (including state) action. A failure (by governments and others) to take reasonable and preventative action to reduce exposure and vulnerability and to enhance resilience, as well as to provide effective mitigation, is therefore a human rights question.”²⁰

The International Law Commission, under the leadership of Eduardo Valencia-Ospina, Special Rapporteur “on the protection of persons in the event of disasters,” in his preliminary report has further emphasised that: “[s]tates are under a permanent and universal obligation to provide protection to those on their territory under the various international human rights instruments and customary international human rights law.”²¹

Certainly the extension of the human rights regime to environmental displacement context is entrenched in the application of the universality of the human rights regime, allied to the legally binding obligations owned especially by the state of origin: to *respect* (refrain from violating human rights), to *protect* (to intervene and take protective measures on behalf of the victim against threats imposed by others or arising from the situation) and to *fulfil* (provide access to goods and services to enable people to enjoy their rights free from discrimination) to individuals and to some extent groups. These tripartite obligations of states were elaborated by Eide, the UN’s Special Rapporteur for Food, in the early 1980’s. Later, Van Hoff replaced the obligation to fulfil by two more nuanced obligations, to *ensure* and to *promote*. These are called “programmatic,” meaning that they require a positive action by the state and have a progressive (temporal) element.²² In the words of Scott: “while the obligation to respect is the classic negative obligation of non-interference, forbidding a state to directly encroach upon a right. The other three require varying degrees of positive action or state policy.”²³ This new level of understanding that transcends the classical notions of negative and the varying degree of positive duties of states is relevant to have mind in the context of environmental displacement and when we generally refer in the next sections to home states’ negative and positive duties.

Indeed, states’ obligations are confirmed in many treaties and have been elaborated on in both regional and international jurisprudence. It is important to establish in the following sections what duties states have with regards to environmental degradation and how they arguably are transferrable within the environmental change context in particular with regards to protecting EDPs. While the whole arena of human rights is affected by environmental change (see Table 3), this part offers a cursory analysis of the most directly affected and the

²⁰ OHCHR “Organisation profile: Policies and Programmes in DRR” *available from:*

<http://www.preventionweb.net/english/professional/contacts/profile.php?id=1370> [accessed 20 March 2012].

²¹ ILC (2008) “Preliminary Report on the Protection of Persons in the Event of Disasters by Mr. Eduardo Valencia-Ospina, Special Rapporteur” 60th Session, UN Doc A/CN.4/598 (5 May 2008) para. 25.

²² Van Hoof, G.J.H. (1984) “The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views” in P. Alston & K. Tomasevski (eds.) “The Right to Food” (Martinus Nijhoff) p.106.

²³ Scott, C. (1989) “Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights” 27 Osgoode Hall Law Journal 3 (Fall) p. 834; pp.769-878.

specific state obligations deriving from the analysis of (quasi) judicial decisions of international and regional human rights bodies.²⁴

Table 3 – The human rights impacts of environmental change

Climate Impact	Human Impact	Rights Implicated
Sea Level Rise <ul style="list-style-type: none"> Flooding Sea Surges Erosion Salination of land and water 	<ul style="list-style-type: none"> Loss of land Drowning, injury Lack of clean water, disease Damage to coastal infrastructure, homes, and property Loss of agricultural lands Threat to tourism, lost beaches 	<ul style="list-style-type: none"> Self-determination [ICCPR;ICESCR,1] Life [ICCPR, 6] Health [ICESCR, 12] Water [CEDAW,14; ICRC 24] Means of subsistence [ICESCR,1] Standard of living [ICESCR, 12] Adequate housing [ICESCR,12] Culture [ICCPR, 27] Property [UDHR,17]
Temperature Increase <ul style="list-style-type: none"> Change in disease vectors Coral bleaching Impact on Fisheries 	<ul style="list-style-type: none"> Spread of disease Changes in traditional fishing livelihood and commercial fishing Threat to tourism, lost coral and fish diversity 	<ul style="list-style-type: none"> Life [ICCPR, 6] Health [ICESCR, 12] Means of subsistence [ICESCR, 1] Adequate standard of living [ICESCR, 12]
Extreme Weather Events <ul style="list-style-type: none"> Higher intensity storms Sea Surges 	<ul style="list-style-type: none"> Dislocation of populations Contamination of water supply Damage to infrastructure: delays in medical treatment, food crisis Psychological distress Increased transmission of disease Damage to agricultural lands Disruption of educational services Damage to tourism sector Massive property damage 	<ul style="list-style-type: none"> Life [ICCPR,6] Health [ICESCR,12] Water [CEDAW,14; ICRC 24] Means of subsistence [ICESCR,1] Adequate standard of living [ICESCR, 12] Adequate and secure housing [ICESCR,12] Education [ICESCR,13] Property [UDHR,17]
Changes in Precipitation <ul style="list-style-type: none"> Change in disease vectors Erosion 	<ul style="list-style-type: none"> Outbreak of disease Depletion of agricultural soils 	<ul style="list-style-type: none"> Life [ICCPR,6] Health [ICESCR,12] Means of subsistence [ICESCR,1]

Source: Maldives Submission under Resolution Human Rights Council 7/23 (2008) available from: http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf

3. Protection Obligations of States under International Human Rights Law: A Survey of Illustrative Examples

3.1 Considerations Related to the Right to Life

The right to life is protected and well established in major international and regional frameworks such as the Universal Declaration of Human Rights²⁵ (UDHR), the International Covenant on Civil and Political Rights²⁶ (ICCPR), the African Charter on Human and People’s Rights²⁷ (Banjul Charter), the American Convention on Human Rights²⁸ (ACHR) and the European Convention on Human Rights²⁹ (ECHR). It has been referred to as the “first right of man”³⁰ and the most fundamental of all rights³¹ from which no derogation is

²⁴ The (quasi-) judicial decisions discussed below are from the U.N. Human Rights Committee (UNHRC) or Committee on Civil and Political Rights (CCPR); the Committee on Economic, Cultural and Social Rights (CESCR) the European Court of Human Rights (ECtHR); the Inter-American Commission on Human Rights (IACmHR); the Inter-American Court of Human Rights (IACtHR) and the African Commission on Human and People’s Rights (ACmHRP).

²⁵ Art. 3 of UDHR (1948).

²⁶ Art. 3 of the ICCPR (1966).

²⁷ Article 4 Banjul Charter (1981). Of importance is that the Banjul Charter does not contain a derogation clause; this means that the limitations on rights provided by the Charter cannot be justified by emergencies or other special circumstances, in contrast to most international human rights instruments.

²⁸ Article 4 ACHR (1978).

²⁹ Article 2 ECHR (1950).

³⁰ Newman, F. & Vasak, K. (1982) “Civil and Political Rights in K. Vasak (ed.) “The International Dimensions of Human Rights” 2 (UNESCO) p. 144.

permitted, even in the case of a public emergency.³² In its General Comment 6³³ of the ICCPR on the scope and content of the right to life the United Nations Human Rights Committee (HRC) stressed the right to life as “supreme” and one that should not be interpreted in a restrictive way. The committee has highlighted that the inaction of states to prevent, mitigate, or remedy life-threatening harms from environmental degradation or change (within national borders or effective control of the situation) could theoretically amount to a violation of the right to life. The *jus cogens* essence of the right to life emphasizes the importance of the state of origin as the duty-bearer not only in cases of inadequate action but also in case of failure when it was supposed to prevent its violation.³⁴ In a way, it recognizes today’s complexity of violations of human rights by national and international actors where governments cannot simply rely on non-interference in the enjoyment of a particular human right. Instead, the state is required to take positive action to ensure that traditional civil and political rights are guaranteed.

The HRC has reinforced this idea under its General Comment No.31, acknowledging that state parties have both positive and negative obligations.³⁵ States are required to take positive actions in order to protect human life, reduce child mortality; increase life expectancy; and eradicate hunger, malnutrition, and the proliferation of diseases.³⁶ The committee has “opened the door for the right to life to stretch beyond the traditional threat coming from public authorities to include environmental threats affecting the welfare and livelihoods of millions of people around the world.”³⁷ Environmental stresses act as a threat multiplier in already-fragile regions, aggravating the conditions that lead to failed states, challenging global peace and stability, putting at stake people’s lives.³⁸

There are particular communities at risk, especially those living in the Arctic and coastal regions. These communities are already suffering from the impacts of environmental change on their right to life. In 2005, the *Inuit petition* to the Inter-American Commission on Human Rights (IACmHR) explained the adverse effects of climate change on their right to life, stating: [c]hanges in ice and snow jeopardize individual Inuit lives, critical food sources are threatened, and unpredictable weather makes travel more dangerous at all times of the

³¹ HRC (2004) “General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant” U.N. Doc. CCPR/C/21/Rev.1/Add.13 (29 March 2004).

³² HRC (1982) CCPR “General Comment No. 6: Article 6 (Right to Life)” (30 April 1982).

³³ *Ibid* para. 1.

³⁴ Leib, H. L. (2011) “Human Rights and the Environment Philosophical, Theoretical and Legal Perspectives” (Brill) p. 72.

³⁵ HRC (2004) CCPR General Comment No. 31 *Op. Cit.* para. 6.

³⁶ HRC (1982) CCPR General Comment No. 6 *Op.Cit.* para. 5.

³⁷ Leib (2011) *Op. Cit.* p. 73.

³⁸ This was highlighted in recent reports and studies by national governments: the United Kingdom of Great Britain and Northern Ireland (2008) “The National Security Strategy of the United Kingdom: Security” in an interdependent world; German Advisory Council on Global Change (2008) “World in transition – Climate Change as a Security Risk.” Climate change as a global challenge to peace and security was also emphasised in 2007 by the Norwegian Nobel Committee: “The chief threats may be direct violence, but deaths may also have less direct sources in starvation, disease or natural disasters. A goal in our modern world must be to maintain “human security” in the broadest sense” *available from:*

http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/presentation-speech.html [accessed 23 April 2012].

year.”³⁹ The petition highlighted the responsibility of the U.S. government of the failure to take appropriate action to tackle climate change. Despite the rejection of the Inuit petition by the Commission it has nevertheless, in other occasions, stated that the “realisation of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment.”⁴⁰ In this context, the IACmHR did not limit its interpretation of the right to life to Article 4 of the American Convention on Human Rights (ACHR) as protection solely against arbitrary killing, but expanded its approach.

The connection between and the right to life and health and the role of the state to protect these rights was also emphasised by the IACtHR, first, in the *Yanomami Community v Brazil*⁴¹ case and later in *Sawhoyamaya Indigenous Community v Paraguay*.⁴² Each of these involved the lives and well-being of indigenous populations. In the latter, the court acknowledged the failure of Paraguay to protect the right to life of the Sawhoyamaya, by failing to protect their lands and displacing them to peripheral roadside areas thereby causing them to lose their traditional means of subsistence.⁴³ As a consequence, many members of this community, including older people and children, died due to undernourishment and lack of medical attention. The court sustained that “[s]tates have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right”⁴⁴ and “must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life.”⁴⁵ The right to life is warranted by states’ positive obligations. The Inter American System (in)directly advances the protection of the environment for present and future generations, sustaining that states should take the necessary legal measures to prevent the violation of the right to life.

Numerous cases decided by the ECtHR have responded to claims of violations of Article 2 of the ECHR. The relevance of the European jurisprudence for environmentally induced

³⁹ IACmHR, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (“Inuit petition”) (7 December 2005) pp.90-91. This petition filed with the Inter-American Commission on Human Rights in December 2005, on behalf of Inuit in the United States and Canada, claims that U.S. climate change policy violated their rights. Although unsuccessful, the petition explains how Inuit lives are at jeopardy from the effects of climate change: the sea ice on which Inuits travel and hunt freezes, thaws earlier, and is thinner; food supplies are threatened, making harvesting more difficult; increases of unforeseen weather events and decreases in snow disables the Inuit from building emergency shelters, which have caused increased life casualties and accidents among hunters; and the decrease in summer ice makes travelling more dangerous due to rougher seas and increases of dangerous storms available from: <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> [accessed 13 April 2011].

⁴⁰ IACmHR, *The Report on Human Rights Situation in Ecuador*, OAS/Se.L/V/II.96, Doc.10 rev.1 (24 April 1997) Chap. VIII.

⁴¹ IACmHR, *Yanomami Community v Brazil* Case No. 7615 (5 March 1985) paras. 175,176,177. The actions of the Brazilian government in allowing the construction of a trans-Amazonian highway in the Yanomami territory and the exploitation of its surrounding mineral resources lead the influx of non-indigenous populations allied to the spread of diseases resulting in the decimation of lives. Among other things, the court found that the state failed to take appropriate timely and effective measures to protect the integrity of Yanomami rights to life, liberty, and personal security, guaranteed by Article 1 of the American Declaration.

⁴² IACtHR, *Sawhoyamaya Indigenous Community v Paraguay*, Series C no. 146 (29 March 2006).

⁴³ *Ibid.* Article 1 (2) ICCPR

⁴⁴ *Ibid.* para. 151.

⁴⁵ *Ibid.* para. 153.

displacement is mainly focused on two important cases. The first one, *Budayeva v Russia*,⁴⁶ deals with the failure of the state to prevent a mudslide that destroyed a dam (leading to 8 deaths), and the second case, *Öneriyildiz v Turkey*,⁴⁷ concerns the explosion of methane at a waste plant (leading to the death of 26 and injuring 11 others). In both cases, the court emphasised the importance of the state not having an adequate framework to prevent the threats to the right to life and the need for states to take positive measures to protect those whose life might be at risk within their jurisdiction.

Under the *Öneriyildiz* ruling, the key point is that the risks were “immediate and known” insofar as their eventual likelihood was previously documented and highlighted to the Turkish national authorities in a report nearly two years earlier.⁴⁸ The state knew of the potential and actual harm of industrial and other “dangerous activities” and had a duty to act. The court affirmed that the right to life “does not solely concern deaths resulting from the use of force by an agent of the State but also [...] lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction,” and stressed that “this positive obligation entails above all a primary duty on the State to put into place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”⁴⁹ In reality what the court acknowledges is that the threshold of harm relates to inaction by the state not to harm the environment alone but also the duty to protect right-holders from environmental harm.

In the same vein, the case regarding the fatal mudslide, the European court highlighted the importance of the Russian government in protecting people’s basic human rights before, during and after a particular disaster occurs. The court concluded:

“In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that has been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use [...] The scope of positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.”⁵⁰

The court found that Russia did not have in place an early-warning system to facilitate evacuation in time, ignored the early warnings that a mudslide might happen, disregarded the protection and repair of dams,⁵¹ and further, did not conduct any investigations into the causes of the mudslide.⁵² The judgement determined that positive and procedural duties of states arise from the right to life when a natural hazard is clearly identifiable and the state has

⁴⁶ ECtHR, *Budayeva and Others v Russia*, Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (20 March 2008) para. 132.

⁴⁷ ECtHR, *Öneriyildiz v Turkey* Application No. 48939/99 (30 November 2004) paras. 89-90.

⁴⁸ *Ibid.* para 101. The explosion occurred in 23 April 1993 and reporting evidence next to the government authorities was made available on 27 May 1991.

⁴⁹ *Ibid.* paras. 128-129.

⁵⁰ *Ibid.* para. 137.

⁵¹ ECtHR, *Budayeva and Others v Russia Op. Cit.* paras. 147-58.

⁵² *Ibid.* paras 159-160.

the effective means to mitigate the risk. Similarly, in *Kolyadenko v Russia*⁵³ the court found a breach of Article 2 in a situation where the government failed to impose planning controls in an area at risk of flooding, placing citizen's lives at risk.

In the context of environmental displacement, this acknowledgment puts into perspective two main ideas: firstly, of the need to have adequate frameworks to protect the right to life (both to prevent and reduce the risk of its violation) and secondly, that the breach of the right is effectively tackled. Considering the loss of life that has occurred in many human-induced climate change instances - hurricanes, storms, and heat waves - over the past years, one can foresee in the near future claims (for example in European Courts) towards states for their irresponsibility in not tackling the problem of environmental change proactively or for not complying with mandatory reduction greenhouse gas emissions. The same can be true with regards to pollution and generally environmental degradation. As Judge Jambrek puts it, in his concurring opinion in *Guerra and Others v Italy*:⁵⁴

“It may therefore be time for the Court's case law on Article 2 (right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life. Article 2 also appears relevant and applicable to the facts of the instant case, in that 150 people were taken to hospital with severe arsenic poisoning. Through the release of harmful substances into the atmosphere, the activity carried on at the factory thus constituted a “major accident hazard dangerous to the environment.”

In a way, legal judgement is evolving to considering situations of real risk towards a preventive approach to avoid violations of human rights, including those that are or potentially will be displaced. In this context, and in order to avoid further risks, in 2008, the government of the Maldives submission to the OHCHR as part of its preliminary study on climate change and human rights described how climate change (sea level rise, warming water and melting ice) endangers the right to life of its citizens (increased floods, storms surges, and erosion).⁵⁵ By 2025 predictions of increase 0.5 metres of water would inundate 15% of the most populated island of the Maldives (*Male'*) and by 2100 inundate half of it.⁵⁶

⁵³ ECtHR, *Kolyadenko v Russia*, Application Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (09 July 2012). While the ECtHR in this case, reaffirmed that national authorities in tune with local needs have a “margin of appreciation” since they are best placed to make regulatory decisions, the court found however, that the measures taken by the Russian authorities were inadequate to discharge Russia's obligations to take positive steps to safeguard the right to life of those within its jurisdiction required under Article 2 of the ECHR. The case concerned the release of water from a reservoir, which put at risk the local population. The court found that even though the weather conditions, which required the release of water, were exceptional, the authorities knew that it may be necessary to release the water and the potential consequences should have been foreseen (paras. 163-165). The government authorities failed to put in place adequate measures to reduce the risk (paras.169-173). This case, as well as the previous ones, from the ECtHR suggests that the “margin of appreciation” of states is narrow (or does not apply) where the preventative measures taken by the government were absent or totally inadequate to a foreseeable risk.

⁵⁴ ECtHR, *Guerra and Others v Italy*, Application No. 14967/89 (19 February 1998), Jambrek, J. concurring.

⁵⁵ OHCHR (2008) “Submission of the Maldives to the Office of the UN High Commissioner for Human Rights” (25 September 2008) available from:

http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf [accessed 23 November 2014].

⁵⁶ *Ibid.* p. 19-20.

Furthermore, because circa 42 % of the population lives within 100 m of the shoreline even partial flooding overtime is “likely to result in drowning, injury and loss of life.”⁵⁷

3.2 Considerations Related to the Right to Private and Family Life

The right to privacy as a civil and political right is relevant in the context of environmental displacement, as it imposes the obligation of the state to protect one’s private and family life. The ICCPR states under Article 17 that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence (...) Everyone has the right to protection of the law against such interference or attacks.” Similar provisions can also be found under the American Convention on Human Rights⁵⁸ and the European Convention on Human Rights.⁵⁹ Many cases brought before the ECtHR have been prolific in using Article 8 under the allegation that environmental degradation impacts the individual’s right to privacy.

In *Lopez Ostra v Spain*,⁶⁰ the applicant argued the positive duty of the state to secure her rights under Article 8 from a leather processing waste treatment plant near her home, which was emitting toxic fumes and smells that “immediately caused health problems and nuisance.”⁶¹ The court did not affirmatively acknowledge the duty of the state to prevent pollution, but indirectly did so. As the court found that the government did not strike “a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life,”⁶² thus indirectly acknowledging the balancing of the state’s duty to prevent pollution for the enjoyment of the applicant’s right to privacy, even when the individual’s health was not acutely endangered⁶³ (finding a breach of Article 8 and ordering the allocation of compensation). In *Guerra and Others v Italy*,⁶⁴ the ECtHR reinforced its view of the impact of environmental pollution and the state’s violation of Article 8 (in the failure of the state to act, to provide local population with information about risk factors and

⁵⁷ Ibid. p. 21.

⁵⁸ Article 11 (2) and 21 ACHR

⁵⁹ Article 8 (1) ECHR

⁶⁰ ECtHR, *Lopez Ostra v Spain*, Application No. 16798/90 (09 December 1994)

⁶¹ *Ibid.*(1994) para. 8.

⁶² *Ibid.* (1994) para. 56.

⁶³ ECtHR, *Lopez Ostra v Spain*, *Op. Cit.* para. 51 It is enough for the pollution to impact “individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.”

⁶⁴ ECtHR, *Guerra and Others v Italy*, *Op. Cit.* paras. 58, 60. “The Court considers that Italy cannot be said to have “interfered” with the applicants’ private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life [...]The Court reiterates that severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely [...] In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.”

The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants’ right to respect for their private and family life, in breach of Article 8 of the Convention.”

how to proceed in the event of an accident). Similarly, in *Fadeyeva v Russia*,⁶⁵ the ECtHR ruled on the state's unwillingness to provide effective solutions to help the applicants to move from the polluted area⁶⁶ and take positive measures to regulate the emission levels⁶⁷ near Russia's largest iron smelter plant: it held that, "despite the wide margin of appreciation left on the respondent state, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8."⁶⁸ The acknowledgment by the court that the adverse polluting effects must reach a "certain minimum level" to severe endangerment of health is not needed as it depends on "all the circumstances of the case."⁶⁹

By analogy, the European jurisprudence is relevant for EDPs as it clearly emphasises the obligations of the home states to take positive actions to generally protect them against environmental harm: either directly caused by pollution or failing to protect against environmental hazards and private actors.⁷⁰ The ECtHR has used the "fair balance" approach between the rights of the individual and those interests of the wider community, whether environmental harm is caused directly by the State or a private actor.⁷¹ In determining this balance, they defer to states on how to reach the acceptable environmental threshold. And while states may undertake or allow environmental degradation that impacts the enjoyment of human rights, they must take the necessary preventative measures and steps to protect against environmental harm that does not go too far.⁷²

3.3 Considerations Related to the Right to Adequate Standard of Living

Article 25(1) of the UDHR states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family." There is a strong link between an individual and his/her surrounding natural environment. A healthy environment is a prerequisite for an individual's health and well-being. State parties to the ICESCR also acknowledge the right of everyone to have an adequate standard of living for themselves and for their family (Article 11) as an inclusive or overarching right. The composition bundles the right to adequate food, clothing, access to safe and potable water, housing, continuous progress of living conditions⁷³ and the right to be free from hunger (adequate supply of safe

⁶⁵ ECtHR *Fadeyeva v Russia*, Application No. 55723/00 (30 November 2005).

⁶⁶ *Ibid.* para.88.

⁶⁷ *Ibid.* para. 133.

⁶⁸ *Ibid.* para. 134 The Russian government was obliged to pay compensation to the applicant amounting to 6,000 Euro for non pecuniary damages in addition to all costs and expenses related to the case. *Ibid.* para. 152.

⁶⁹ *Ibid.* para. 69 "The assessment of that minimum is relative and depends on all circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects [and] (...) [t]he general environmental context (...)."

⁷⁰ *Ibid.*

⁷¹ ECtHR, *Hatton and Others v United Kingdom* Application No. 36022/97 (08 July 2003) para. 98; ECtHR, *Fadeyeva v Russia Op.Cit.* para. 105; ECtHR, *Lopez Ostra v Spain Op.Cit.* para. 51 and ECtHR, *Taskin v Turkey*, Application No. 46117/99 (30 March 2005) para. 116.

⁷² McInerney-Lankford, S., Darrow, M. & Rajamani, L. (2011) "Human Rights and Climate Change: A Review of the International Legal Dimensions" (World Bank) pp. 32-33.

⁷³ Article 11 (1)ICESCR.

food and nutrition).⁷⁴ The World Health Organization has determined that these basic health determinants will be most at risk by environmental changing conditions.⁷⁵

3.3.1 Considerations Related to the Right to Food

The right to adequate food is protected in many international human rights instruments.⁷⁶ In 2001, the right to food was defined “[A] human right, inherent in all people, to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food to the cultural traditions of people to which it belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear.”⁷⁷

Environmental instruments have raised the importance of the right to food and of climate mitigation measures to “ensure that food production is not threatened.”⁷⁸ The right entails a progressive realisation of the right of everyone to food, including a core obligation to ensure that a minimum standard is immediately met: “States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.”⁷⁹ The CESCR has highlighted the importance of the right to food as an inherent part of the dignity of the human person and essential for the fulfilment of other human rights mirrored in the International Bill of Human Rights.⁸⁰ The committee has noted the availability and accessibility to food provisions as a major component of the right food and the interdependency between the environment and right to food (indicating the need to take “appropriate economic, environmental and social policies”⁸¹). Further, the CESCR has linked the effects of environmental conditions to the right to food stating that “even where the State faces severe resources constraints, whether caused by a process of economic adjustment, economic recession, climate conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.”⁸²

⁷⁴ Article 11(2) ICESCR.

⁷⁵ World Health Organization (2008) “Protecting Health from Climate Change – World Health Day 2008” (World Health Organization), p. 6 available from: http://www.who.int/world-health-day/toolkit/report_web.pdf?ua=1 [accessed 12 July 2014].

⁷⁶ The ICESCR recognises under Article 11 (1), “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions” while pursuant to Article 11 (2) they recognise that urgent steps may be necessary to ensure “the fundamental right to freedom from hunger and malnutrition”. The right to food has been included under Article 25 of UDHR; Article 12(2) CEDAW; Articles 24 (2) (c) and 27; and in many national constitutions such as those of Bangladesh, Brazil, Colombia, India, Iran, Pakistan, South Africa, and Sri Lanka.

⁷⁷ “Report by the Special Rapporteur Jean Ziegler on the right to food to the Commission on Human Rights 57th session” U.N. Doc. E/CN.4/2001/53 (7 February 2001) p. 8 para14.

⁷⁸ Article 2 UNFCCC.

⁷⁹ Committee on Economic, Social and Cultural Rights (CESCR) (1999), “General Comment No. 12: Right to adequate food (Article 11 of the Covenant)” (12 May 1999) para.6.

⁸⁰ *Ibid.* para.4.

⁸¹ *Ibid.*

⁸² *Ibid.* para.28.

There is strong evidence that environmental changing conditions impact the right to food (both availability and accessibility) in a significant way.⁸³ In 2008, Olivier de Schutter, the special rapporteur on the right to food, argued for the increased reliance on technology for agricultural production as a means to cope with population growth and climate change.⁸⁴ He further pinpointed the negative effects of the development of agrofuel as a means to replace fossil fuels for transports in order to mitigate climate change.⁸⁵ In context, the rapporteur has prompted states in general and the international community in particular to develop policies and encourage sustainable and diverse resilient agricultural practices, as a means to cope with environmental change disruptions.⁸⁶

3.3.2 Considerations Related to the Right to Water

Human existence is dependent on water. Despite this, it is only over the past decade that the right to water has gained adequate international recognition. It has particularly gained terrain in several international human rights instruments.⁸⁷ The rise of the right to water and its inextricable relation with the human rights catalogue (right to health, right to adequate housing, right to food, right to life and human dignity) has been made self-evident by the U.N. Committee on Economic, Social and Cultural Rights (CESCR), under its General Comment No. 15: “The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”⁸⁸ Additionally, the U.N. General Assembly, in its Resolution 64/292, has further acknowledged “clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”⁸⁹

⁸³ Von Doussa, J. Corkery, A. & Chartres, R., (2008) “Human Rights and Climate Change” (Australian Human Rights and Equal Opportunity Commission, Background Paper) p. 5; *See generally*, Bals, C. *et al.* (2008) “Climate Change, Food Security And The Right To Adequate Food” (Diakonisches Werk derEKD and German Watch e.V.); Söllner, S. (2007) “The Breakthrough Of The Right To Food” 11 Max Planck Yearbook of UN Law, pp. 391-415.

⁸⁴ Schutter (2008) Report of the Special Rapporteur on the right to food: building resilience: a human rights framework on world food and nutrition security, U.N. Doc. A/HRC/9/23 *available from*: <http://www.unhcr.org/refworld/docid/48cf71dd2.html> (08.09.2008).

⁸⁵ *Ibid.* para.25-34.

⁸⁶ UNGA (2009) “Statement prepared by Special Rapporteur Olivier de Schutter on the right to food, interactive thematic dialogue of the U.N. General Assembly on the global food crisis and the right to food” (06 April 2009) *available from*: <http://www.un.org/ga/president/63/letters/conceptfoodcrisis.pdf> [accessed 19 November 2014]; “United Nations Special Rapporteur on the right to food Olivier de Schutter, contribution to the U.N. Commission on Sustainable Development at its 17th session” (4-15May 2009) *available from*: <http://www.srfood.org/images/stories/pdf/otherdocuments/19-srftsubmissioncsd-01-05-09-1.pdf> [accessed 19 November 2014];

⁸⁷ For instance, Article 14, paragraph 2, of the CEDAW stipulates that states parties shall ensure women the right to “enjoy adequate living conditions, particularly in relation to [...] water supply”. Article 24, paragraph 2, of the CRC requires states parties to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water.”

⁸⁸ CESCR (2003) “General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)” U.N. Doc. E/C.12/2002/11 (20 January 2003) para. 1.

⁸⁹ UNGA (2010) “The human right to water and sanitation” U.N. Doc. RES/64/292 (28 July 2010) para.1. Previously the UNGA (2003) “International Decade for Action, “Water for Life”, 2005-2015” U.N. Doc. RES/58/217 (23 December 2003) had emphasized that “water is critical for sustainable development, including environmental integrity and the eradication of poverty and hunger, and is indispensable for human health and well-being” Para.1.

State protection for those displaced implies too the protection of water resources. This entails that water resources must be made available for all and physically and economically accessible without discrimination.⁹⁰ Forecasts predict that the increase of global temperature will threaten water availability for 50 million people. This trend will be further exacerbated by weather extremes such as drought and flooding. As a way of example, the island of Tuvalu declared in 2011 a state of emergency due to lack of potable drinking water.⁹¹ Today, it is estimated that 1.1 billion people are denied access to safe drinking water which is a major cause of illness and morbidity.⁹² This too can be linked to other major natural disasters where the destruction of water and sanitation systems directly curtailed the access to potable water including the outbreak of diseases. The 2000 Mozambique and 2004 Bangladesh floods as well as the 2004 Asian Tsunami and 2005 Pakistan earthquakes are such illustrative examples.⁹³

3.3.3 Considerations Related to the Right to Adequate Housing

The right to housing is understood not only as a right to refuge but also as “the right to live somewhere in security, peace and dignity.”⁹⁴ The right to housing is found under Article 11 of the ICESCR and in an array of other conventional instruments,⁹⁵ international declarations and general comments.⁹⁶ In the context of climate change, the Office of the High Commission for Human Rights has highlighted in a precise way the guarantees of the right to housing, which include:

“(a) adequate protection of housing from weather hazards (habitability of housing); (b) access to housing away from hazardous zones; (c) access to shelter and disaster preparedness in cases of displacement caused by extreme weather events; (d) protection of communities that are relocated away from hazardous zones, including protection against forced evictions without appropriate forms of legal or other protection, including adequate consultation with affected persons.”⁹⁷

The right to adequate housing imposes, therefore, an overarching obligation of states to prevent and protect individuals from the impacts of climate change, including ensuring access

⁹⁰ CESCR (2003) “General Comment No 15: The Right to Water” *Op. Cit.* para. 12.

⁹¹ BBC News (2011) “Tuvalu declares emergency over water shortage” (3 October 2011) *available from:* <http://www.bbc.com/news/world-asia-pacific-15147043> [accessed 5 October 2011].

⁹² U.N. Human Rights Council (2009) U.N. Doc. A/HRC/10/61 (15 January 2009) *Op. Cit.* para.29.

⁹³ See Watson, J. Michelle, G. & Connolly, M. (2007) “Epidemics after Natural Disasters” 13 *Emerging* (1) pp.1-5 and International Federation of the Red Cross and Red Crescent Societies (2009) “Tsunami five-year Progress report 2004-2009” (International Federation of the Red Cross and Red Crescent Societies) p. 14.

⁹⁴ CESCR (1999) “General Comment No12: Right to adequate food” *Op. Cit.* para.6.

⁹⁵ The right to adequate housing is found also under Article 5 (e) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 14 of the CEDAW; Article 27 of the CRC and Article 43 of the International Convention on the Protection of the Rights of All Migrant Workers (IMWC).

⁹⁶ See for e.g., Principle 4 of the Declaration on the Rights of the Child, UNGA Res 1386 (XIV) (29 November 1959); Article 10 (f) of the Declaration of Social Progress and Development, UNGA Res 2542 (XXIV) (11 December 1969); Se. III (8), Chap. II(A.3) of the Vancouver Declaration on Human Settlements, adopted by the UN Conference on Human Settlements in 1976; Article 8.1 of the Declaration of the Right to Development, UNGA Res 41/128 (4 December 1986) and CESCR General Comment No. 4 (1991) Article 11 (1) (right to adequate housing).

⁹⁷ U.N. Human Rights Council (2009) “Report on the Relationship Between Climate Change and Human Rights” U.N. Doc. A/HRC/10/61 (15 January 2009) para. 38.

to housing away from recognized hazardous areas as well as an obligation to provide shelter in case displacement occurs following a disaster. The Special Rapporteur on the right to housing, Raquel Rolnik, has highlighted that “States have clear obligations under international human rights law to respect, protect and fulfil the right to adequate housing and to pursue, through international cooperation, global solutions to the global problem of climate change and its impact on housing.”⁹⁸

The preventative approach to protection of the right to housing also imposes on states a duty to relocate communities away from hazardous zones and take precautionary measures to avoid forced evictions. Drawing conclusions from previous UNDP and IPCC reports, the OHCHR observes that “[s]ea level rise and storm surges will have a direct impact on many coastal settlements. In the Arctic Region and in low-lying island States such impacts have already led to the relocation of peoples and communities. Settlements in the low-lying megadeltas are also particularly at risk, as evidenced by millions of people and homes affected by flooding in recent years.”⁹⁹

It is important to notice, however, that the right to housing can be a doubled-edged right for those displaced by environmental factors. While it is fundamental that states tackle in a proactive manner the relocation of populations at risk to safer areas, it is important that where it is possible to return to their land, people are informed and given the choice. The Special Rapporteur on the right to adequate housing, has reminded policy makers that one needs to learn from post-tsunami reconstruction processes: in some countries, certain populated areas were entirely relocated to resettle in safer spots but were never given the opportunity to return to their homes, and instead these areas became tourist and commercial areas¹⁰⁰ (and in essence constituted a form of indirect forced evictions).¹⁰¹ Safety and security of the population becomes a camouflaged priority of states over other governmental and commercial interests. The realisation of the right to housing requires, therefore, that states take adequate “resource allocations and policy initiatives,” including developing with the

⁹⁸ UNGA (2009) “The right to adequate housing report submitted by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, submitted pursuant to Human Rights Council resolution 6/27.” U.N. Doc. A/64/255 (6 August) p. 14, para.36.

⁹⁹ *Ibid.* para.36.

¹⁰⁰ UN News Centre (2009) “Climate Change Talks must include focus on Adequate Housing, says UN” expert (23 October 2009) *available from:* <http://www.un.org/apps/news/story.asp?NewsID=32695> [accessed 19 November 2014]. *See* the joint Statement by Special Rapporteur on Housing, Ms. Raquel Rolnik, and United Nations Special Rapporteur for Internationally Displaced Persons, Ms. Chaloka Beyani, during World Habitat Day Celebrations (03 October 2011) *available from:* <http://www.unhabitat.org/content.asp?cid=10482&catid=7&typeid=8&AllContent=1> [accessed 19 November 2014].

¹⁰¹ *Ibid.* In the case of EDPs indirect forced evictions take place when environmental degradation or catastrophe was the major cause of “eviction.” According to the Special Rapporteur on Housing, Ms. Raquel Rolnik while the government enacted temporary measure of protection allocating individuals housing elsewhere, they never had the possibility of return to their property as the state decided to confer their land to other commercial interests. The CESCR has defined a forced eviction as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of and access to, appropriate forms of legal or other protection.” *See CESCR, General Comment No. 7 (1997) “General Comment No. 7 The right to adequate housing (Art.11.1): forced evictions”* U.N. Doc. E/1998/22 (20 May 1997).

population concerned adequate consultation processes in cases of relocation or displacement¹⁰² and the development of effective “international cooperation” strategies.¹⁰³

3.4 Considerations Related to the Right to Health

The ICESCR recognises the right of everyone to “the enjoyment of the highest standard of physical and mental health” (Article 12 (1)). General Comment 14 further elaborates on how the enjoyment of the right to health is intricately reliant on environmental circumstances and other rights.¹⁰⁴

The right to health is also referred to in a series of articles in the CRC,¹⁰⁵ CEDAW,¹⁰⁶ and regional instruments, such as the European Social Charter,¹⁰⁷ the EU Charter of Fundamental Rights,¹⁰⁸ the Protocol of San Salvador,¹⁰⁹ and the Banjul Charter.¹¹⁰ Generally, state action is seen as obligatory as they *shall* take adequate and appropriate measures to pursue the full implementation of and to promote and encourage *international cooperation* with the view to achieving the full realisation of the right to health. It entails a system of protection that enables each individual access to preventative care, benefit from medical treatment and the conditions that guarantee the realisation of that right without discrimination.

¹⁰² UN Human Rights Council (2009) UN Doc A/HRC/10/61 *Op. Cit.* p. 15.

¹⁰³ CESCR (1991) General comment No. 4: Right to adequate housing *Op. Cit.* paras.10 and 15.

¹⁰⁴ The CESCR states under “General Comment No. 14 (2000): Right to the highest attainable standard of health (Art. 12) U.N. Doc. E/C.12/2000/4 (11 August 2000) para.11 (emphasis added): “*an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international level.*”

¹⁰⁵ Article 24 (1) CRC (emphasis added) stipulates: “States Parties recognize the right of the child to the enjoyment of the *highest attainable standard of health and to facilities for the treatment of illnesses and rehabilitation of health.* States parties *shall* strive to ensure that no child is deprived of his or her right of access to such health care services.”

¹⁰⁶ Article 12 CEDAW says (emphasis added): ” 1. States Parties *shall* take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties *shall* ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.

¹⁰⁷ Article 11 European Social Charter (ESC) adopted on 18 October 1961, in force since 26 February 1965, 529 UNTS 89, revised 1996 (emphasis added): “The right to protection of health With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or *in co-operation with public or private organisations*, to take appropriate measures designed *inter alia*: 1. *to remove* as far as possible the causes of ill-health; 2. *to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health*; 3. *to prevent* as far as possible epidemic, endemic and other diseases.

¹⁰⁸ Article 35 Charter of Fundamental Rights of the European Union, adopted 18 December 2000, legally binding since the Treaty of Lisbon entered into force on 1 December 2009, 2000/C 364/01 18 says (emphasis added) Health care “Everyone has the right of access to *preventive health care and the right to benefit from medical treatment* under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

¹⁰⁹ Article 10 Protocol of San Salvador

¹¹⁰ Article 16 Banjul Charter

The right to health is not confined to medical assistance, but includes all aspects of environmental improvements and protection from hazards (air, water, food pollution).¹¹¹ This is reflected in the Draft Declaration of Principles on Human rights and the Environment¹¹² and under other environmental instruments, such as the Stockholm Declaration¹¹³ and the Rio Declaration,¹¹⁴ Agenda 21,¹¹⁵ the UNFCCC,¹¹⁶ and many other multi-environmental agreements.¹¹⁷ The main difference here is the recognition that the attainment of the right to an adequate standard of living and the right to health is a “duty of [not only the state of origin/residence but of] all Governments;” it is a “shared responsibility.” Facts from a WHO report show that more than 160,000 deaths from malaria and malnutrition may be due to an increase in world temperatures, and that number is predicted to double in the next decade.¹¹⁸ Paul Hunt, the Special Rapporteur on the right to health, has also reiterated how health is a broad concept, which entails more specific elements, such as the right to healthy workplaces and the natural environments.¹¹⁹ He documented how pollution, a lack of clean drinking water, and poor sanitation had affected the most marginalised parts of the population, such as children, indigenous people and the poor in Peru.¹²⁰

¹¹¹ Thorne, M. (1991) “Establishing environment as a human right.” 19 *Denver Journal of International Law and Policy* p. 322, pp. 301-342.

¹¹² The Draft Declaration of Principles on Human Rights and the Environment Annex I (1994) states under Principle 7: “All persons have the right to the highest attainable standard of health free from environmental harm.”

¹¹³ The Stockholm Declaration (1972) asserts that under “Principle 1 Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

¹¹⁴ The Rio Declaration (1992) enlightens under (emphasis added) Principle 1, “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature” and under “Principle 14 States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.”

¹¹⁵ Agenda 21, action plan adopted at the UN Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, governments, and major groups in every area in which humans impact the environment.

¹¹⁶ The UNFCCC (1992) refers to the adverse effects that climate change will have including (Article 1 (1)) “significant deleterious impacts on human health and welfare,” urging state parties to take, inter alia, (Article 4 (1) (f)) health impacts into account in the relevant social, economic and environmental policies.

¹¹⁷ Convention on Long-Range Transboundary Air Pollution, adopted 13 November 1979, in force since 16 March 1983, 1302 UNTS 217 (Article 2) ; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted 22 March 1989 1673 UNTS 57 Chapter XXVII-3 (Article 2 (8) (9)) and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted 10 September 1998, in force since 24 February 2004 (revised 2013) 224 UNTS 337 Chapter XXVII (Article 1).

¹¹⁸ Bhattacharya, S. (2003), “Global Warming Kills 160,000 a year” *New Scientist* (01 October 2003) *available from: <http://www.newscientist.com/article/dn4223-global-warming-kills-160000-a-year.html>* [accessed 12 November 2014].

¹¹⁹ UN Commission on Human Rights (now UN Human Rights Council), “Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Mission to Peru” UN Doc. E/CN.4/2005/51/Add.3, (4 February 4, 2005) para. 52.

¹²⁰ The report notes real violations of the right to health in Peru. In Belen, (water and sanitation) the contamination of the River Nanay with mercury from mining companies lead to increases in infant mortality due to diarrhoea and other water-related diseases. In Callao (lead poisoning), due to the export and storage of lead ore, it was documented that more than half of children possess high levels of lead in their blood. In San Mateo

The health inequalities gap between countries all over the world will increasingly widen with environmental changing conditions. State action at the national and international levels to protect those displaced by environmental factors and humankind is not only timely but necessary. As the Alma-Ata Declaration acknowledged, “the gross inequality in the health status of the people, particularly between developed and developing countries, as well within countries, is politically, socially and economically unacceptable and is, therefore, of common concern of all countries.”¹²¹

The right to health and its inextricable dependency on the environment has also been called upon in regional and national courts with regards to pollution of air and water, environmental protection and food scarcity.¹²² The African Commission on Human and People’s Rights (ACmHPR) in the case *Social Economic Rights Action Centre v Nigeria*¹²³ found that the Nigerian government violated, amongst other things, the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family rights, due to the fact that it condoned and facilitated the operations of oil corporations in Ogoniland.¹²⁴ The Commission urged the government of Nigeria “to ensure protection of the environment health and livelihood of the people of Ogoniland.”¹²⁵ In this sense it insisted on the governments duties of protection in the present and in the future. The Commission highlighted that Nigeria should guarantee “adequate compensation to the victims of human rights violations, including relief and undertaking resettlement assistance to victims of government sponsored raids and a comprehensive clean-up of lands and rivers damaged by oil operations.”¹²⁶ The Commission claimed that the government should take positive measures to stop and reverse the environmental degradation. In the future, appropriate environmental and social impact assessments by independent bodies, as well as procedural information access to regulatory and decision-making bodies, to communities likely to be

de Huanchor (the impact of mining) toxic mining affected local residences and in particular indigenous populations.

¹²¹ Declaration of Alma-Ata International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978, Article II available from: http://www.who.int/publications/almaata_declaration_en.pdf [accessed 12 November 2014]. It was the first declaration requiring urgent action by all states and international actors to promote and protect health equality for all people.

¹²² For example, the IACmHR in the aforementioned *Yanomami* case, where the government of Brazil forced indigenous populations out of their territory without compensation to build a high way, was preemptory in acknowledging the impact that such action had on the right to life, but also on the right to health and well-being. The petitioners also claimed that other rights were stalled, such as free movement, residence, liberty and security. While the decision did not grant any sort of remedy or force the government to halt or overturn the situation to the previous environmental status quo it nevertheless, recommended that the state take action to protect the Yanomami Indians.

¹²³ ACmHPR, *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, Comm. No. 155/96 (27 October 2002).

¹²⁴ *Ibid* p. 12 (emphasis added): “[D]espite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given green light to private actors, and oil companies in particular, to *devastatingly affect the well-being* of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.”

¹²⁵ *Ibid*. p. 15.

¹²⁶ *Ibid*. p. 14.

affected were recommended to ensure safe operations during any further oil extraction developments.¹²⁷

Similarly, the IACmHR in the 1997 report on human rights in Ecuador¹²⁸ acknowledged the adverse effects from pollution (including contaminations and deaths in the local community) of oil and mining exploitation in the Orient region and consequent violation of the right to life and health of the affected communities. Echoing the conclusions of the African Commission, it said that the state's obligation is extended beyond negative impact of the actions by private actors and that states have an obligation "to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury."¹²⁹ It further stated that states should take a preventative approach to life and health threatening harm and "respond with appropriate measures of investigation and redress."¹³⁰

In the context of EDPs, these cases are of extreme importance as they reinforce the protection obligations of states of origin to protect. It highlights the government's duty and its failures for not taking action in the past, and urges the government to take steps now to reverse the situation (by allocating compensation and resettlement mechanisms to the victims). Furthermore, it looks into the future, guaranteeing substantive and procedural instruments (environmental and social impact assessments, right to access to information, and community participation) to prevent the violation or the undermining of human rights.

3.5 Considerations Related to Other Human Rights

In addition to the rights discussed thus far, the effects of environmental change may impact an array of other human rights as well. The changes in the environment in particular due to environmental change have been characterized as a "profound denial of freedom of action and source of disempowerment."¹³¹ Extreme weather patterns, increased floods and droughts and related crop impacts will further hamper the realization of the rights to property,¹³² means of subsistence,¹³³ culture, freedom of residence, and movement.¹³⁴

¹²⁷ *Ibid* p. 15.

¹²⁸ IACmHR, (1997) Report on the situation of Human Rights in Ecuador *Op. Cit.*

¹²⁹ *Ibid*. Chapter VIII.

¹³⁰ *Ibid*.

¹³¹ United Nations Development Programme (2007/2008) "Human Development Report 2007/2008 Fighting Climate Change: Human Solidarity in a Divided World" p.31 *available from:*

http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf [accessed 10 June 2013].

¹³² Article 17 UDHR; Article XXIII American Declaration; Article 21 American Convention. *See* Ardilez-Martinez D. *et al.* (2008) "Human Rights and Climate Change Study" p. 14 *available from:* http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/NSW_Young_Lawyers_HR_ClimateChange.pdf [Accessed 20 December 2014]. The authors note that the effects of climate change may result in deprivation of property without compensation, particularly in respect of rising sea levels in coastal areas and on the use and enjoyment of property where temperature changes affect weather patterns (including more droughts or more tropical storms) and consequently possible land uses.

¹³³ Article 1 (2) ICCPR.

¹³⁴ Article 13 UDHR.

For indigenous groups, the changes in the environment are likely to disrupt the strong relationship that they have with their land,¹³⁵ natural resources and their way of life, affecting a further set of protected rights and interests.¹³⁶ This was highlighted in 2005 by the Sub-Commission on the Promotion and Protection of Human Rights on the prevention of discrimination and protection of indigenous people's¹³⁷ and later in 2008, during the seventh session of the Permanent Forum on Indigenous Issues.¹³⁸ The UN Declaration on the Rights of Indigenous People¹³⁹ has recognized that the indigenous populations have the rights to the conservation and protection of their environment¹⁴⁰ and the productive capacity of their lands or territories and resources, which they have traditionally owned, occupied, or otherwise used or acquired.¹⁴¹ They further have the right to redress (which can include restitution or, when this is not possible, just, fair, and equitable compensation) for the lands, territories and

¹³⁵The strong relationship that some communities have with their land has been highlighted in various national jurisdictions. In 1993, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities issued a second report of its Special Rapporteur on Human Rights and the Environment in which the Special Rapporteur (Ms. Fatma Zohra Ksentini), emphasized the Colombian case *Organización Indígena de Antioquia v Codechoco et Madarién* concerning the damages caused to the environment as a result of forestry exploitation highlighting that the court not only recognized the existence of material damages but also that the devastation of the forest alters the relationships of indigenous populations with their environment and puts in danger not only their life but also their cultural and ethnic existence. U.N. Commission on Human Rights (now U.N. Human Rights Council) (1993), Second Report prepared by Mrs Fatma Zohra, Special Rapporteur (U.N. Doc. E/CN.4/Sub.2/1993/7) 23 July 1993 p. 17 para.31.

¹³⁶ See the Indigenous People's Global summit on Climate Change, The Anchorage Declaration, 24 April 2009 para.2; Combined reading of Article 3 UNFCCC and UN Committee on Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) Doc. E/C.12/2000/4, 11 August 2000 para. 27 "In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health."

¹³⁷ See U.N. Commission on Human Rights (now U.N. Human Rights Council) (2005) "Prevention of discrimination and Protection Indigenous People's" Expanded working paper by Françoise Hampson on the human rights situation of indigenous peoples in States and other territories threatened with extinction for environmental reasons U.N. Doc. E/CN.4/Sub.2.2005/28 16 June 2005 paras. 6, 7, 8 states: "Three different kinds of situation, all of which relate to environmental degradation, need to be distinguished. There is first the problem of environmental damage caused to the land of indigenous peoples, with an impact on the enjoyment of their land rights and with implications for a wide variety of their personal right (...) The second situation is where life is no longer sustainable on the land of a particular indigenous group, requiring that they move and/or be given different or additional land within the same State.(...) The third situation,(...) regards the population of sovereign States. It is not a question of their being able to move within the State. They will not become internally displaced persons. Nor will they become refugees, in the sense of the 1951 Convention on the Status of Refugees. That treaty does not recognize as refugees persons who have to leave their country for reasons relating to the environment. In certain circumstances, they may be regarded as indigenous peoples but, following their displacement, they will not be indigenous in relation to receiving countries. It is not clear that they come within the mandate of any existing special procedure and yet they face the prospect of complete disruption to their lives and livelihood."

¹³⁸United Nations Permanent Forum on Indigenous Issues (2008) "Special theme: Climate change, bio-cultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges" Seventh Session" (New York, 21 April - 2 May, 2008) paras. 5, 6 stated: "Indigenous peoples' ancestors have adapted to climate change for thousands of years; however, the magnitude, accelerated pace and compound effects of climate change today are unprecedented, thus presenting major challenges to indigenous peoples' capacity to adapt (...) Indigenous peoples, who have the smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change."

¹³⁹ U.N. Declaration on the Rights of Indigenous People, adopted 13 September 2007 U.N. Doc. A/RES/61/295 (02 October 2007).

¹⁴⁰ *Ibid.* Article 29.

¹⁴¹ *Ibid.* Article 26 (1).

resources, that they have traditionally owned or otherwise that have been damaged without their free, prior and informed consent.¹⁴² For these and other communities whose existence is threatened and displacement is imminent, such as those living in SIDS, environmental change further endangers their right to self-determination,¹⁴³ as well as the right to the benefits of their culture.¹⁴⁴ In this context, the government of Tuvalu has been eloquent, affirming within the international fora the need of states to take action both at national and international levels to prevent displacement of their population: “While Tuvalu faces an uncertain future because of climate change, it is our view that Tuvaluans will remain in Tuvalu. We will fight to keep our country, our culture and our way of living. (...) We believe if the right actions are taken to address climate change, Tuvalu will survive.”¹⁴⁵

Finally, it is important to highlight in the context of environmental change and displacement that freedom of movement and residence, one of the most basic and fundamental human rights, might be particularly at risk. This is because freedom or liberty of movement is generally conceived as “the right to leave and return to one’s country” and is considered “an indispensable condition for the free development of a person.”¹⁴⁶ Generally speaking, the right of freedom of movement includes three basic characteristics as guaranteed by Article 12 of the ICCPR: 1) the right of every person who is residing lawfully¹⁴⁷ in the territory of a state to move freely and to choose his/her place of residence within the territory of that state (Article 12 (1)); 2) the right to leave a country (Article 12 (2));¹⁴⁸ and 3) the right to enter one’s country (Article 12 (4)). This means that individuals affected by environmental factors have the right to choose to return to their place of origin, to relocate to another part of the country, or integrate themselves in another region. More importantly, the state has the general obligation to guarantee protection against violations of this right, including from all forms of internal¹⁴⁹ (and, by extension, - external)¹⁵⁰ displacement and respecting the will of the

¹⁴² *Ibid.* Article 28 (1).

¹⁴³ Article 13 UDHR; Article 1 & Article 12 (1) ICCPR; Article 1 ICESCR ; *See* HRC (1984) CCPR “General Comment No. 12 The right to Self-Determination of People’s” UN Doc. HRI/GEN/1/Rev.1, (13 March 1984).

¹⁴⁴ Article 27 UDHR; Article 15 ICESCR and Article XIII of the American Declaration.

¹⁴⁵ European Parliament (2009) “Climate change threatens Tuvalu's survival, says Prime Minister Apisai Ielema” Press Release Development and Cooperation Commission 10 December 2009 *available from:* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20091207IPR66100+0+DOC+XML+V0//EN> [Accessed 15 December 2013].

¹⁴⁶ HRC (1999) CCPR General Comment No. 27 Freedom of movement (Art.12) UN Doc. CCPR/C/21/Rev.1/Add.9 (18 October 1999) para 1. *See* Beyani, C. (2000) “Human Rights Standards and the Movement of People Within States” (Oxford University Press) p. 3. The author notes that the deprivation of freedom of movement may bar other human rights such as the freedom of assembly and association, right to property, and the right to employment.

¹⁴⁷ The access and criteria of a lawful resident in the territory of a state is a matter of domestic law. *See* HRC (1999) *Op. Cit.* General Comment No. 27 para.4.

¹⁴⁸ Importantly, there is no corresponding general right to enter another state. *See generally*, Harvey, C. & Barnidge, R. (2005) “The right to leave one’s own country under international law” paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (September 2005) pp.16-17.

¹⁴⁹ HRC (1999) *Op. Cit.* General Comment No. 27 para.7. “The right to reside in a place of one’s choice within the territory includes protection from all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.”

¹⁵⁰ HRC (1999) *Op. Cit.* General Comment 27 paras.8-9. Protection against external displacement including expulsion.

populations concerned (that can only be subject to limitations under certain conditions provided by law: national security, public emergency, and public health¹⁵¹). Adequate and precise information to avoid or overcome displacement should be provided by governments to the communities (potentially) affected by environmental factors. As provided by the U.N. Human Rights Committee in its general comment No. 27, forced displacement is best prevented by ensuring that freedom of movement and residence is fully respected and protected. In *Malawi Association and Others v Mauritania*, the African Commission on Human Rights, decided that Mauritania utterly failed in its responsibility to respect freedom of movement and residence of its citizens by failing to prevent displacement.¹⁵² In the Americas, the IACtHR, in *Mapiripán Massacre v Colombia*, has too asserted that freedom of movement and residence is the core principle upon which the prevention of displacement is dependent.¹⁵³

The juridical weakening of the right of freedom of movement and residence is particularly visible with regards to disappearing Islands States because of the residents' inability to return to their own states. In other states where return is still possible, as the former special rapporteur on the human rights of internally displaced people, Walter Kälin, has said: "The right of return is a key principle; when the original residential areas have proven dangerous, voluntary relocation or resettlement elsewhere are options, provided that the livelihoods and access to basic services are provided."¹⁵⁴

4. Analogy of Protection Obligations of States under International Human Rights Law for Environmentally Displaced Persons

4.1 Scope of Protection: The Underlying Duty to Prevent Human Rights Violations

From the foregoing analysis of (quasi) and judicial case law and from what whatever angle states' positive obligations are approached (direct and conscious interference¹⁵⁵ or inaction¹⁵⁶ or the various combination of both¹⁵⁷), it seems that the quintessence of protection concerns the prevention of human rights violations. It is unequivocally clear that the issue of

¹⁵¹ Article 12 (3) ICCPR.

¹⁵² ACmHPR, *Malawi Association and Others v Mauritania* Comm. No. 54/91 61/91, 98/93, 164/97 à 196/97 and 210/98 (11 May 2000) pp.21-23. These joined communications alleged institutionalized racial discrimination perpetrated by the ruling Moor community against the more populous black community and the existence of slavery and analogous practices in Mauritania. It was alleged, amongst other things, that black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the government along with their livestock. In this context, the Commission found that the confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constituted a violation of the right to property (Article 14, ACHPR) as well as of the right to freedom of movement and residence (Article 12(1), ACHPR).

¹⁵³ IACtHR, *Mapiripán Massacre v Colombia*, Series C No. 134 (15 September 2005).

¹⁵⁴ U.N. News Service (2010) "Faute de stratégie adaptée, Haïti est toujours dans la crise humanitaire, selon un expert" 19 October 2010 available from: <http://reliefweb.int/report/haiti/faute-de-strategie-adaptée-haïti-est-toujours-dans-la-crise-humanitaire-selon-un-expert> (authors own translation) [accessed 25 December 2014]. This was a quote from the previous Special Rapporteur on the human rights of internally displaced people, Walter Kälin, on the situation of Haiti nine months after the earthquake occurred in 2010.

¹⁵⁵ ECtHR, *Hatton and Others v the United Kingdom Op. Cit.*.

¹⁵⁶ ECtHR, *Guerra and Others v Italy Op. Cit.*; *Öneryildiz v Turkey Op. Cit.*

¹⁵⁷ ECtHR, *Öneryildiz v Turkey, Op. Cit.*; *Taskin and Others v Turkey Op. Cit.*

prevention is the starting point and one of the principal content of states' positive obligations. This is particularly highlighted in the section titles of the ECtHR's *Öneryildiz* judgement¹⁵⁸ and made particularly clear by the same court in *Fadeyeva*: "the Court's first task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights."¹⁵⁹ The courts, in particular the ECtHR have adopted the approach that the right to life compels states to take all the necessary measures to prevent both natural and human-made disasters.¹⁶⁰ While the issue of environmental displacement has been touched upon under the Inuit Petition to the IACmHR, it has not been examined by any other national or international jurisdiction. This does not mean, however, that states do not have obligations towards EDPs. On the contrary, the duties that states have with regards to environmental degradation are, arguably, transferrable in the environmental displacement context. While the obligations of states do not warrant the creation of a particular status *per se* they impose obligations to prevent and reduce environmental risks and - by extension - population displacement, including their overall protection of human rights. From this angle, protection does not only relate to actual violations of human rights, but also consists of an obligation of states to prevent their occurrence.¹⁶¹

The jurisprudence spells out that the analysis of human rights infringements is possible even in advance. Thus, the assessment of human rights may require such an *ex ante* analysis where there is credible evidence of the impact of environmental change on potential human rights violations and displacement. The increasing reliable and country-specific data on environmental change and human displacement can in turn be the basis for states' response measures, as well as arguably consolidating obligations on states to implement them.

4.2. Minimum Scope of Protection

Under international law, states have the obligation to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁶² The protection obligations of civil, political, economic, social, and cultural rights include communities affected by environmental factors. First and foremost, the protection of vulnerable populations must be a priority for states. But this obligation of protection of human rights must be also guaranteed to all individuals by states within their own territory, but also to any person under their jurisdiction. This implies that protection is warranted to individuals who find themselves under a jurisdiction of a state, even if that person is not situated within its own territory.¹⁶³ In other words, state protection

¹⁵⁸ ECtHR, *Öneryildiz v Turkey*, *Op. Cit.* Point 3 paras, 90, 101, 107.

¹⁵⁹ ECtHR, *Fadeyeva v Russia* *Op. Cit.* para.89.

¹⁶⁰ See in particular ECtHR *Öneryildiz v Turkey* *Op. Cit.*; ECtHR, *Budayeva and Others v Russia* *Op. Cit.* . See Kälin, W. & Dale, C. H. (2008) "Disaster Risk Mitigation – Why Human Rights Matter" *Forced Migration Review* No. 31 p. 38.

¹⁶¹ Van Boven, T. (1991) "Prevention of Human Rights Violations" in A. Eide & J. Helgesen (eds.) "The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address. Essays in Honour of Torkel Opsahl" (Norwegian University Press) p 191.

¹⁶² Article 55 (c) U.N. Charter (1945)

¹⁶³ HRC (2004) "General Comment No. 31 [80] The nature of the general legal obligation imposed on States Parties to the Covenant" *Op. Cit.* para. 10.

is viewed in a holistic way. General Comment 15 had previously pointed out that the enjoyment of Covenant rights must be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, or migrants.¹⁶⁴

The scope of states' positive obligations is also directly related to *abstract* and *concrete* notions of protection. Abstractly, states have the duty to satisfy under international law the most elementary needs ("minimum core obligation [in abstracto]") of the individual or the group of individuals here under scrutiny that are "deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education"¹⁶⁵ even in times of severe resources constraints. States are responsible to protect the vulnerable members of society "by the adoption of relatively low-cost targeted programmes."¹⁶⁶ Conversely, the scope of states positive obligations is related the concrete content of protection, i.e., the protection that can be effectively secured by states resources.

In *Budayeva and Others*, for example, the ECtHR reasoned that an "impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; (...) this results from the wide margin of appreciation States. This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature."¹⁶⁷ It seems that the protection of human rights will be dependent on the healthy finances of the state. In reality, though the content of protection may vary from one context to another if there is a need to establish, as Xenos puts it, "a minimum content of protection in order to deal with positive obligations in a non-theoretical matter."¹⁶⁸ Within states' bundle of measures to protect human rights if only one measure is possible, it does not imply that positive obligations are not imposed; it merely implies, the author adds, that "positive obligations can arise and be accordingly imposed in relation to this measure alone, provided that the effectiveness of protection is guaranteed."¹⁶⁹ A specific example can derive from the right of information, which does not impose an impossible burden on state's resources.

The protective function of the state can often be reflected in existing laws or constitutional provisions to ensure and to promote the protection of human rights. Consequently, the responsibility of states lies in its enabling and protective role and not necessarily in existing financial resources. In *Öneryildiz*, the case that concerned, as previously discussed, a fatal

¹⁶⁴ HRC (2004) "CCPR General Comment No. 15 (1986) The Position of Aliens Under the Covenant" U.N. Doc. HRI/GE/1/Rev.7 (12 May 2004) para.1.

¹⁶⁵ CESCR (1990), "General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)", E/1991/23 (14 December 1990) para. 10.

¹⁶⁶ *Ibid.* para. 12.

¹⁶⁷ ECtHR, *Budayeva and Others v Russia Op. Cit.* para. 135.

¹⁶⁸ Xenos, D. (2012) "The Positive Obligations of the State under the European Convention of Human Rights" (Routledge) p. 106.

¹⁶⁹ *Ibid.*

industrial accident in which 39 people lost their lives, the court was able to discern abstract and concrete measures of protection in the forms of various administrative steps, stating that “The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place legislative and administrative framework designed to provide deterrence against threats to the right to life (...) and must make it compulsory for all those concerned to take practical measures to ensure effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventative measures, particular emphasis should be placed on the public’s right to information as established in the case-law of the Convention institutions.”¹⁷⁰

In the context of displacement, this concrete notion of protection enables states to move beyond *ad hoc* protection responses after displacement occurs to ensure that a system of protection is in place and specifically targeted prior to displacement. The Strasbourg court has highlighted that allowing various actions to be dependent on financial resources or priorities of the state does not excuse states from their obligation to forestall risk and to “do everything within their power to protect [people] from the immediate and known risks to which they were exposed.”¹⁷¹ The content of measures and standards to human rights protection is addressed both to states and to other private actors who are responsible for human rights violations. The next section sheds some light on the obligations of states procedural rights.

4.3 Obligations of States Procedural Rights

It is important to highlight the obligations of states procedural rights in the environmental domain and their inter-linkage with environmental displacement in order for governments to provide a complete and effective protection of human rights. Outlined in several international documents, and overtly recognised by the regional human rights jurisprudence, the right to information, the right to public participation in decision making processes as well as the right to remedy are all cornerstones to safeguarding the human rights of people menaced by environmental stressors. Without a doubt, that information dissemination in case of environmental risks caused by disasters risks (as the nuclear accident in Japan) or (as the in case of Hurricane Katrina) spares the lives of human beings. In other cases, the participation of the public in decision-making processes ensures that preventative action is taken if evacuation is needed, for example, in case of sea-level rise. In case of violations of human rights stemming from environmental factors the right to remedy must enter the equation. Interestingly enough, the procedural obligations of states towards environmentally displaced people particularly the right to information, were highlighted by the United Nations Population Fund during the Cancun discussions in December 2010.¹⁷²

¹⁷⁰ ECtHR, *Öneriyildiz v Turkey Op. Cit.* paras. 71; 89-90.

¹⁷¹ *Ibid.* para. 109.

¹⁷² United Nations Population Fund (UNFPA) (2010) “Displacement and Migration: Examples of Initiatives to Support Resilience and Adaptation” U.N. System Side Event Cancun (30 November 2010) p. 2.

4.3.1 The Relevance of the Right to Information

States should ensure that the public is provided the *right to access information*, which is in their hands necessary for their protection from environmental factors. In other words, it is necessary that the right to information is understood not only from a narrow point of view as the right to seek information, but that states disseminate information and provide the public with the widest basis for informed decision making.

The codification of a specific governmental obligation to provide information from environmental hazards to the public upon request derives from both international and regional instruments. For example, it is particularly mentioned in the International Covenant on Civil and Political Rights¹⁷³ and the Universal Declaration of Human Rights.¹⁷⁴ But it is also made evident under the United Nations Convention on Climate Change¹⁷⁵ and under Principle 10 of the Declaration on Environment and Development adopted by the 1992 Conference of Rio de Janeiro. The latter can be considered as the worldwide recognition of the right to information concerning the environment including information on hazardous materials and activities in their communities. It is the Aarhus Convention,¹⁷⁶ however, where state parties to the U.N. Economic Commission for Europe produced a landmark agreement on 25 June 1998 to promote procedural rights. The Aarhus Convention compels state parties to make information available to the public on environmental matters and, in case of an imminent threat to human health, whether caused by human or natural causes, obliges states to provide the necessary information that could enable the public who may be affected to take measures to prevent or mitigate the consequences. Therefore, states must ensure that they have an information system in place to inform the public about the environmental risks and in parallel provide regular updates of environmental situation. The treaty does provide for numerous exceptions to the duty to inform in Article 4 (4), thus echoing other economic, political, and legal concerns. These exceptions could enable states to withhold important information. Nevertheless, all exceptions must be read restrictively, and states may wish to provide broader information rights. In any event, and as illustrated in the Strasbourg

¹⁷³ Article 19 (2) ICCPR. See HRC (2011) “General Comment No. 34, Article 19, Freedoms of opinion and expression” U.N. Doc. CCPR/C/GC/34 (12 September 2011) where a connection of the right of access to information is made with regards to other rights in the Covenant (e.g. Article 2 non-discrimination; Article 17 respect for private life and privacy; Article 25 political participation).

¹⁷⁴ It is relevant to highlight that the right to information in the human rights context derives from the right to freedom of expression and opinion. See for example, Article 19 UDHR. There are other instruments however, that highlight the relevance of the right to information, such as Article 27 of the Convention concerning the Protection of the World Cultural and Natural Heritage, adopted on 16 November 1972, in force since 17 December 1975, 1037 UNTS 151; Article 21(a) of the 1982 World Charter for Nature UNGA World Charter for Nature UN Doc. A/RES/37/7 (28 October 1982); European Parliament and of the Council Directive 2003/4/EC of the on public access to environmental information (28 January 2003).

¹⁷⁵ Article 6 (a) (ii) UNFCCC in carrying out its commitments, state parties shall “Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: (ii) Public access to information on climate change and its effects.”

¹⁷⁶ Aarhus Convention *Op. Cit.*

Örnerlydiz case, the court made it clear that, even if the right to information is respected, it not sufficient to absolve states from its responsibilities.¹⁷⁷

Nevertheless, the right to information is of particular importance to populations that are particularly vulnerable to the effects of environmental change. It allows populations to take preventative action in case of an imminent environmental danger, enabling states to adopt adequate *ex ante* protection measures. These can include ordering evacuation measures to safer areas within the country or even permanent relocation actions within or beyond national state borders. In case of displacement due to environmental causes, it allows the state to take *ex post* protection measures by ensuring that the population affected receives adequate information and participates in the decision-making process if they wish to return to their place of origin.¹⁷⁸

By analogy, states' obligations to disseminate information in case of environmental risks is particularly inferred in the ECtHR's *Guerra and Others*. The court reiterated that the right to information implies states obligations to make information available to the public on environmental matters, but also "a positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public."¹⁷⁹ The ECtHR applied the same ruling concerning the right to information in *Oneryildiz* indicating that Turkey had violated several provisions of the ECHR (among which, Article 2 on the right to life).¹⁸⁰ In a comparable case, *McGinley and Egan v U.K.*, regarding risk assessment concerning nuclear testing causing possible adverse effects on the health of persons, the court reasoned that Article 8 (right to respect private life) implied a obligation on the state to put into action an adequate procedure for providing information on hazardous activities to exposed individuals.¹⁸¹ The right to information was later made clear by the same court in *Tatar v Romania* on the positive obligations of states deriving also from the right to respect private and family life in order to assess the risks to which populations are

¹⁷⁷ ECtHR, *Öneryildiz v Turkey* (2004) *Op. Cit.* para. 108.

¹⁷⁸ UNGA (2009) "Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons" U.N. Doc. A/64/214 (3 August 2009) para. 30. The report highlights some universal principles that should be respected with regards to persons displaced or at risk of displacement from environmental change who wish to freely to return to their homes including: 1) information on the process, consultation with and participation of the affected communities. 2) safety; 3) recovery of land and property upon return, including through settlement of property and land disputes; 4) physical needs and livelihoods.

¹⁷⁹ ECtHR, *Guerra and Others v Italy Op. Cit.* para. 52. The ECtHR found a violation of Article 8 (right to respect private life) and reasoned that this right implied a right to information if such information is pertinent to the enjoyment of that right. It is relevant to add that the ECtHR did not follow the interpretation of the former European Commission on Human Rights (EcmHR a body of experts in charge of determining the admissibility of cases for consideration on merits by the ECtHR, disbanded in November 1998 upon restructuring and the entry into force of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms) which held that Italy had violated its obligations not under Article 8 but rather Article 10 (right to Freedom of expression) by withholding information to residents on the risks of living close to a chemical plant. The Commission argued that Article 10 placed positive obligations on states both to make information available and to actively publish where the protection of the general public well being and health or danger to the environment is at stake. ECommHR *Guerra and Others v Italy* Application No. 14967/89 (29 June 1996).

¹⁸⁰ ECtHR, *Oneryildiz v Turkey* (2004) *Op. Cit.* para. 60.

¹⁸¹ ECtHR, *McGinley and Egan v U.K.* Application Nos.21825/93 and 23414/94 (08 June 1998).

exposed.¹⁸² In the judgement of *Vilness and Others v Norway*, the ECtHR took a further step and acknowledged that, under certain situations, states' obligations to provide access to information, to assess health risks encompasses not only the non-refusal to provide but also a duty to actively provide such information regardless of scientific uncertainty regarding the scope and extent of the risks.¹⁸³

The outlined case law helps us ensure that, with regards to (pre-)displaced populations, the right to information can be called upon not only on classical environmental matters *per se* but also by analogy to other situations including those stemming from environmental change factors.¹⁸⁴ As previously seen, this correlation is also visible in (quasi) judicial decisions both in the African and American regions, where there has been acknowledgment of the violation of the right to information and the parallel recognition of the obligation of states to take preventative measures to protect human rights.¹⁸⁵

4.3.2 The Relevance of the Right to Public Participation in Decision Making

The right to public participation in decision-making is intrinsically linked with the right to information. The public plays a major role in decision making in particular with regards to environmental and by extension human rights impacts. It is by no means odd that the right to participation can be found in various human rights law and environmental law instruments.¹⁸⁶ It is particularly noticeable, for example, under article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights and other international and regional human rights texts. The right to public participation has also been given particular relevance in the context of climate change. Under the UNFCCC states have an obligation to facilitate "Public participation in addressing climate change and its effects and developing adequate responses."¹⁸⁷ From this angle, the right to public

¹⁸² ECtHR, *Tatar v Romania* Application No. 67021/01 (27 January 2009) paras. 88,113, 118, 122, 124,128. The Court held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of ECHR on account of the Romanian authorities' failure to protect the right of the applicants, who lived in the vicinity of a gold mine, to enjoy a healthy and protected environment.

¹⁸³ ECtHR, *Vilness and Others v Norway* Application No. 52806/9 (05 December 2013) para. 244.

¹⁸⁴ It should be acknowledged however, that while other human rights treaties seem to recognise the right to information as a discrete or implied right deriving from the right to freedom of expression and opinion the ECHR itself does not recognise that right under Article 10 Freedom of Expression. The ECtHR has yet to sustain the interpretation that Article 10 (right to information) can give rise to a positive obligation incumbent on a state to disclose relevant information but has nevertheless, recognised the right to information in relation to other substantive rights (Article 2 Right to life and Article 8 Right to privacy of ECHR). See Donders, Y. (2015) "International Covenant on Economic, Social and Cultural Rights: Accessibility and the Right to Information" in T. MacGonagle & Y. Donders "The United Nations and Freedom of Expression and information critical perspectives" (Oxford University Press) p. 98; pp. 89-120. In this context and in relation to the ECtHR the author states: "the Court (ECtHR) is ready to accept far-reaching positive obligations concerning the dissemination of information under Art. 8 (and 2), in particular when it concerns potential health risks, whereas it has not (yet) been ready to accept such obligations under Article 10."

¹⁸⁵ See for e.g., IACtHR, *Claude Reyes et al. v Chile* Series C No. 151 (19 September 2006) paras. 73, 151 regarding deforestation of a Chilean region by a company; the court acknowledged the violation of the right to information but also reaffirmed the parallel obligation of states to take preventative measures.

¹⁸⁶ Article 14 (1) (a) Convention on Biological Diversity adopted 5 June 1992, in force since 29 December 1993, 30619 UNTS Chapter XXVII.

¹⁸⁷ Article 6 (a) (iii) UNFCCC.

participation comprises not only the right to be heard but also the right to affect decisions. This dual component of the right to public participation can also be found under the United Nations Convention to Combat Desertification, and calls for an integrated commitment of all relevant actors national governments, local population and authorities, non-governmental organisations, the scientific community and international (bilateral and multilateral) partners.¹⁸⁸

To a large extent, participation is a matter of legitimacy in which the public plays an active role (through representation, deliberation, or other form of action) in decision-making processes in other words, the ways in which proposed rules become norms and then law. Indeed, in the words of Kiss, “public participation is based on the right of those who may be affected, including foreign citizens and residents, to have a say in the determination [not only] of their environmental future”¹⁸⁹ but most importantly - we add, - on the protection of their human rights. This reckoning is made evident in *Hatton and Others v United Kingdom*, where the European Court explains that states’ public authorities, in decision-making processes affecting environmental issues, must “ensure that due weight has been accorded to the interests of the individual.”¹⁹⁰

This rights-based approach to public participation is intimately related to environmental displacement, and has been particularly highlighted by Raquel Rolnik, the Special Rapporteur on adequate housing:

“A rights-based approach would also ensure that, while affected communities are able to relocate away from hazardous zones (e.g. sinking cities), all efforts are made to ensure adequate and genuine consultation with the communities before any relocation decision is taken. In no circumstances should individuals be subject to forced evictions. A rights-based approach accordingly brings a focus on participation in planning and decision-making and on access to information, as well as accountability.”¹⁹¹

¹⁸⁸ Article 3 United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) adopted 14 October 1994, in force since 26 December 1996, 954 UNTS 3/ [2000] ATS 18/ 33 ILM 1328 (emphasis added): “ In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following: (a) the Parties should ensure that decisions on *the design and implementation of programmes* to combat desertification and/or mitigate the effects of drought are taken with the *participation of populations and local communities* and that an enabling environment is created at higher levels to facilitate action at national and local level; (b) the Parties should, in a spirit of international solidarity and partnership, improve cooperation and coordination at subregional, regional and international levels, and better focus financial, human, organizational and technical resources where they are needed; (c) the Parties should develop, in a spirit of partnership, cooperation among all levels of government, communities, non-governmental organizations and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use.”

¹⁸⁹ Kiss A. (2003) “The Right to the Conservation of the Environment” in R. Piccolotti & J. D. Taillant (eds.) “Linking Human Rights and the Environment” (The University of Arizona Press) p. 36.

¹⁹⁰ ECtHR, *Hatton and Others v United Kingdom* (2003) Application n° 36022/97 (8 July 2003) para.99. The court case deals with the night-time noise increase due to air transport travel in Heathrow airport and the violation among others of Article 8 ECHR. According to the court public decision making process also implies the realisation of studies and investigations to ensure a balance a fair balance between the competing interests of the individuals affected by the night noise and the community as a whole.

¹⁹¹ UNGA (2008) “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context” U.N. Doc. A/63/275 (13 August 2008) para. 38.

A rights-based approach to public participation cannot be detached from the principles of equality and non-discrimination. This requires that governments pay special attention to vulnerabilities and inequalities in not only the pre- but also post- displacement contexts to address inequalities and protect the most vulnerable. Generally, the groups disproportionately affected by environmental disasters include women, children, disabled, older people, and indigenous groups, many of who live under unsure tenure conditions and in vulnerable area exposed to strong winds, flooding, and landslides. Examples include Honduras in the wake of Hurricane Mitch in 1998 (in particular indigenous populations and women)¹⁹² or the Colombia floods throughout 2010 and 2011 (in particular indigenous and Afro-Colombians)¹⁹³ or even Hurricane Katrina in the U.S. in 2005 (affecting mostly poor African-Americans).¹⁹⁴

States should take special measures to protect most disadvantages groups to ensure equal enjoyment of their human rights. In a post-displacement phase, this may be translated into ensuring adequate access to information and public participation in decision making, and in particular to supporting those groups in returning to their original homes or to finding alternative land or housing. Governments should ensure that the most adequate participative approach¹⁹⁵ is taken. As a way of example, in Gujarat, India, in the aftermath of the 2001 earthquake while the government made a comprehensive and generally successful rehabilitation effort, which included the reconstruction of the affected villages three kilometres from the original location with the agreement of the local population this was found six years after the earthquake to be empty. The affected population, returned to the original village and built their own, alleging either a special attachment with their land or few local integrating infrastructures.¹⁹⁶

From the above, one thing can be made clear: while it is true that governments should ensure the right to participation and information even in the context of displacement by environmental factors, it must be seen as collaborative right. In this context, it is also relevant to highlight the increasing need of available remedy mechanisms to reinforce and protect the human rights of EDPs.

¹⁹² UNGA (2010) “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik” U.N. Doc. A/HRC/16/42 (20 December 2010) paras. 31, 32.

¹⁹³ Ferris, E. & Petz, D. (2011) “A Year of Living Dangerously: A Review of Natural Disasters in 2010” (London, The Brookings Institution — London School of Economics), p. 19.

¹⁹⁴ The Brookings Institution (2005) “New Orleans after the storm: lessons from the past, a plan for the future” (October 2005), p. 6 *available from*: http://www.brookings.edu/~media/research/files/reports/2005/10/metropolitanpolicy/20051012_neworleans.pdf [accessed 05 November 2014].

¹⁹⁵ *See generally*, International Red Cross and Red Crescent Societies (2010) “A practical guide to Gender-sensitive Approaches for Disaster Management” *available from*: <http://www.ifrc.org/PageFiles/96532/A%20Guide%20for%20Gender-sensitive%20approach%20to%20DM.pdf> [accessed 05 November 2014].

¹⁹⁶ UNGA (2010) A/HRC/16/42 (20 December 2010) *Op. Cit.* paras. 42, 43.

4.3.3 The Necessity of the Right to Access to Justice

The International Covenant on Civil and Political Rights¹⁹⁷ and other international instruments¹⁹⁸ develop quite extensively the content of the right to access to justice. Authors like Sudre have said that the right to access to justice is a complementary right¹⁹⁹ to other proscribed rights in international instruments. Though somewhat true, the author seems to overshadow the relevance of the right in itself. Its power derives from the following duality: the possibility of an effective remedy but also the eligibility for reparations. In the context of displacement, such remedies should involve, for example, full investigation and release of what acts or omissions led to the damages incurred by the displaced population and surviving relatives, including the prosecution of any criminally responsible acts.²⁰⁰ In addition, victims of displacement should be eligible for reparations, which can include compensation for the loss of family, property damage, and loss of revenue.²⁰¹ Both avenues should be dealt with or without the recourse to the ordinary judicial system, but always dealt with in an expedited way.

Generally speaking, states cannot be responsible for disasters that occur,²⁰² but from the previous analysis of the case law in sections 2 and 3, the right to life and other human rights create positive obligations on states to take the appropriate measures to safeguard the human rights of those who are within their jurisdictions against disasters risks.²⁰³ It is in this context that the right to access to justice seems justified, particularly when a disaster is foreseen and the state is unable or unwilling to take precautionary measures (e.g. temporary evacuation, relocation to safer areas, prohibiting return to unsafe locations) against the ensuing threat to

¹⁹⁷ Article 2 (3) (a) ICCPR reads: “Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

¹⁹⁸ See for example, Article 6 (1) and Article 13 ECHR; Article 25 ACHR; Principle 10 of the Rio Declaration provides that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” In this context, Agenda 21 calls on governments to establish judicial and administrative procedures for legal redress and remedy of actions that affect the environment or infringe the human rights of those concerned; Article 9 (3) Aarhus Convention.

¹⁹⁹ Sudre, F. (2005) “Droit Européen et International des Droits de l’Homme” (Presses Universitaires de France, 7^{ème} éd.) p. 387.

²⁰⁰ Brookings Institution & University of Bern (2005) “Protecting Internally Displaced Persons: Manual for Law and Policy Makers” (Brookings Institution October 2008) p. 58.

²⁰¹ *Ibid.*

²⁰² The Parliamentary Assembly of the Council of Europe, in its Recommendation 1862 (2009), “Environmentally induced migration and displacement: a 21st-century challenge” (30 January 2009) highlighted the concern that people in Europe have no specific legal remedy against environmental degradation and climate change due to human activity that affects their health and safety para. 5.

²⁰³ See ECtHR, *Okyay v Turkey*, Application No. 36220/97 (12 July 2005) paras. 67-69. The ECtHR noted that national administrative authorities failed to comply with previous national judgements to suspend the activities of three power stations. On the contrary, the Turkish Council of Ministers decided that the three thermal power stations should continue to operate despite the administrative courts' judgements. The decision had no legal basis and was unlawful under domestic law, which entitled the applicants to live in a healthy and balanced environment as duty-bound under the Turkish Constitution. The court held unanimously that there had been a violation of Article 6 (1) (right to a fair trial) of the European Convention on Human Rights. In *Taskin and Others v Turkey Op. Cit.* para 132, the ECtHR also held that the exploitation of a gold mine constitutes a genuine and serious threat to the right to live in a healthy and balanced environment guaranteed under Article 56 of the Turkish Constitution.

the right to life when it knew or should have known about the danger and had the capacity to act - to save human lives.

The IACtHR has formulated the legal obligation of states to take reasonable steps to prevent human rights violations more explicitly:

“The duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.”²⁰⁴

The environment is part of the wider legal protection human rights agenda and through international complaints procedures human rights tribunals offer the avenue to challenge government action. Because the environment and human rights are common denominators for EDPs, the right to access to justice might pave the way for governments to put in action measures to minimize or avoid altogether the effects of environmental displacement. The right to effectively protect human rights to avoid irreparable harm to the human person is essentially “a *law of protection* of the human being, [where] provisional measures reach effectively their plenitude, being endowed with a character, more than precautionary, truly *tutelary*.”²⁰⁵

5. The Explicit Recognition of the Duty of States to Protect from Displacement

In his book *International Law for Humankind: Towards a New Jus Gentium* Cançado Trindade highlights the presence of a preventative dimension in the domain of protection of the human person. The author rightly acknowledges that, in the past, the rules of international law were crystallised in a static outlook of the international legal order. Globally, the world was safer. The outlook today is different, he adds:

“In our days, amidst an acute consciousness of vulnerability, one begins to rethink those rules bearing in mind the temporal dimension, the incidence – perhaps less tangible, but real – and influence of which on juridical solutions begins to be felt with increasing intensity, as a feature of our times. There is, in this connection, a much greater awareness of the relevance of the preventative dimension in the role of law. [...] In recent developments concerning in particular environmental protection and human rights protection, the preventative dimension becomes manifest.”²⁰⁶

The manifestation of a preventative dimension (as the state’s underlying duty to prevent the violation of human rights) gains ground not only amidst international and regional (quasi) jurisdictional decisions. More importantly, the preventative dimension is further evident in a number of relevant interconnected normative texts and operational frameworks that, - explicitly or implicitly, - place obligations on states to prevent environmental displacement

²⁰⁴ IACtHR, *Velasquez Rodriguez v Honduras*, Series C No.4 (29 July 1988), paras. 174-175.

²⁰⁵ Cançado Trindade, A. (2010) “International Law for Humankind Towards a New *Jus Gentium*” (Martinus Nijhoff Publishers) p. 43.

²⁰⁶ *Ibid.* pp. 39-40.

and the violation of people's human rights. The following section aims to analyse various legal instruments where there arguably is an explicit recognition of the duty of states to prevent displacement of EDPs.

5.1 Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement (GPID) are a set of principles developed in 1998 by the former United Nations Secretary-General Representative on internally displaced persons, Francis M. Deng. They offer guidance to states in pre-in-post displacement phases. It is their holistic perspective that plays a key role in the conceptualisation of protection for EDPs in the context of this work (see Chapter 2 Section 6). The GPID have been used by states as a basis for their national laws and policies on IDPs. They have also been acknowledged by the (former) U.N. Commission on Human Rights and the UN General Assembly,²⁰⁷ and well received by the Inter-Agency Standing Committee (IASC), which is composed of heads of the key U.N. and non-U.N. humanitarian international relief and development agencies. The Principles have been widely disseminated by both international and regional bodies (such as Organization of American States, the African Union, and the Organisation for Security and Cooperation in Europe) and grass-roots organisations.²⁰⁸ The GPID may be generally considered primary soft law since they are addressed to the international community as a whole²⁰⁹ and seek to reassert human rights and humanitarian norms contained in various instruments, whilst being legally innovative within the context of internal displacement.

Even if it seems that the GPID articulate the topic of preventing displacement in a subsidiary way, they are germane to certain issues of human vulnerability, as well as to the question of state obligations. For the purpose of the Principles, the definition of internally displaced persons (paragraph 2) makes it clear that displacement extends to human-caused and natural disasters. In addition, Principle 3 articulates that the primary duty and responsibility for ensuring protection and assistance rests with national authorities.²¹⁰

The GPID offer three provisions of relevance to the prevention of displacement from natural or human-made disasters. Those provisions are Principles 5, 6, and 9. Principle 5 lays out the duty of states to abide by their obligations under international law, including human rights and humanitarian law, to prevent and avoid the conditions that may lead to displacement of persons in the first place. Principle 6 recognises that individuals have the right to protection

²⁰⁷ UN Commission on Human Rights (now UN Human Rights Council) (1998) "Res. 1998/50, Internally displaced persons" (17 April 1998); UNGA (1999) "Res. 54/167, Protection of and assistance to internally displaced persons" (17 December 1999).

²⁰⁸ See Kälin, W. (2008) "Guiding Principles on Internal Displacement - Annotations" Studies in Transnational Legal Policy No. 38 (Washington DC, ASIL, The Brookings Institution Project on Internal Displacement). The Annotations are the most authoritative for interpreting the GPID.

²⁰⁹ See Shelton, D. (2000) "Commentary and Conclusions", in D. Shelton (ed.) "Commitment and Compliance" (Oxford University Press) pp. 449-450.

²¹⁰ This general principle is repeated several times throughout the text (e.g. Principle 25 - provision of assistance; Principle 28 - establishment of conditions and provisions of means to voluntarily return; Principle 29 - assistance in recovery or compensation for property and lost possessions GPID).

from “arbitrary displacement,” which it does not define. However, it does illustrate it with an indicative list of examples where displacement is caused by (unfounded) human intervention. States cannot forcibly evacuate (displace) parts of their populations unless such an evacuation is vital for the safety and health of the people affected by disasters.²¹¹ The reasoning behind displacement in the case of disasters would hardly be justifiable in any other circumstance.²¹² Morel explains that, even though much of the content of the GPID is binding upon states that are party to the relevant human rights and humanitarian law instruments (or customary law), this is not the case neither with regards to the definition of internally displaced person nor with Principle 6.²¹³ These provisions have no binding character, but only have a “soft law” status because they have not been officially adopted by states by means of treaty or a convention.²¹⁴

However, with regard to Principle 6, the purpose of expressly stating a right not to be arbitrarily displaced was to “defin[e] explicitly what is now only implicit in international law “specifically” a general rule according to which forced displacement may be undertaken only exceptionally and, even then may not be effected in a discriminatory matter nor arbitrarily imposed.”²¹⁵ The implicit prohibition from displacement derives from certain provisions namely freedom of movement and residence, the right to freedom from arbitrary interference with one’s home and the right to housing, whereas the explicit prohibition from arbitrary displacement derives from humanitarian law and the law related to indigenous peoples.²¹⁶ “Taken together, these rights and guarantees constitute a sound legal basis for restating, in general terms, a general prohibition against arbitrary displacement”²¹⁷ with customary character.²¹⁸

It is important to notice that Principle 6 is focused on evacuation rather than the effects of disasters. But the general latitude of the definition of internally displaced persons (covering

²¹¹ Principle 6 (2) (d), GPID.

²¹² Kälin (2008) *Op. Cit.* p.18.

²¹³ Morel, M. (2014) “The Right not to be Displaced in International Law” (Intersentia) p. 84.

²¹⁴ *Ibid.*

²¹⁵ Kälin (2008) *Op. Cit.* p. 14; Stavropoulou, M. (1994) ”The Right Not to Be Displaced” 9 *The American University Journal of International Law and Policy*” 3 p. 738, pp. 689-749. The notion of “arbitrary” displacement refers to the classical approach under which a lawful restriction of human rights may be pursued as long as it is legal, legitimate, necessary, and proportionate.

²¹⁶ See Kälin (2008) *Op. Cit.* p.14; Article 12 UDHR; Articles 12 (1) and 17 ICCPR; Articles 11 and 21 (1) ACHR; Article 8 ECHR and Article 2(1) Protocol No.4 to the ECHR; Article 12(1) ACHRP; Articles 49 and 147 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) adopted 12 August 1949, in force since 21 October 1950, 75 UNTS 287; Articles 51(7), 78(1) and 85 (4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted 08 June 1977 in force since 07 December 1978, 1125 UNTS 3; Articles 4(3)(e) and 17 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) adopted 08 June 1977 in force since 07 December 1978, 1125 UNTS 609 and Article 16 of Convention No. 169 (ILO) concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, in force since 5 September 1991, 28 ILM 1383 (emphasis added): “The peoples concerned *shall not* be removed from the lands which they occupy.”

²¹⁷ Kälin (2008) *Op. Cit.* p. 14

²¹⁸ Simons, M. (2002) “The Emergence of a Norm Against Arbitrary Forced Relocation” 34 *Columbia Human Rights Law Review* p .96 pp. 95- 156.

both human and natural disasters) and the combined reading of Principles 5 and 6, can lead us to conclude that displacement, could be considered “arbitrary” if it is imputable to government authorities. Indeed, displacement can be a result of an active or passive state policy in other words, if the government acts unreasonably in exposing people to disaster risks or it fails to mitigate disaster risks under human rights law.²¹⁹ Furthermore, Principle 9 provides that “states are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”²²⁰ A study on the legal aspects relating to the protection against arbitrary displacement, prepared in the context of the GPID articulated “forced displacement” as containing “policies that have the purpose or the effect of compelling people to leave their home and place of habitual residence, including in some case relocating them to another area of the country, against their will.”²²¹ In relation to state involvement, the following was highlighted:

“In many cases the State will be responsible for and actively involved in carrying out displacement policies. In other cases the State may condone, tolerate or acquiesce to such policies and its role may be more difficult to discern. However, even in cases where the precise role of the State is unclear, the effect of such policies and their consequences for the enjoyment of human rights will be sufficient to determine the legality or illegality of forced movement and the obligations of the State concerned vis-à-vis the persons so moved (displaced). Where it is determined that the forced removal of people is a result of (active or passive) State policy and is illegal questions of State responsibility arise.”²²²

It follows from the above that, under the GPID, there is grounding for a general obligation (positive and negative) of states to refrain from arbitrarily displacing people, as well as a duty to both prohibit and prevent people from displacement both by human-made and natural disasters. In practical terms, this can be translated by a general lack of state policy (such as disaster preparedness or even climate adaptation policies) or by the inaction of the state to protect its people when a disaster occurs. Authors like Stavropoulou, have argued that this preventative approach or even the consolidation of the right not to be displaced “would provide governments of developed countries weary of refugees with a pretext for increased efforts to contain them in their country of origin.”²²³ In reality, the GPID clearly articulate under Principle 2(2) that they “shall not be interpreted as restricting or modifying or

²¹⁹ Fisher, D. (2010) “Legal Implementation of Human Rights Obligations to Prevent Displacement due to Natural Disasters” in K. Koser & A. Solomon (eds.) “Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges” pp. 551-590, p. 553.

²²⁰ ILO Convention no 169 of 1989 *Op. Cit.* Article 13 (1) provides that “governments shall respect the special importance for the cultures and spiritual values of their relationship with their lands or territories, or both as applicable, which they can occupy or otherwise use, and in particular the collective aspects of this relationship.” The UN Declaration of the Rights of Indigenous Peoples (2007) provides that “States shall provide effective mechanisms for prevention of, and redress for (...) [a]ny action which has the aim or effect of dispossessing [indigenous peoples and individuals] of their lands, territories or resources” UNGA Res. 61/1295, UN Doc. No A/RES/61/1295 (13 September 2007) . Arguably, the language used here is wide enough to include cases where states fail to adequately protect the rights of indigenous population from loss of their homes due to environmental stressors.

²²¹ *Compilation and Analysis of Legal Norms* (1998), Part II, Introduction para.3.

²²² *Ibid.* Introduction para.5.

²²³ Stavropoulou, M. (2010) “The Kampala Convention and Protection from Arbitrary Displacement” 36 *Forced Migration Review* pp.62-63.

impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.”

Protection from displacement is thus complementary to the right to seek and enjoy asylum in other countries.²²⁴ More importantly, protection from, during, and after displacement fully interact with each other, highlighting the much-needed holistic and integrative approach to protection for EDPs. The domino effect of a preventative approach to protection implies that the personal scope of application can be extended to the externally displaced persons category (even if it was established in the context of GPID). This is because, in the context of environmental change, any legal or policy framework that positively prevents and avoids internal displacement can have ramifications to avoid cross-border displacement. To the extent that the GPID do not merely reproduce existing norms, states are not formally bound by them, so their innovative impact may be limited. But the fact that the GPID have been incorporated by approximately 20 states into their national legislation and policies solidifies an explicit preventative approach to protection and a certain degree of recognition of this obligation by national states.²²⁵

5.2 Internal Displacement Protocol to the Great Lakes Pact

The GPID and its normative foundations have influenced many regional and sub-regional processes, such as the adoption of the Kampala Convention (see next section) and the Protocol on the Protection and Assistance to Internally Displaced Persons added to the Pact on Security, Stability and Development in the Great Lakes Region (IDP Protocol to the Great Lakes Pact).²²⁶

With the objective of ending endemic conflicts and the consequences thereof prevailing in the Great Lakes Region, the IDP Protocol to the Great Lakes Pact is the first multilateral instrument legally obliging states to enact national legislation to implement the GPID. This includes enacting the necessary legislative framework to prevent arbitrary displacement and to eliminate the root causes of displacement altogether, under Article 3(1).²²⁷

Like the GPID, the IDP Protocol to the Great Lakes Pact thus imposes both positive and negative obligations upon states to protect people from displacement, including both natural and human-made disasters. In particular, and to the extent possible, states are obliged to

²²⁴ Morel (2014) *Op. Cit.* p. 87.

²²⁵ See Brookings- Bern Project on Internal Displacement:

<http://www.brookings.edu/about/projects/idp/resources/idp-policies-index> (Accessed 6 October 2014).

²²⁶ In December 2006 at the International Conference on the Great Lakes Region eleven states (Angola, Burundi, Central African Republic, Chad, Democratic Republic of Congo, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia) adopted the Pact on Security, Stability and Development in the Great Lakes Region (Great Lakes Pact) which entered into force in June 2008. The IDP Protocol to the Great Lakes Pact forms one of the ten Protocols to the Great Lakes Pact. Both the Great Lakes Pact and its ten Protocols have been ratified by the eleven states that participated in the International Conference on the Great Lakes Region.

²²⁷ Article 3 (1) IDP Protocol to the Great Lakes Pact reads: “Member States undertake to prevent arbitrary displacement and to eliminate the root causes of displacement.”

mitigate the consequences of displacement caused by natural disasters (Article 3 (2)).²²⁸ By emphasising the obligation of states not only to prevent arbitrary displacement but also to eliminate the root causes of displacement, the IDP Protocol to the Great Lakes Pact establishes, in a way, a legal framework that makes explicit the general obligation of state parties to prevent displacement. This general obligation is further articulated in the IDP Protocol prescribing member states to use the Annotations of the Guiding Principles as an authoritative source for their interpretation, and annexes the GPID to the Protocol.

In the context of EDPs, this general obligation can include the obligation of states taking both a preventative and proactive approach to mitigate and/or adapt to the effects of environmental change and thus avoid displacement. Examples include taking steps to reduce greenhouse emissions, implementing national adaptation plans and providing for channels of engagement and cooperation between organs of government to develop adequate regional circular migration schemes as a legitimate adaptation strategy to adapt to environmental stressors and ensure cooperation with international partners, as well as effective participation of those displaced (or potentially) in policy making process.²²⁹ By signing this document, the Great Lakes States committed themselves to adopting and implementing the GPID at the national level. The Protocol also endeavours to adapt the GPID to the characteristics of internal displacement within the region (particularly, by defining the scope of the states' duties and setting up a regional mechanism for monitoring protection of those displaced).

5.3 The Kampala Convention

The 2009 Convention for the Protection and Assistance of Internally Persons in Africa (Kampala Convention) is the first human rights pan-regional document adopted by the African Union to solidify and acknowledge the duty of protection as prevention. It aims to offer a legal framework that imposes obligations on states to fully respect their obligations under international law so as to prevent and avoid conditions that might lead to the arbitrary displacement of persons.²³⁰ No other human rights instruments at the international or regional levels (ICCPR, ICESCR, ECHR, ACHR or ACHPR) offer such recognition. By setting the

²²⁸ Article 3 (2) IDP Protocol to the Great Lakes Pact reads: "Member States shall, to the extent possible, mitigate the consequences of displacement caused by natural disasters and natural causes."

²²⁹ Many of these ideas are (can be) domesticated in Article 6 of the IDP Protocol to the Great Lakes (emphasis added): "Adoption and Implementation of the Guiding Principles 1. Member States undertake to adopt and implement the Guiding Principles as a *regional framework for providing protection and assistance to internally displaced persons* in the Great Lakes Region; 2. Member States accept to use the "*Annotations of the Guiding Principles on Internal Displacement*" as an authoritative source for interpreting the application of the Guiding Principles; 3. Member States shall enact national legislation to domesticate the Guiding Principles fully and to provide a legal framework for their implementation within national legal systems; 4. Member States undertake to ensure that such legislation shall: a. *Define internally displaced persons according to Article 1(4)(5) of this Protocol*; b. *Prescribe the procedures for undertaking development induced displacement*; c. *Specify the organs of government responsible for providing protection and assistance to internally displaced persons, disaster preparedness and the implementation of the legislation incorporating the Guiding Principles*; d. *Provide for the channels of engagement and cooperation between the organs of government, organs of the United Nations, the African Union, and civil society*; e. *Enable the holistic incorporation of the Guiding Principles*. 5. Member States shall ensure the *effective participation of internally displaced persons in the preparation and design of the said legislation*.

²³⁰ Article 4 (1) Kampala Convention.

normative and legal framework for the governance of internal displacement, the Kampala Convention aims at promoting and strengthening regional and national measures to “prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions.”²³¹

Generally, the Convention can be commended for the open latitude of its provisions. This is particularly visible with regards to the non-exhaustive causes and consequences of internal displacement referred to under Article 4.²³² Like the GPID, the Kampala Convention provides a set of rights of internally displaced persons and the corresponding duties of the duty-bearers in the pre-in-post displacement phases. Undisputed under international law, the Kampala Convention ensures that states parties lay at the centre as duty-bearers, complemented by an extensive catalogue of obligations, though the regional instrument does go a bit further than the GPID as it also specifies the obligations of other non state-actors.²³³ In the words of Maru: “[b]y proscribing all kinds of action that may cause arbitrary displacement and imposing duties on [states and non-state] actors who may come in contact with IDPs, the Kampala Convention aspires towards effective prevention of displacement as its main aim.”²³⁴

Indeed, the Kampala Convention exerts prevention, mitigation, and perhaps avoidance altogether of conflict induced displacement, natural and man-made disaster induced displacement and development induced displacement. In particular regarding disasters, sometimes the options are rather limited and people might have to retreat from those areas and to adapt or mitigate the impacts of environmental change. Overall, the Convention seeks to offer protection against all kinds of displacement.

It is particularly regarding natural and man-made disasters, and relevant in the context of this work, that the Kampala innovation comes about. It formalizes for the first time, in a legally binding document, the plight of those displaced by environmental change that are not traditionally protected under international law.²³⁵ It does so in a holistic and inclusive matter

²³¹ Article 2 (a) Kampala Convention.

²³² See in particular the catch all clause under Article 4 (4) (h) of Kampala Convention. The prohibited categories of arbitrary displacement include (but are not limited to): “Displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.”

²³³ The Kampala Convention stipulates obligations to other non-state actors, such as armed groups, NGO’s, civil society organisations, international aid agencies, other private actors such as companies or private military and security companies and other global governance multilateral bodies such as the African Union. See Articles 3 (1) (g) (h) (i) 4 (3), 5 (11), 6, 7,8, 13, 14 of Kampala Convention. Of importance is the fact that the Kampala Convention establishes criminal responsibility for individuals engaged or involved in arbitrary displacement. See Article 3 (1) (g) of the Kampala Convention.

²³⁴ Maru, M. T. (2011) “The Kampala Convention and Its Contribution in Filling the Protection Gap in International Law” 1 *Journal of Internal Displacement* 1 pp. 91-130, p. 98. See Article 2 (a); Article 3 (1) of the Kampala Convention.

²³⁵ This recognition is particularly visible under Article 1(k); Article 4 (4) (f); Article 5 (4) and Article 12 (3) of the Kampala Convention.

narrowing the protection gap of over 20 million people in Africa alone,²³⁶ and the sheer number and increasing trend of those displaced by environmental factors.²³⁷ Like Principles 5 and 6 of the GPID, the Kampala Convention imposes both negative and positive duties on states to refrain from, prohibit, and prevent arbitrary displacement.²³⁸ Explicit reference is made to avoiding forced evictions (or arbitrary displacement) in the context of disasters (Article 4 (4)(f)). It further imposes on state parties the duty to “devise early warning systems, in the context of the continental early warning systems, in areas of potential displacement, establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures.”²³⁹

The Convention is clear about state parties’ obligations in terms of protecting people internally displaced “as a result of or in order to avoid the effects of (...) natural or manmade disasters” (Article 1(k)), including disasters associated with the impacts of climate change (Article 5(4))²⁴⁰ and the need to seek durable protection solutions. Additional attention is also paid on the duty of states parties “to protect communities with special attachment to, and dependency, on land due to their culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests.”²⁴¹

The document seeks to harden in a legally binding document provisions that previously were only found in a soft law format under the GPID. In doing so it aims at being comprehensive by including and highlighting the legitimate concerns of those displaced by environmental factors. At the same time it fulfils at a regional level the legal protection gap that existed prior to the Convention.²⁴² Through this holistic optic, one has to agree with Stravoupoulou that

²³⁶ See IDMC and UN OCHA (2009) “Monitoring Disaster Displacement in the Context of Climate Change: Finding of a study by the United Nations Office for the Coordination of Humanitarian Affairs and Internal Displacement Monitoring Centre” (Norwegian Refugee Council) pp. 11-12.

²³⁷ See Pachauri, R. & Reisinger, A. (eds.) (2007) IPCC Climate Change 2007: Synthesis Report, Summary for Policymakers, contribution of Working Groups I, II, and III to the Fourth Assessment Report, IPCC, p. 104.

²³⁸ See Article 3 (1) (a) Kampala Convention. See also Article 4 (1) Kampala Convention, which is similar to Principle 5 of GPID. Authors like Maru (2011) *Op. Cit.* p. 109 neatly summarises the duty of states to respect, protect and fulfil: “In the Kampala Convention, prevention mainly means the prohibition, effective deterrence, and avoidance of arbitrary population displacements. In other words, it refers to the freedom from arbitrary displacement and the obligations of states and the international community to eliminate when possible and reduce the causes of displacement, and mitigate their negative impact when they occur. As the old wisdom dictates “prevention is better than the cure,” thus addressing the roots causes of displacement constitutes the most effective measure to prevent displacement from occurring.”

²³⁹ Article 4 (2) Kampala Convention. As previously seen similar provisions also exist regarding the duties of states parties with regards to disaster-induced displacement laid down in Articles 3 (2) and (5) of the Great Lakes Pact.

²⁴⁰ See Article 5 (4); Article 9; Article 11 Kampala Convention

²⁴¹ Article 4 (5) Kampala Convention.

²⁴² See African Union Explanatory note to on the Kampala Convention p. 2 “The absence of a specific and binding international legal regime specific to IDPs represented a serious gap creating numerous challenges for their protection, assistance and finding durable solutions for their problems. It is to address this gap in Africa, a continent disproportionately affected by internal displacement that the African Union embarked on the development of a binding legal framework.” See also Maru *Op. Cit.* p. 94 stating “If international protection and assistance are provided under international law for other vulnerable groups, why should not international law provide similar protection to IDPs who face similar or even higher degrees of vulnerability and hence more needs compared to other vulnerable groups. In a nut shell, the absence of binding law has left million of IDPs out of compass of the international protection of human rights, thus, resulting in a “protection gap”.”

the Kampala Convention inadvertently (or not) includes and seeks to protect both internal and external displacement going beyond the scope of its title.²⁴³ In other words, the Convention extends obligations of protection to environmentally displaced persons, ensuring that they are granted equal protection as any other internally displaced person through all phases of displacement. The corroborating argument lays with the general openness of its provisions, in particular the definition of protection from displacement (not limiting itself to internal displacement) under article 4(4)²⁴⁴ and where prevention of internal displacement and timely response can significantly contribute to the reduction of refugees and asylum seekers, (notwithstanding the complementary character of the right to seek asylum in other countries derived from the GPID and generally absorbed by the Kampala Convention).²⁴⁵

One of the most crucial issues of the Kampala Convention is the enforcement of its provisions, including the duty of states to protection from displacement. As Mr. Nyanduga, the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa, remarked in unequivocal terms: “[u]nless African states address the gap between the assumption of international legal obligations, their implementation and domestication, adoption of additional instruments, including those related to IDPs, will not alleviate human rights violations.”²⁴⁶ The monitoring mechanisms envisaged under the document are not particularly strong and are limited to periodic meetings of the Conference of State Parties and the submission of reports to the African Commission on Human and People’s Rights. A prominent role is given to the African Union in coordinating states’ efforts and protecting and assisting IDPs in extreme cases. Questions regarding interpretation and application of the

²⁴³ Stravropoulou, M. (2010) “The Kampala Convention and Protection from Arbitrary Displacement” 36 Forced Migration Review pp. 62-63; p. 62. The author even suggests that the Kampala Convention complements the 1951 Convention on the Status of Refugees. *See* Morel (2014) *Op. Cit.* p. 93 expressing the opposite view alleging that protection from displacement under the Kampala Convention was established specifically for the protection and assistance of IDPs and not for those across the international border, even if Article 4 (4) speaks about displacement generally.

²⁴⁴ Article 4 (4) of the Kampala Convention reads: “All persons have a right to be protected against arbitrary displacement. The prohibited categories of arbitrary displacement include but are not limited to: a) Displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population; b) Individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law; c) Displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict; d) Displacement caused by generalized violence or violations of human rights; e) Displacement as a result of harmful practices; f) Forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected; g) Displacement used as a collective punishment; h) Displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.

²⁴⁵ *See* Preamble para. 11 of the Kampala Convention reads: “Recognising the inherent rights of internally displaced persons as provided for and protected in international human rights and humanitarian law and as set out in the 1997 United Nations Guiding Principles on Internal Displacement, which are recognized as an important international framework for the protection of internally displaced persons.”

²⁴⁶ Nyanduga, T. B. (2006) “The Role of the African Commission on Human and People’s Rights in Addressing Internal Displacement” Coalition for an Effective African Committee on Human and Peoples Rights, (26 April 2006) p. 12 *available from:* http://africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=20&Itemid=29&lang=en [accessed 15 October 2014].

Kampala Convention can be referred by states to the African Court of Justice and Human Rights as it becomes operational. Importantly, access to justice by individuals to the future African Court (on a violation of guaranteed rights in any human rights instrument ratified by the state parties) is rather limited and can only be permitted if the state party expresses and accepts the competence of the court. Ultimately, the best available option for individuals is to use the African Commission on Human and People's Rights in light of any human rights violation, including under the Kampala Convention. But even here, the decisions of this organ are not legally binding upon the states concerned.

5.4 The Peninsula Principles

The Peninsula Principles on climate displacement within states²⁴⁷ are a result of a five-year process of consultations with communities in affected countries. They were crafted taking into account the views of governments, civil society organisations, U. N. agencies and affected populations. They gained momentum in August 2013 when a team of international legal and climate experts gathered in the Red Hill on the Mornington Peninsula near the Victorian capital Melbourne (the place that also inspired the Principles' name) under the headship of Displacement Solutions.²⁴⁸

The Peninsula Principles seek to minimize the impact of climate change displacement on individuals within the boundaries of their own country. The definition of who is a climate displaced person is limited to "individuals, households or communities who are facing or experiencing climate displacement,"²⁴⁹ which is "the movement of people within a State due to the effects of climate change including sudden and slow-onset environmental events and processes, occurring alone or in combination with other factors."²⁵⁰ The Principles open with a preamble laying out their overarching humanitarian purpose and their international sources. Like the GPID the Peninsula Principles are not crafted in a legal vacuum as they overtly affirm that they "build on and contextualize the United Nations Guiding Principles on Internal Displacement to climate displacement within states"²⁵¹ and acknowledge the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles), incorporating some of their provisions.

Interestingly, the Peninsula Principles recognise that "climate displacement can involve both internal and cross-border displacement," but limit their scope because it adds: "most climate displacement will likely occur within State borders."²⁵² There is an implied danger in this assumption for two reasons. First, the Principles purposively leave out other persons that are also in need of protection (those who cross the border due to environmental factors) where a

²⁴⁷ Peninsula Principles on Climate Displacement within States, 19 August 2013 *available from:* <http://displacementsolutions.org/peninsula-principles/> [accessed 15 August 2015].

²⁴⁸ Displacement Solutions is a non-governmental organization that works with displaced populations communities, governments and the UN to find rights-based land solutions to climate displacement. More information is *available from:* <http://displacementsolutions.org/about-ds/>

²⁴⁹ Principle 2 (c) Peninsula Principles.

²⁵⁰ Principle 2 (b) Peninsula Principles.

²⁵¹ Preamble para. 3 Peninsula Principles.

²⁵² Preamble para.6 Peninsula Principles.

protection gap has been clearly identified in various international fora. Second, it fails to see protection of EDPs as a holistic enterprise. A more general criticism of the Principles has been made by Ferris, adding that they “do not tackle the difficult issue of determining when climate change forces people to leave or how to differentiate those who are displaced by the effects of climate change and other environmental/economic reasons.”²⁵³ The question therefore arises as to whether another set of principles is really necessary and what their overall added value is.

Essentially, the Peninsula Principles can be praised because they focus on the needs of environmentally displaced persons and not the interests of states. The particular focus on protection from displacement gains relevance from the very beginning of the document articulating “the right of climate displaced persons to remain in their homes and retain connections to the land on which they live for as long as possible” and the corresponding home states obligations “to prioritise appropriate mitigation, adaptation and other preventative measures to give effect to that right.”²⁵⁴ Indeed, “States should, in all circumstances, comply in full with their obligations under international law so as to prevent and avoid conditions that might lead to displacement,”²⁵⁵ particularly taking preventative and remedial measures at local, state, and national levels, “prioritising the prevention of displacement.”²⁵⁶ This pre-emptive approach is also reflected in the context of a rights-based and participatory relocation process highlighting the value of the involvement of those victims in choices that affect their future.²⁵⁷ The added value of the Principles is that they craft the duty of home states to prevent as much as possible the displacement of people caused by environmental changing conditions.

In this context (and as a referred before in relation to the previous analysed legal instruments), even if not targeted at those who may cross international borders due to environmental stressors, the Peninsula Principles explicitly build a preventative approach to protection that is also relevant for them. Any action taken by the home state to avoid the displacement of populations internally also contributes to avoiding external forced and protracted displacement. The Principles set, for example, a particular focus on the responsibilities of the country of origin, listing international cooperation and assistance as one of their general obligations and adding that “climate displacement is [also] a matter of

²⁵³ Ferris, E. (2014) “Planned Relocations in the Context of climate Change: The Time to Get Ready is now” (Brookings 18 June 2014) available from: <http://www.brookings.edu/blogs/planetpolicy/posts/2014/06/18-relocations-climate-change-ferris> [accessed 20 June 2014]. In reality such criticism can be refuted as the Peninsula Principles seem to build on the same assumption of this work: in that forced displacement can occur both by “sudden and slow-onset environmental events and processes, occurring alone or in combination with other factors.” (Principle 2 (b)) As previously mentioned, while not all movements are due to environmental factors alone it is important to consider in the context of this problem the environment as an *objective* and *autonomous* factor that leads to displacement (threat multiplier).

²⁵⁴ Preamble para. 7 Peninsula Principles

²⁵⁵ See Principle 5 “Prevention and Avoidance” of the Peninsula Principles.

²⁵⁶ See Principle 7 (a), (b) and (c) “National implementation measures” and Principle 9 “Climate change and risk management” of the Peninsula Principles.

²⁵⁷ Principle 7 (d) “National implementation measures” and Principle 10 “Participation and consent” Peninsula Principles.

global responsibility.”²⁵⁸ The document recognises that the affected states have the right to seek and demand that other states and/or international agencies cooperate in the provisions of adaptation and assistance, as well as protection of those displaced (shared responsibility).²⁵⁹ The highlight of the role of third states and other non-state actors is a step forward for recognizing also their responsibility in protecting both internal and - even if not intentionally - cross-border people displacement.

5.5 Reflections and Conclusions

Beyond the conceptual wrangling of the establishment of a “right not to be displaced in international law,”²⁶⁰ undoubtedly the recognition of the obligation of states to prevent displacement due to natural and human-made disasters has been progressively recognised in both hard and soft law at the international, regional, and sub-regional levels. At the international level protection from displacement is embodied in Principles 5 and 6 of the GPID. At the regional level, this is exemplified in Article 4 of the Kampala Convention. Finally, at the sub-regional level, the IDP Protocol to the Great Lakes Pact protection from displacement is recognised by extension; i.e., as it imposes on state parties the obligation to adopt and implement the GPID.

The explicit recognition of the duty of states to prevent displacement in case of natural and man-made disasters protects every vulnerable individual, guaranteeing that they take the necessary action to prevent and avoid displacement altogether. In this vein, states have both negative and positive obligations to respect, protect, and fulfil the rights of those people who are or potentially will be displaced. States must refrain from carrying out and must prohibit arbitrary displacement, and at the same time prevent and, where possible, mitigate displacement caused by natural or human-made risks or other third parties. In this context, prevention from displacement does not imply the curtailment of the right to seek asylum abroad it; rather, it reinforces and acts as a complementary means of protection. In this sense, the GPID have had an exponential influence, bearing in mind that they were not drafted by states but by a team of experts.

It is true that the majority of the instruments analysed in the previous section are particular to the internal displacement context, and that this can limit their scope of application, but not their relevance. The Kampala Convention offers some conceptual clarity for those people who may be displaced across international borders on various fronts. From a legal perspective, it is the most powerful - even if regional - due to its binding character solidifying a general preventative approach to protection found in international instruments. Secondly, the recognition of prevention of displacement, in particular, vulnerabilities due to natural and human-made disasters, elevates the recognition of a group of the population in need of protection and generally side-lined by international law. It fills at a regional level a previous

²⁵⁸ Principle 8 (a) “International cooperation and assistance” Peninsula Principles.

²⁵⁹ See Principle 8 (b), (c) and (d) and Principle 13 “Institutional frameworks to support and facilitate the provision of assistance and protection” of the Peninsula Principles.

²⁶⁰ See generally, Morel (2014) *Op. Cit.*

international legal protection gap. Furthermore, it enriches the conceptual clarity and the legal definition - unintentionally or not - of what constitutes displacement (that can be both internally and across international borders). At last, by applying the adage “prevention is better than the cure” the Kampala Convention splinters its protection potentials towards environmentally displaced persons, serves as a model and incentive for other regions, and overall contributes to the much-needed holistic approach to protection.

In this context, it must be finally highlighted that the Peninsula Principles represent in a way, a legal synthesis of the various sources of law that were previously analysed. They embody an interdisciplinary approach that is needed to tackle such a complex issue as displacement and serve as a reference point for states. They represent a valuable source, first because they recognise both people internally and externally displaced due to environmental factors, and second because they clearly outline the duties of home states to tackle internal displacement and implicitly avoid, - by extension, - cross-border displacement of populations.

6. The Implicit Recognition of the Duty of States to Protect from Displacement

The operational frameworks on disaster risk reduction and adaptation to climate change at the international and regional levels have, albeit recently, made an influential contribution to the environmental displacement debate. This impact has been increasingly highlighted in the literature. Both international and regional disaster structures do not deal with displacement *per se* but their extensive elaboration on preventing disasters and/or adapting to a changing environment highlight the obligations of states to take preventative action and to reduce vulnerabilities and protect human rights of those affected (or potentially affected) thus, the importance of their perusal in the context of this research.

It is beyond the ambition of this study to examine the entire operational frameworks on disaster risk reduction and adaptation to climate change, but it is worthwhile to make particular reference to various international and regional instruments, in particular the Hyogo Framework on Disaster Risk Reduction and the supporting obligations of the EU and its member states towards disaster risk reduction in developing countries. A section on adaptation to a changing environment is especially outlined, discussing different measures that may avoid displacement and problematize migration as a legitimate strategy of adaptation, as well as the possible development of a new status of protection. At the end, there is a brief note about the increased convergence trend between disaster risk reduction and climate change adaptation and the benefits of such developments to tackle the issue of displacement. In this context, the prophylactic nature deriving from environmental law principles, is examined because of their latitude and complementarity not in granting rights *per se* to those displaced, but in safeguarding an increasingly responsible exposure to environmental harm.

6.1 Disaster Risk Reduction and the Adaptation to a Changing Environment

6.1.1 At the International Level: The Hyogo Framework on Disaster Risk Reduction

The Hyogo Framework on Disaster Risk Reduction (the Hyogo Framework for Action)²⁶¹ is probably the most well-known international instrument on the establishment of a common system of coordination for the prevention of disasters.

It was the U.N. that paved the way towards the establishment of a system of prevention of disasters. In 1972, the General Assembly declared: “the vital importance to lessen the impacts of disasters, of assistance to disaster-prone countries in preventative measures, disaster contingency planning and preparedness.”²⁶² The tragic human, economic, and social consequences of the impacts of disasters in the subsequent decades made the international community conscious of the need to cooperate and take preventative action and of the need to reduce the effects of natural and human-made disasters, but most importantly the need to protect vulnerable populations, gained terrain in the international fora predominantly as governments gathered, reaffirming their commitments in the Millennium Summit.²⁶³

Building upon a previous international consensus document (the Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and its Plan of Action²⁶⁴), the Hyogo Framework for Action was endorsed by the U.N. General Assembly²⁶⁵ following acknowledgment by 168 states at the 2005 World Disaster Reduction Conference. It is a 10-year strategic plan to make the planet safer and more resilient from natural hazards. It sets out five priority areas for action of governments and other stakeholders for the period 2005-2015: 1) Ensure that disaster risk reduction is a national and local priority with a strong institutional basis for implementation; 2) identify, assess, and monitor disaster risks and enhance early warning systems; 3) build a culture of safety and resilience at all levels by using knowledge, innovation, and education; 4) reduce underlying risk factors; and 5) strengthen disaster preparedness for effective response at all levels.²⁶⁶

²⁶¹ Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, U.N. Doc. A/CONF.206/6 (16 March 2005).

²⁶² UNGA (1972) Resolution RES/2959 (XXVII) (12 December 1972) para 4. Of note is that the issue of prevention of natural or human-made disasters was continuously highlighted in various general United Nations General Assembly Resolutions, such as UNGA (1987) Resolution A/RES/42/169 (11 December 1987); UNGA (1989) RES/44/236 (22 December 1989) par.1; UNGA (1991) RES/46/182 (19 December 1991); UNGA (1993) RES/48/188 (21 December 1993) Article 6; and UNGA (1994) RES/49/22 (13 December 1994) paras. 5-6.

²⁶³ UNGA (2000) “Millennium Declaration Resolution” RES/55/2 (13 September 2000), paras. 23, 26. The Millennium Declaration was adopted during the Millennium Summit organised in New York from 6 to 8 September 2000. The main objectives of the Declaration by 2015 was the elimination of poverty; the protection of vulnerable groups; and the promotion of peace, security, human rights, and democracy.

²⁶⁴ The Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and its Plan of Action (Yokohama 23-27 May 1994) *available from*: <http://www.ifrc.org/Docs/idrl/I248EN.pdf> [accessed 08 October 2014]. This strategy, in turn, had built upon the conclusions attained through the “International Decade of Disaster Reduction” that was proclaimed by UNGA (1987) Res. 42/169, UN Doc. No. A/RES/42/169 (11 December 1987).

²⁶⁵ UNGA (2005) “Resolution 60/195 International Strategy for Disaster Reduction” UN Doc. No. A/RES/60/195 (2 March 2005).

²⁶⁶ Hyogo Framework For Action (2005) *Op. Cit.* para. 14.

The Hyogo Framework for action applies not only to natural disasters but also to man-made disasters, which are generated by environmental and technological risks.²⁶⁷ Although the Hyogo Framework is a non-binding instrument, it is complemented by binding human rights obligations, which include the duty of states to reduce natural and man-made environmental risks and protecting populations by introducing legislation, programmes and policies with the overall objective of reducing natural threats.²⁶⁸ Particularly important are, for example, the development of adequate urban planning and construction infrastructures and the establishment of early warning and information systems to protect vulnerable populations. The creation of emergency funds is particularly highlighted to ameliorate the financing of a cooperation system facing a disaster.²⁶⁹

As it was previously demonstrated, courts are beginning to recognize the responsibility of states to protect human rights against recognized environmental risks.²⁷⁰ As a way of example, both the Convention on the Rights of Persons with Disabilities²⁷¹ and the African Charter on the Rights and Welfare of the Child²⁷² human rights treaties articulate the need to protect and assist these particular vulnerable groups, which are affected by disasters.

As evidence tends to suggest that the scale and frequency of disasters may increase due to the effects of climate change, it is important to highlight that disaster risk reduction structures are an important component of climate resilience. The Inter-Agency Standing Committee (IASC), which is composed of heads of the key U.N. and non-U.N. humanitarian international relief and development agencies, has highlighted that disaster reduction frameworks give “some of the most practical actions that support the goals of climate change adaptation.”²⁷³ Warner has explained that the effectiveness of disaster risk reduction strategies may impact or not on population displacement, and if so, how rapidly they can return.²⁷⁴ This is because the destruction of crops and population livelihoods and assets may encourage (or force) people to move.²⁷⁵ In a study carried out in Nepal in the aftermath of the severe flooding in 2008 and 2009, approximately 25 % of those displaced from an area claimed that, even though their

²⁶⁷ Hyogo Framework for Action (2005) *Op. Cit.* para. 6.

²⁶⁸ See *Ibid.* paras. 16-19 and Kälin, W. (2010) “Conceptualising Climate-Induced Displacement” in J. MacAdam (ed.) *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing) p. 93; pp. 81-103.

²⁶⁹ Hyogo Framework for Action (2005) *Op. Cit.* paras. 12-20.

²⁷⁰ As previously seen in sections 3 and 4, the European Court of Human Rights has highlighted the human rights obligations of states to set up of early warning and evacuation systems in order to reduce disaster risk and vulnerabilities of populations, as well as to take all appropriate action when a disaster is foreseeable.

²⁷¹ Convention on the Rights of Persons with Disabilities, UNGA Res 61/106, Annex1 adopted 13 December 2006, entered into force 3 May 2008, Art. 11.

²⁷² African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 adopted 11 July 1990, entered into force 29 November 1999 Articles. 23 and 25.

²⁷³ IASC Task Force on Climate Change (2010) “Quick Guide to Climate Change Adaptation” *available from:* <http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-documents-default&bodyID=76&publish=> (accessed 08 October 2014) p. 1.

²⁷⁴ Warner, K. (2010) “Assessing Institutional and Governance Needs Related to Environmental Change and Human Migration” (Study Team on Climate-Induced Displacement, German Marshall Fund of the United States) p.3.

²⁷⁵ *Ibid.*

land was still fertile and appropriate for cultivation, they were reluctant to return because of other inherent vulnerabilities in their households.²⁷⁶

On a more operational level, it is worth noting in this context that both the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters²⁷⁷ and the Red Cross Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance²⁷⁸ aim to “ensure that disaster relief and recovery efforts are conducted within the framework that protects and furthers human rights of the affected persons.”²⁷⁹ Even though these frameworks are not legally binding several states have included them in their national disaster plans.²⁸⁰

The strategies developed under the Hyogo Framework for Action have enhanced the ability of states to respond to disaster situations and solidified their human rights obligations, while at the same time having a significant impact on the extent of displacement. At the national level, such an obligation has been made explicit, such as in constitutional provisions of different countries²⁸¹ or through the adoption of specific national regulations.²⁸² With the Hyogo Framework for Action coming to an end the U.N. General Assembly requested that the United Nations Office for Disaster Risk Reduction to facilitate the process of developing a post-2015 framework for disaster risk reduction.²⁸³ This process, which gained its inspiration from the Hyogo Framework for Action (for knowledge, practice, implementation, and the science for DRR), culminated in the adoption of the Sendai Framework for Disaster

²⁷⁶ United Nations Resident and Humanitarian Coordinator’s Office (2011) “Long Term Disaster Displaced: A Forgotten Group” (Field Bulletin Nepal, 11 July 2011) available from: http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1759.pdf [accessed 27 May 2015].

²⁷⁷ IASC (2011) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (2011) Brookings-Bern Project on Internal Displacement available from: http://www.brookings.edu/~media/research/files/reports/2011/1/06-operational-guidelines-nd/0106_operational_guidelines_nd.pdf [accessed 27 May 2015].

²⁷⁸ IFRC (2007) Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IFRC, 2007).

²⁷⁹ IASC Operational Guidelines (2011) *Op. Cit.* p. 7.

²⁸⁰ McAdam (2011) *Op. Cit.* p. 243 citing F. Gemenne (2009) “Environmental Changes and Migration Flows: Normative Frameworks and Policy Responses” (PhD thesis, Institut d’Etudes Politiques de Paris and University of Liège) p. 234.

²⁸¹ See for e.g., the 1994 Ethiopian Constitution states in Article 89 that the government “shall take measures to provide protection against natural and human-made disasters; and in the event of disasters, it shall provide timely assistance to victims” available from: <http://www.wipo.int/edocs/lexdocs/laws/en/et/et007en.pdf> [accessed 25 March 2014].

²⁸² See for e.g., in India the 2005 “The Disaster Management Act” available from: <http://www.ndma.gov.in/en/disaster.html> [accessed 08 October 2014]; in Tuvalu the 2008 “National Disaster Management Act” available from: https://www.ifrc.org/docs/idrl/Tuvalu_DMAAct_2007.PDF [accessed 08 October 2014]; in the Philippines the 2010 “Disaster Risk Reduction and Management Act” available from: http://www.ndrrmc.gov.ph/index.php?option=com_content&view=article&id=45:republic-act-no-10121&catid=24:disaster-risk-reduction-and-management-laws&Itemid=39 [accessed 08 October 2014]; in Pakistan the 2010 the “National Disaster Management Act” available from: http://www.na.gov.pk/uploads/documents/1302135719_202.pdf [accessed 08 October 2014]; in Bangladesh the 2012 “Disaster Management Act” available from: <http://www.ddm.gov.bd/pdf/diastermanagementact%202012.pdf> [accessed 08 October 2014].

²⁸³ UNGA (2011) “Resolution adopted by the General Assembly [on the report of the Second Committee (A/66/440/Add.3)] 66/199 International Strategy for Disaster Reduction” 22 December 2011, U.N. Doc. A/RES/66/199 (28 February 2012).

Risk Reduction 2015-2030²⁸⁴ at the Third United Nations World Conference on DRR, which took place in March 2015 in Sendai, Japan. The recognition that “[t]here has to be a broader and a more people-centred preventive approach to disaster risk” is a reflection of the commitment of states to a human rights-based approach to disaster reduction and, -by extension, - displacement prevention.²⁸⁵

6.1.2 At the Regional Level: The European Union Strategy for supporting Disaster Risk Reduction in Developing Countries

The 2007 European Consensus on Humanitarian Aid recognized the importance of disaster preparedness. The EU Disaster Preparedness ECHO (DIPECHO) programme aims to target highly vulnerable communities living in eight disaster-prone regions²⁸⁶ of the world, and their actions reflect how the EU has moved forward from simply providing immediate assistance to establishing long-term operational support strategies, such as the integration of protection and DRR within their humanitarian actions.²⁸⁷ Over the years, financial support has increased for disaster preparedness from an average of €8 million in 1996 to €34.3 million in 2011.

In order to become more widely effective and have positive preventative displacement spill-overs effect in the DIPECHO programme, there is a need to enhance its community-based approach by including other countries within their disaster-prone regions. For example, countries within the Africa Sahel region are not included within the programme and are highly vulnerable countries, susceptible to slow and fast onset environmental changes. With the advent of the 2011 African drought and food crisis, the EU began the development of a more effective and inclusive approach between humanitarian aid and development. In this context, two targeted initiatives were tabled to strengthen the resilience of vulnerable populations: Supporting the Horn of Africa Resilience the so-called “SHARE initiative”²⁸⁸ and the Alliance Globale pour L’Initiative Resilience Sahel also named the “AGIR Sahel

²⁸⁴ UNGA (2015) “Sendai Framework for Disaster Risk Reduction 2015-2030” Third United Nations World Conference on Disaster Risk Reduction Sendai, Japan, 14-18 March 2015, U.N. Doc. A/CONF.224/L.2 (7 April 2015).

²⁸⁵ *Ibid.* para.7 p. 4 reads: “There has to be a broader and a more people-centred preventive approach to disaster risk. Disaster risk reduction practices need to be multi-hazard and multisectoral, inclusive and accessible in order to be efficient and effective. While recognizing their leading, regulatory and coordination role, Governments should engage with relevant stakeholders, including women, children and youth, persons with disabilities, poor people, migrants, indigenous peoples, volunteers, the community of practitioners and older persons in the design and implementation of policies, plans and standards. There is a need for the public and private sectors and civil society organizations, as well as academia and scientific and research institutions, to work more closely together and to create opportunities for collaboration, and for businesses to integrate disaster risk into their management practices. ; See also *Ibid.* para. (c) “Managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development.”

²⁸⁶ See EU Disaster Preparedness ECHO (DIPECHO) programme available from: http://ec.europa.eu/echo/what/humanitarian-aid/risk-reduction_en [accessed 20 October 2014].

²⁸⁷ COM (2010) 722 final 08.12.2010 “The mid term review of the European Consensus on Humanitarian Aid Action Plan-implementing effective principles of EU humanitarian action.”

²⁸⁸ See “SHARE Initiative” available from: http://ec.europa.eu/echo/what/humanitarian-aid/resilience/horn-of-africa-share_en [accessed 25 May 2015].

initiative.”²⁸⁹ These initiatives aimed not only at responding immediately to a crisis situation, but at creating durable solutions for those displaced by environmental-related factors (e.g., land resource management and improving income opportunities for nomadic populations dependent on livestock, among others).

Aware of the increasing change in the environmental and its negative impacts especially in the developing world, in 2008 the European Council²⁹⁰ concluded that the EU should act more proactively in developing a strategy for DRR in developing countries, guided by two emphatic principles (emphasis added): “*national responsibility*, whereby each Member State takes appropriate *preventive and operational* measures for the *protection and safety of people* and *EU solidarity*, which is the basis for the for the *provision of assistance* rendered on request to (...) *third countries and their people, when affected by disaster that exceeds their response capacity*”²⁹¹ and it further invited the European Commission to present a proposal for this effect.²⁹²

The EU strategy for supporting DRR in developing countries was tabled in 2009. The strategy aimed at integrating and systematizing the overall ad hoc and project-based work on DRR carried out by EU Member States and the European Commission in developing countries, and at the same time self-reinforcing the EU policy on development cooperation and humanitarian aid, supporting the 2005-2015 Hyogo Framework for Action and the Millennium Development Goals. It was felt that, while the EU and its Member states were working on DRR with developing countries, progress was incoherent, limited, lacked a common voice, and needed to be improved. The strategy reflects the context of partnership and cooperation with developing countries, in line with the EU’s Treaty obligations.²⁹³

While the strategy covers developing countries and overseas countries and territories it has a special focus on “disaster-prone regions, least developed and highly vulnerable countries and localities and the most vulnerable groups.”²⁹⁴ Importantly, it focuses on a “multi-hazard approach” encompassing not only natural and man-made disasters but holistically acknowledging that other different hazards can also interact in and create a domino effect on

²⁸⁹ See “AGIR Sahel initiative” available from: <http://www.oecd.org/site/rpca/agir/> and European Commission, Humanitarian Aid and Civil Protection (2015) “Building Resilience in the Sahel & West Africa” http://ec.europa.eu/echo/files/aid/countries/factsheets/sahel_agir_en.pdf [accessed 25 May 2015].

²⁹⁰ The European Council defines the general political direction and priorities of the European Union. With the entry into force of the Treaty of Lisbon on 1 December 2009, it became an institution. It consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission.

²⁹¹ Council of the European Union (2008) “Council Conclusions on Reinforcing the Union's Disaster Response Capacity – towards an integrated approach to managing disasters” 2878th General Affairs Council meeting (16 June 2008) para. 5 available from:

http://www.eu2008.si/si/News_and_Documents/Council_Conclusions/June/0616_GAERC-Disaster_Response.pdf [accessed 25 May 2015].

²⁹² Council of the European Union (2008) “Presidency Conclusions” Doc 10128/08 (29 May 2008) paras. 5, 6. available from: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf [accessed 25 May 2015].

²⁹³ See Articles 208; 209, 210 and 211 of the TEU.

²⁹⁴ Communication from the Commission to the Council and the European Parliament of 23 February 2009 – EU strategy for supporting disaster risk reduction in developing countries COM (2009) 84 final (23 February 2009) p. 6.

populations, such as environmental degradation or the increasing impact of flooding. Consideration is given to both slow and fast-onset disasters, as well as large and small-scale recurring events (e.g., landslides; flash floods, fires, storms). It excludes from its scope conflict and war, emphasising the relevance of dealing with the impact of environmental factors on vulnerable countries and their populations.

In parallel to reinforcing the EU's response to disasters, the strategy shows the increased effort from the EU to work in the field of prevention, preparedness, mitigation, and development, something that the Hyogo Framework for Action is currently lacking.²⁹⁵ Building on preventative disaster solutions and creating synergies between environmental, development, and humanitarian initiatives is intended to have co-benefit effects to socio-economic development, create more resilient communities against environmental disruptions and ultimately avoid the displacement of populations in vulnerable prone areas. In a way, it indirectly builds a preventative protection framework for environmentally induced displacement, even if it is not intended to do so.

Consequently, the EU strategy links the supporting obligations of the EU and its member states towards developing countries with the overall objective "to contribute to sustainable development and poverty eradication by reducing the burden of disasters on the poor and the most vulnerable countries and population groups [and by extension EDPs], by means of improved Disaster Risk Reduction."²⁹⁶

6.2 Adaptation to a Changing Environment

The international community has over the years put some strategies into place to reduce greenhouse gas emissions, to avoid directly the impacts of climate change and indirectly the displacement of populations. This process, called "mitigation" has been described by the IPCC as "an anthropogenic intervention to reduce the anthropogenic forcing of the climate system; it includes strategies to reduce greenhouse gas sources and emissions and enhancing greenhouse gas sinks."²⁹⁷ These mitigation efforts were crystallised at the international level with the adoption of the UNFCCC in 1992²⁹⁸ and later with the Kyoto Protocol in 1997.²⁹⁹ The international community soon, however, realised that climate change impacts are not

²⁹⁵ UN General Assembly Resolution 60/195 (2005), *Op. Cit.* para. 4. In fairness it should be noted that, the Hyogo Framework for Action does recognise the mutually supportive objectives of sustainable development, poverty reduction and good governance. In addition to this, the Annex of the document also highlights some multilateral developments of relevance to wider sustainable development objectives (e.g. third Action Programme for Least Developed Countries; The Millennium Declaration) but overall it does link prevention, preparedness, mitigation and development in an effective way.

²⁹⁶ COM (2009) 84 final *Op. Cit.* p. 5

²⁹⁷ IPCC (2007) Fourth Assessment Report, Working Group II, Glossary of Terms p. 878.

²⁹⁸ The UNFCCC is the the main international instrument dealing with climate change. The main goal of the Convention, as per Article 2 is: "Stabilisation of greenhouse emmissions in the atmosphere at a level that would prevent dangerous antropogenic interference with the climate system. Such level should be acheived within a time-frame sufficiente to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatned and to enable economic development to proceed in a sustainable manner."

²⁹⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) adopted on 11 December 1997, in force since 16 February 2005, 2303 UNTS 148.

entirely preventable, so the focus on adaptation (or “adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities”)³⁰⁰ became strongly high at the negotiation table.

This became noteworthy during the climate negotiations in 2007 with the thirteenth conference of the parties (COP 13). While reference to environmental change and human displacement was not directly made during the negotiations, attention was paid to the potential impact of environmental change on vulnerable populations and regions. As a result, the Bali Road Map was adopted as a negotiating strategy for climate change, including adaptation. This resulted in the creation of the Bali Action Plan,³⁰¹ which led to the development of the Ad Hoc Work Group on Long Term Cooperative Action (AWG-LCA). The Bali Action Plan underlined the importance of risk reduction approaches to helping vulnerable communities adapt to climate change.

As previously mentioned elsewhere in this study, direct reference to environmental change and human displacement, in particular cross-border movement, was made by December 2010 in Cancun (COP 16) as a result of the negotiations on enhanced action on adaptation (as part of the Bali Action Plan under the AWG-LCA) paragraph 14(f) of the Cancun Adaptation Framework (emphasis added):³⁰²

“14. Invites all Parties to enhance action on adaptation under the Cancun Adaptation Framework, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, by undertaking, inter alia, the following:

(f) Measures to enhance understanding, coordination and cooperation with regard to *climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.*”

Its verbosity implies the protection of cross-border displaced persons as a triangulation of efforts that is needed at the international, regional, and national levels, and planned relocation as part of protection and assistance measures. But more importantly, as Kälin rightly affirms (emphasis added): “it *recognises migration as a form of adaptation*, and this means that international adaptation funding maybe directed towards *preventing displacement and developing relocation and migration schemes.*”³⁰³ In a way, it urges states to look at

³⁰⁰ IPCC (2007) Fourth Assessment Report, Working Group II, Glossary of Terms p. 869.

³⁰¹ UNFCCC (2007) Climate Negotiations “ Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007”(Bali Action Plan) UN. Doc. FCCC/CP/2007/6/Add.1 (14 March 2008).

³⁰² UNFCCC (2010) Climate Negotiations “Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010” (Cancun Adaptation Framework) U.N. Doc. FCCC/CP/2010/7/Add.1 (15 March 2011). *See more generally*, “The objective of the Cancun Adaptation Framework (paras 11-35) is to enhance action on adaptation, including through international cooperation and coherent consideration of matters relating to adaptation under the Convention. Ultimately enhanced action on adaptation seeks to reduce vulnerability and build resilience in developing country Parties, taking into account the urgent and immediate needs of those developing countries that are particularly vulnerable” *available from: <http://unfccc.int/adaptation/items/5852.php>* (accessed 25 November 2014).

³⁰³ McAdam (2012) *Op. Cit.* p. 232.

protection measures for environmentally induced displacement as part of the overall prevention strategy to deal with the impacts of environmental change, in accordance with their common but differentiated responsibilities.³⁰⁴

Even though environmental-induced displacement has entered the UNFCCC agenda in reality the issue of whether the UNFCCC can be used as an effective protection framework or as a basis for state responsibility for such protection can be illusive.³⁰⁵ Both the UNFCCC and the Kyoto Protocol treaties do not have per se a specific provision for the protection of environmentally induced displacement.³⁰⁶ Nevertheless, the language of those treaties creates specific international legal obligations for states to assist climate adaptation frameworks for least developed countries, including the National Adaptation Programme of Action (NAPAs),³⁰⁷ a programme that aimed at providing least developed countries³⁰⁸ with adaptation program funding and assistance.

³⁰⁴ UNFCCC (1992) *Op. Cit.* Articles 3 (1), (2), and (3); 4 (1) (b), (3), and (4). This is in line with the obligations of states under the UNFCCC of their common but differentiated responsibilities, to give consideration to those vulnerable state parties, to take precautionary measures to prevent and minimise the causes of climate change and mitigate its adverse effects by assisting developing countries even when there is a lack of scientific certainty. *See* Cancun Adaptation Framework (2010) *Op. Cit.* Chapter 2. The Conference of the Parties (COP 16) also formed an Adaptation Committee and Subsidiary Body for Implementation work programme on loss and damage, focusing on longer-term foreseeable impacts such as sea level rise and desertification and their wider implications for society, and established the new Green Climate Fund. More recently, with the creation of under the UNFCCC of the “Warsaw International Mechanism for Loss and Damage” to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change, in a comprehensive, integrated, and coherent manner, the parties will hopefully have the opportunity to address the issue of environmental displacement. More information on this is *available from*: http://unfccc.int/adaptation/workstreams/loss_and_damage/items/9073.php [accessed 23 July 2015].

³⁰⁵ As world leaders meet in Paris to negotiate what would be a final version of a new climate agreement in December 2015 the recently presented draft agreement (October 2015) removed a paragraph that previously (July 2015) comprised provisions to establish a climate change and displacement coordination facility: to provide support for emergency relief, to assist in providing organised migration and to plan relocation and undertake compensation measures. Despite the openness to the idea of the governments of the U.S., United Kingdom and France, states such as Australia, did not approve of such coordination facility for displacement as it did not see it as the most effective way to progress meaningful international action to address climate change. *See* “Scenario note on the tenth part of the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action” Point 26, ADP.2015.4. Informal Note (24 July 2015) *available from*: <http://unfccc.int/resource/docs/2015/adp2/eng/4infnot.pdf> [accessed 28 October 2015] and “Draft Agreement” Ad Hoc Working Group on the Durban Platform for Enhanced Action ADP.2015.8. Informal Note (05 October 2015) *available from*: <http://unfccc.int/resource/docs/2015/adp2/eng/8infnot.pdf> [accessed 28 October 2015] as well as “UN drops plan to help move climate change affected people” *The Guardian* (07 October 2015) *available from*: <http://www.theguardian.com/environment/2015/oct/07/un-drops-plan-to-create-group-to-relocate-climate-change-affected-people> [accessed 28 October 2015].

³⁰⁶ *See* IASC (2008) “Climate Change, Migration and Displacement: Who will be affected?” IASC, Working Paper (31 October 2008) *available from*: <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf> [accessed 23 July 2015].

³⁰⁷ National Adaptation Programme of Action (NAPAs) *available from*: http://unfccc.int/national_reports/napa/items/2719.php [accessed 28 May 2015]. The National Adaptation Programmes of Action (NAPAs) use a less flexible, eight-step process that results in a list of discrete projects, not a holistic plan. The UNFCCC established the NAPAs in 2001 to help the least developed countries address their most urgent and immediate adaptation needs. Completing a NAPA made the least developed countries eligible to apply for NAPA project funding under the Global Environment Facility’s Least Developed Countries Fund. The NAPAs have been criticized as being small-scale projects and not really integrated with national development and poverty reduction. However, they were never meant to be a holistic long-term approach but rather to ascertain urgent priorities.

6.2.1 Measures of Adaptation to Avoid the Displacement of Populations

It is possible to flesh out measures of adaptation by developed countries to reduce the vulnerability and prevent the displacement of populations. These projects of adaptation have been put into *in situ* actions in accordance with the needs and priorities of each country. Concrete adaptation measures at international, regional and local level can include for example, the amelioration of agriculture methods, protecting water supply infrastructure, developing early warning systems or the construction of dikes to prevent flooding from sea level rise.³⁰⁹ In Austria and Switzerland efforts have been made to protect populations from floods and avalanches.³¹⁰ In the UK a programme on the management of risks that could derive from flooding from the river Thames has also been put into place.³¹¹ Perhaps most notoriously is the case of the Netherlands, a country where part of its territory is situated below sea level and where construction of a network of dikes has been essential both to face flooding from sea level rise and to protect their population from displacement.³¹² The adaptation strategy put in place at EU level in 2013³¹³ is already one of the priorities of community action, recognizing that “the Mediterranean basin, mountain areas, densely populated floodplains, coastal zones, outermost regions and the Arctic are particularly vulnerable.”³¹⁴

In developing countries, particularly in regions where the effects of climate change will be particularly felt the issue of displacement of populations and/or migration due to environmental impacts has been increasingly highlighted. Countries like Mozambique and Ethiopia have underscored that drought and desertification have an enormous social cost that

³⁰⁸ See UNFCCC (1992) *Op. Cit.* Article 4 para.8 of the developing countries that are particularly vulnerable to climate change are: “(a) Small island countries; (b) Countries with low-lying coastal areas; (c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay; (d) Countries with areas prone to natural disasters; (e) Countries with areas liable to drought and desertification; (f) Countries with areas of high urban atmospheric pollution; (g) Countries with areas with fragile ecosystems, including mountainous ecosystems; (h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and (i) Land-locked and transit countries.”

³⁰⁹ International Strategy for Disaster Reduction (2008) “Climate Change and Disaster Risk Reduction” Briefing Note 1, (September 2008) p. 7.

³¹⁰ Gagnon-Lebrun, F. & Agrawala, S. (2006) “Progress to Adaptation to Climate Change in Developed Countries” Organization for Economic Co-operation and Development (OECD) May 2006, pp.33-40.

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions “An EU Strategy on adaptation to climate change” COM (2013) 216 final (16 April 2013).

³¹⁴ *Ibid.* p. 2. In this context, the European Climate Adaptation Platform (Climate-ADAPT) has been put in place aiming to support Europe in adapting to climate change. It is an initiative of the European Commission and helps users to access and share information on: expected climate change in Europe; current and future vulnerability of regions and sectors; national and transnational adaptation strategies; adaptation case studies and potential adaptation options and tools that support adaptation planning *available from* <http://climate-adapt.eea.europa.eu> [accessed 25 November 2013].

lead to loss of means of subsistence and the migration of the populations.³¹⁵ Bangladesh and Mauritania have stressed the social consequences of the exodus of populations to the big urban centres, and the African Central Republic warned of the consequences of changing weather patterns that have led to migratory movements towards southern regions.³¹⁶ Other countries, like Haiti, have emphasised that poverty brought about by environmental degradation and drought is conducive to migration.³¹⁷

In an attempt to to develop and implement strategies to address the needs of the population and help them build resilience and means of subsistence, countries like Nepal have developed early warning systems for populations (such as raised watchtowers) in risk-flood zones and have reinforced embankments to prevent glacial lakes from bursting their banks.³¹⁸ Other relevant examples come from SIDS like Tuvalu, strengthening community disaster preparedness and taking preventative action plan to respond to potential catastrophes,³¹⁹ or in the Maldives the “safe island” programme,³²⁰ a market-driven strategy designed in 1998 providing incentives for voluntary migration to alternative islands with better economic opportunities and better protection against disasters.³²¹ In reality, most of the NAPAs have

³¹⁵ Ministry for the Coordination of Environmental Affairs (MICOA) (2007) “National Adaptation Programme of Action” Maputo 2007, pp. 15-16; The Federal Democratic Republic of Ethiopia (2007) “Climate Change National Adaptation Programme of Action” (June 2007) p. 5.

³¹⁶ Ministry of Environment and Forest Government of the People’s Republic of Bangladesh (2005) “National Adaptation Programme of Action” November 2005, p. 36; Islamic Republic of Mauritania “National Adaptation Programme of Action” (November 2004) p. 11.

³¹⁷ Ministère de L’environnement Programme Changements Climatiques République d’Haïti (2006) “Plan D’Action National D’Adaptation” (October 2006) p. 16. See more generally, on reducing vulnerability through adaptation World Bank *et al.* (2003) “Poverty and Climate Change: Reducing the Vulnerability of the Poor through Adaptation” (World Bank January 2003).

³¹⁸ Government of Nepal Ministry of the Environment (2010) “National Adaptation Programme of Action (September 2010).

³¹⁹ Tuvalu’s Ministry of Natural Resources, Environment, Agriculture and Lands (2007) “Tuvalu’s National adaptation Programme of Action” (May 2007) pp. 51-52.

³²⁰ The “safe islands” programme has been replaced by a more holistic and reinforcing (physical, societal and economic resilience) programme in 2008 called “Resilience Communities”. See Venton, C. *et al.* “Cost Benefit Study of Disaster Mitigation Measures in three Islands in the Maldives” UNDP Maldives September 2009 p. 28. In May 2014, various UN agencies acting in the Maldives and the Government of Maldives launched the “Low Emission Climate Resilient Development” (LECRd) Programme. The LECRd is a three-year joint programme worth US\$ 9.2 million that aims at responding to the United Nations Development Assistance Framework (UNDAF) Outcome 9: *Enhanced capacities at national and local levels to support low carbon lifestyles, Climate Change Adaptation and Disaster Risk Reduction*. The programme will assist Laamu Atoll and its islands to realize low emission and climate-resilient development while attempting to mainstream issues pertaining to LECRd into local development planning and service delivery for greater community-level ownership and sustainability available from:

<http://www.mv.undp.org/content/maldives/en/home/presscenter/articles/2014/05/18/un-agencies-and-government-of-maldives-launch-the-low-emission-climate-resilient-development-programme-lecred/> [Accessed 25 November 2014].

³²¹ Other adaptation priority measures in the Maldives include for example, building capacity for coastal protection, coastal zone management and flood control; integrating climate change adaptation into a national disaster management framework; strengthening tourism institutions to coordinate climate response in the tourism sector; improving building designs to increase resilience and strengthen enforcement of building code; and acquiring appropriate sewage treatment and disposal technologies to protect water resources. See Ministry Environment, Energy and Water of the Republic of Maldives (2008) “National Adaptation Programme of Action” (March 2008) pp. 43-44.

focused on preventing environmental displacement and not migration or mobility itself as an important feature of the adaptation planning process. Nevertheless, as Martin sustains:

“in some cases, the NAPA identifies migration as an adaptation strategy itself. This perspective appears in two contexts. First, some countries see migration as a way to reduce population pressures in places with fragile ecosystems. Second, countries recognise that resettlement of some populations may be inevitable, given the likely trends, and should be accomplished with planning.”³²²

Under the Cancun Adaptation Framework, a process was established to enable LDCs to formulate and implement National Adaptation Plans (NAPs), building upon their predecessor experience, the NAPAs. The NAPs enables parties to formulate and implement national adaptation plans as a means of identifying medium- and long-term adaptation needs posed by climate change and developing and implementing strategies and programmes to address those needs by providing technical support and project-specific funding, and to mainstream climate change risks.³²³ It is in this context, and worth mentioning here, that some countries in South America, such as Bolivia, Peru, Brazil, and Colombia, have begun to include migration as part of their NAPs.³²⁴

Successful adaptation plans can and will help reduce the forced displacement of populations, but they are not immune from related challenges. First, adaptation programmes are dependent on available economic and human resources for their implementation, which are often limited. Then, they require a transformational change in government practices in working in a proactive rather in a reactive matter. Finally, adaptation plans must take a dual-axis approach to prevent displacement, but at the same time consider migration as a legitimate adaptation strategy.

6.2.2 Migration as a Legitimate Strategy of Adaptation

Rather seeing migration as a symptom of the incapacity to adapt³²⁵ to environmental change, new theoretical and empirical studies posit migration as an effective and legitimate

³²² Martin, S. (2010) “Climate Change Migration and Adaptation” The German Marshall Fund of the United States. Study Team on Climate Induced- Migration, p. 3 *available from:* https://seors.unfccc.int/seors/attachments/get_attachment?code=X30QEH9FOO3WU37DO4W675SSDX63PNC6 [accessed 7 July 2013].

³²³ See NAPs *available from:*

http://unfccc.int/adaptation/workstreams/national_adaptation_plans/items/6057.php [accessed 1 June 2015]. The NAPs have a more holistic approach of a continuous, progressive, and interactive and flexible process, which follows a country-driven, gender-sensitive, participation in a fully transparent manner, and are also an opportunity to align with other international initiatives such as the Millenium Development Goals and the Hyogo Framework for Action and its successor.

³²⁴ See Warn, E. (2013) “Adaptation, Adaptation, Adaptation; Migration, Climate Change and National Adaptation Plans in South America” (International Organization for Migration) *available from:* <http://weblog.iom.int/adaptation-adaptation-adaptation-migration-climate-change-and-national-adaptation-plans-south> [accessed 1 June 2015]; *See also* Warner, K. *et al.* (2014) “Integrating Human Mobility Issues Within National Adaptation Plans” Policy Brief No.9; United Nations University Institute for Environment and Human Security (June 2014).

³²⁵ Brown, O. (2008) “Migration and Climate Change” 31 Migration Research Studies (International Organization for Migration) pp.34, 38.

strategy.³²⁶ Migration emerges, therefore, as a proactive and appropriate measure in order to face environmental stressors that particularly, at early stages of environmental degradation migration, can help reduce human risks, livelihoods, and ecosystems, and boost the overall ability of households and communities to cope with the adverse effects of environmental and climate change.³²⁷ Furthermore, it may be one of the best-suited short-term responses given the costs of mitigation and other forms of adaptation to climate change.³²⁸

It is true, however, that migration may not be suited for all vulnerable populations, such as poor, older, children, or disabled people, given their limited physical and financial capacity to migrate, but it does enable those who can to improve their livelihood development, transfer of remittances, and knowledge and skills upon their return thereby boosting the overall economic development of the country, particularly working in tandem with other adaptation and development strategies. Against this background, migration should be conceived to protect those who leave but also those who stay behind, as they are often the most vulnerable.

Countries at particular risk from environmental changing conditions, like Bangladesh, have favoured including migration policies within the wider adaptation strategies, both at the international and national levels, to help the most vulnerable populations.³²⁹ For others, like Mali, “migration has increasingly become a strategy in view of these new precarious climatic and environmental conditions.”³³⁰ In some cases, for islands like Tuvalu, the Solomons and the Comoros, migration and relocation are the last chance to adapt.³³¹

6.2.2.1 New Status of Protection

Migration as a complementary preventative displacement strategy for those in some climate hot-spot communities has been highlighted by governments at the Global Forum on

³²⁶ See generally, scholarship establishing this positive link: Davies, S. (1993) “Are Coping Strategies a Cop Out?” 24 *Institute for Developing Studies Bulletin* (4) pp. 60-72; Adger, W. N. *et al.* (2003) “Adaptation to Climate Change in the Developing World” 3 *Progress in Development Studies* pp. 179-195; McLeman, R. & Smit, B. (2006) “Migration as an Adaptation to Climate Change” 76 *Climate Change* pp.31-53; Tacoli, C. (2009) “Crisis of adaptation? Migration and Climate Change in a Context of High Mobility” 21 *Environment and Urbanization* pp. 513-525; Barnett, J. & O’Neil, S. J. (2012) “Islands, resettlement and adaptation” 2 *Nature Climate Change* pp. 8-10

³²⁷ Climate Change, Environment and Migration Alliance (2010) “Climate Change, Environment and Migration: Frequently Asked Questions” (International Organization for Migration M & United Nations University), p. 5.

³²⁸ Johnston, J. S. (2008) “A Looming Policy Disaster” *Regulation* Fall p. 44 pp.38-44.

³²⁹ UNFCCC, AWG-LCA (2009) “Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan” Doc FCCC/AWGLCA/2009/MISC.4 (Part I), 19 May 2009, Paper 6 Bangladesh, p. 27 reads “Develop and implement measures including those related to national and international migration to address those impacts for which it is difficult to build resilience or planned relocation for climate refugees. In extreme circumstances, provision should be made in the immigration policies of Annex I countries to accept climate refugees.”

³³⁰ Ministry of Environment and Sanitation Republic of Mali (2008) “Elements of a National Policy for Adaptation to Climate Change” May 2008, p. 41.

³³¹ See Tuvalu’s Ministry of Natural Resources, Environment, Agriculture and Lands (2007) *Op. Cit.* p. 25; Solomon Islands Ministry of Environment, Conservation and Meteorology (2008) “National Adaptation Programmes of Action” November 2008, pp.39, 40; Union des Comores, Ministère du Développement Rural, de la Pêche, de l’Artisanat et de l’Environnement (2006) “Programme d’Action National d’ Adaptation aux Changements Climatiques” March 2006, p. 11.

Migration and Development³³² in 2010, either through new cooperation agreements between neighbouring countries or taking stock of existing bilateral and regional migration solutions.³³³ They noted that developing international temporary and circular labour migration schemes could build the resilience of environmentally vulnerable communities, particularly through reinvestment of remittances³³⁴ and skill transfer mechanisms. A study carried out by the Asian Development Bank on climate-related migration in the Asia-Pacific region has also recommended a new form of migration governance, to deal with the effects of environmental change that often lead to “undocumented migration, [trafficking], lack of protection and exploitation of migrant workers.”³³⁵

International agencies and experts have increasingly called for re-examining the strict limitations of migration and considering new possibilities for protecting those forced to migrate in the context of adaptation,³³⁶ particularly looking at existing labour migration models.

³³² The Global Forum on Migration Development is a voluntary, informal, non-binding and government-led process open to all states Members and observers of the United Nations, to advance understanding and cooperation on the mutually reinforcing relationship between migration and development and to foster practical and action-oriented outcomes *available from*: <http://www.gfmd.org/process> [accessed 25 November 2014].

³³³ Global Forum on Migration and Development (2010) “Report of Proceedings, Fourth Meeting of the Global Forum on Migration and Development” Roundtable 3, Policy and institutional Coherence to address the relationship between migration and development, assessing the relevance and impact of climate change on migration and development (Mexico, November 8-11 2010) p. 37 *available from*: <http://www.gfmd.org/docs/mexico-2010> [assessed 25 November 2014]).

³³⁴ See World Bank (2014) “Migration and Remittances: Recent Developments and Outlook Special Topic: Forced Migration” 23 Migration and Development Brief p.3. According to the World Bank, officially recorded remittances to developing countries are expected to reach US\$435 billion this year, an increase of 5 % over 2013. The growth rate in 2014 is substantially faster than the 3.4 % growth recorded in 2013, driven largely by remittances to Asia and Latin America. In 2015 the outlook is expected to be a bit more moderate to 4.4 % raising flows of US\$454 billion.

³³⁵ University of Adelaide, Flinders University and University of Waikato (2009) “Climate Change and Migration in Asia and the Pacific” (Asian Development Bank) pp. 25-27.

³³⁶ See generally, Barnett, J. & Webber, M. (2009) “Accommodating Migration to Promote Adaptation to Climate Change” (Commission on Climate Change and Development); Tacoli, C. (2009) “Crisis or Adaptation? Migration and Change in the Context of High Mobility” 21 Environment and Urbanization pp. 513-525; The Government Office for Science (2011) “Foresight: Migration and Global Environmental Change (2011) Final Project Report” (The Government Office for Science, United Kingdom) *available from*: <https://www.gov.uk/government/publications/migration-and-global-environmental-change-future-challenges-and-opportunities> [accessed 12 July 2015]; Black, *et al.* (2011) “The Effect of Environmental Change on Human Migration 21S Global Environmental Change pp.S3-S11; Asian Development Bank (2012) “Addressing Climate Change and Migration in Asia and the Pacific” (Asian Development Bank Philippines); Baberjee, S. Black R. & Kniveton, R. (2012) Migration as an effective model of adaptation to climate change: Policy Paper for the European Commission (Sussex Centre for Migration Research). See more recently, “Human Mobility in the context of climate change elements for the UNFCCC Paris Agreement” (March 2015) *available from*: http://climatemigration.org.uk/wp-content/uploads/2015/05/FINAL-ADVISORY-GROUP-Human-Mobility-in-the-Context-of-Climate-Change_4May2015.pdf [accessed 05 June 2015]. Recommendations from the Advisory Group on Climate Change and Human Mobility (The United Nations’ High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the United Nations University Institute for Environment and Human Security (UNU-EHS), the United Nations Development Programme (UNDP), the Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), Refugees International, the Center for International Relations Studies de Sciences Po (Sciences Po-CERI), and the Arab Network for Environment and Development (RAED) anchored in Paragraph 14 (f) of the Cancun Adaptation Platform have ascertained how the upcoming climate change negotiations in Paris should deal with migration and displacement. They outline to governments the impacts of climate change and their extension to human migration and displacement and mention migration as an adaptation strategy.

Models of interest at the regional level for SIDS include the Kiribati Australia Nursing initiative,³³⁷ which facilitates knowledge and work exchange for those in nursing school, or the Seasonal Employers Programme between New Zealand and insular States in the Pacific, which are similar to guest worker programmes, allowing a person from a designated country to work in a particular sector for a fixed amount of time. At the international level, the Seasonal Agricultural Workers Programme between Canada and the Caribbean³³⁸ or the Temporary and Circular Labour Migration scheme between Spain-Colombia³³⁹ have been also put forward as relevant examples to consider.

Some experts have proposed the creation of a new status of protection either through establishing temporary relocation schemes (TRS) (to enable individuals to apply for legal temporary status in a host country when a sudden disaster occurs and they have to possibly relocate elsewhere in their country of origin) or provide temporary protection status (TPS) (for those who cannot return to their country of origin).³⁴⁰ However, existing EU normative standards, such as circular migration, proposed under the EU's Seasonal Workers Directive and Mobility Partnerships, offered under the EU's Global Approach to Migration may be useful to explore as a preventative or *proactive* protection strategy. They offer a legal migrant status within the EU that can be used for people who live in environmentally vulnerable areas. They may also constitute a future model to promote not only international but also regional migration. For those who are forced to move on a permanent or quasi-permanent basis where the prospects of return to their country of origin may be slim, *reactive* complementary protection granted under the EU Qualification Directive (QD) may offer some interesting solutions.³⁴¹ For those individuals who are forced to cross an international border due to fast-onset environmental change, other temporary protection measures may be a path to explore. While temporary protection measures vary worldwide, a provisional type of protection is granted for situations of mass influx under the EU Temporary Protection Directive. This legal mechanism ensures emergency protection from *refoulement* and great manoeuvring to protect EDPs. These protection

³³⁷ Leighton, M. (2012) "Population Displacement, Relocation, and Migration" in M. B. Gerrard & K. F. Kuh (eds.) "The Law of Adaptation to Climate Change: U.S. and International Aspects" (American Bar Association) p. 711 pp. 693-729.

³³⁸ See Henneby, J. & Pribisch, K. (2010) "A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program (International Organization for Migration) and Basok, T. (2007) Canada's Temporary Migration Programme: A Model Despite Flaws" Migration Policy (12 November 2007) available from: <http://www.migrationpolicy.org/article/canadas-temporary-migration-program-model-despite-flaws> [accessed 20 March 2015].

³³⁹ De Moor, N. (2011) "Temporary Labour Migration for Victims of Natural Disasters: The Case of Colombia" in M. Leighton, X. Shen & K. Warner (eds.) "Climate Change and Migration: Rethinking Policies for Adaptation and Disaster Risk Reduction" Source No. 15/2001 (United Nations University for Environment and Human Security April 2011) pp. 92-103.

³⁴⁰ Leighton (2012) *Op. cited* p. 713.

³⁴¹ European Council Directive 2004/83/EC of 29 April 2004 "On Minimum Standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted". This Directive has been recast by European Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 "On Minimum Standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted" (Recast).

standards will be explored in Part III, of this work where we analyse more pragmatic solutions for the protection of EDPs.

6.3 Convergence between Disaster Risk Reduction and Climate Change Adaptation

As previously referred, disaster risk reduction is an essential element of adaptation and building climate resilience.³⁴² This convergence is of relevance in order to increase the resilience of vulnerable communities and tackle displacement. This idea is constructed in the necessity to have full complementarity between the two areas that have been - to some extent - working in isolation.³⁴³ The disaster risk community is now not only concerned with addressing existing risks, but is also increasingly forward looking in an attempt to address uncertainty and new long-term risks, which are typical within the climate change agenda.³⁴⁴ Because the disaster risk reduction agenda is largely based on bottom-up community-level actions to allow local laws and practices to be tailored to the risk environment, it has much to offer to the climate change agenda, which is generally a top-down, global agenda still in a development phase.³⁴⁵ In essence, both agendas have analogous and reinforcing objectives: preventing damage, reducing negative impacts, protecting the most vulnerable populations using risk and vulnerability assessment tools, and mainstreaming cross-sector regimes to developing national strategies.³⁴⁶ This agenda for integration and increased cooperation is widely reflected in both international and regional instruments on disaster risk reduction, which were analysed. Importantly, they are also highlighted in other operational platforms for dialogue and cooperation, such as the Global Climate Change Alliance,³⁴⁷ in order to provide sustainable solutions on environmental change to developing countries.

³⁴² See COM Staff Working Document SEC (2011) 215 final (16 February 2011) p. 4. This is also reflected in IASC, Task Force on Climate Change, “Quick guide to climate change adaptation” (2010 p. 4) *available from*: <http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-common-default&sb=76> [accessed 22 March 2013].

³⁴³ Thomalla *et al.* (2006), “Reducing Hazard Vulnerability: Towards a Common Approach between Disaster Risk Reduction and Climate Adaptation” *Disasters*, pp.40-41 pp.39-48.

³⁴⁴ *Ibid.* p. 42 This is particularly visible during the 1990 UN International Decade for Natural Disaster Reduction (launched by the United Nations, following the adoption of Resolution 44/236 (22 December 1989); The 1994 Yokohama Strategy and Plan of Action for a Safer World Guidelines for Natural Disaster Prevention, Preparedness and Mitigation launched at World Conference on Natural Disaster Reduction Yokohama, Japan, 23-27 May 1994 and the World Conference on Disaster Risk Reduction have contributed to a shift in disaster management towards developing a coordinated understanding of the root causes of vulnerability and the development of a long term strategy for predicting and managing risk.

³⁴⁵ *Ibid.* pp. 40 and 42.

³⁴⁶ McAdam (2012) *Op. Cit.* p. 242.

³⁴⁷ The Global Climate Change Alliance (GCCA) “is an initiative of the European Union, launched in 2007 and coordinated by the European Commission, aimed at strengthening dialogue and cooperation on climate change with developing countries most vulnerable to climate change and supporting their efforts to develop and implement adaptation and mitigation responses. It focuses on the Least Developed Countries and the Small Island Developing States. These countries have contributed the least to greenhouse gas emissions, but are often the most affected by climate change and have limited resources to address the related challenges. The GCCA is a global alliance, involving a wide range of partners across the world with a focus on helping the most vulnerable developing countries to more effectively address the challenges associated with climate change. The GCCA is based on two pillars: platform for dialogue and cooperation and technical and financial support.” The alliance focuses its technical support along five priority area. Among them are *adaptation* (help improve knowledge about the effects of climate change and the design and implementation of appropriate adaptation actions, in particular in the water and agriculture sectors, that reduce the vulnerability of the population to the impacts of

6.4 Prophylactic Nature of the Duty to Protect Deriving from Environmental Law Principles

As previously mentioned, international environmental instruments do not explicitly deal with the issue of either environmentally displaced persons or their protection. In general, international environmental treaties refer to specific environmental problems. However, the increasing complexity of environmental issues has led to the development of environmental legal principles, which in a way are creating ground for the internationalization of environmental protection. International law has stepped in, in order to regulate activities that traditionally belonged to the internal affairs of states.³⁴⁸ Common principles of environmental law (enshrined in various international environmental conventions, such as UNFCCC, the Kyoto Protocol or the Convention on Long-Range Transboundary Air Pollution) because of their latitude, play a crucial role for environmentally displaced persons because they emanate prophylactic obligations for all states, giving current environmental changing conditions, and are built upon the idea of considerable risks. In this context, there are three principles that reflect the duty of states to protect the environment and (even if indirectly) environmentally displaced persons from displacement, which are worth analysing here: the principle of prevention of harm, the precautionary principle, and the overarching principle of sustainable development.

6.4.1 Principle of Prevention of Harm

The principle of prevention of harm orients states towards measures of reduction and control of the effects of climate change and environmental degradation. It seeks to avoid environmental harm, irrespective of whether there are transboundary impacts.³⁴⁹ This rationale derives from the interdependency of all environmental segments and the fact that it is often difficult to remedy environmental damage (e.g., the extinction of species of fauna or flora, erosion, and pollution of the seas create irreversible situations).³⁵⁰ For example, in the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice has precisely highlighted the duty of states to prevent harm (emphasis added): “in the field of environmental *protection, vigilance and prevention* are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.”³⁵¹ Similarly, in the *Pulp Mills on the River Uruguay* case, the court found that that the principle of prevention is part of customary international law and that states should use all the means at their disposal to avoid activities that are carried out in their territory or in any area under its jurisdiction that cause significant

climate change; it builds on National Adaptation Programmes of Action and other national government plans) and *disaster risk reduction* (seeks to help developing countries to prepare for climate-related natural disasters, reduce their risks and limit their impacts) available from: <http://www.gcca.eu/about-the-gcca/what-is-the-gcca> [accessed 09 October 2014].

³⁴⁸ Atapattu, S. (2006) “Emerging Principles of International Environmental Law” (Transnational Publishers) p. 7.

³⁴⁹ Kiss, A. & Shelton, D. (2007) “International Environmental Law” (Martinus Nijhoff Publishers) p. 91.

³⁵⁰ *Ibid.*

³⁵¹ ICJ, “Gabčíkovo-Nagymaros Project” *Hungary v Slovakia*, (25 September 1997) p.78, para. 140.

damage to the environment of another state.³⁵² The principle therefore, reflects the obligation of all states to put into action measures to reduce environmental risks, even if they seem inevitable.³⁵³

The principle of prevention can perhaps be considered an overarching aim that gives rise to a number of legal mechanisms.³⁵⁴ Amongst these, action plans are, according to Sands *conditio sine qua non* to minimize the effects of an eventual disaster.³⁵⁵ In fact, authors like Kiss and Shelton have acknowledged that “the objective of almost all international environmental instruments is to prevent environmental deterioration, whether the texts concern pollution of the sea, inland waters, the atmosphere, or the protection of living resources.”³⁵⁶ These measures of prevention (protection and conservation) of the environment are far from being a mode of protection for EDPs. In reality, environmental degradation and the effects of environmental change may indeed lead to the displacement as well as migration of populations. Nevertheless, the general obligation to prevent the degradation of the environment and the need to evaluate the impacts of human activity on the environment per se leave maneuvering for the protection of EDPs from displacement even if they were not foreseen in the different international treaties.³⁵⁷

³⁵² ICJ, “Pulp Mill on the River Uruguay” *Argentina v Uruguay* (20 April 2010) p. 45 para. 101.

³⁵³ See ICJ. “Nuclear Testing” *New Zealand v France* (22 September 1995), p. 411 para. 87 (emphasis added): “As the law now stands it is a matter of legal duty to first establish before undertaking an activity that the activity does not involve any unacceptable risk to the environment.”

³⁵⁴ See Kiss & Shelton (2007) *Op. Cit.* pp. 91-92. These can include, for example, prior assessment of environmental harm, licensing and authorisation procedures for hazardous activities, conditions of operations, consequences of violations; emission limits, product and process standards, the use of best available techniques, the adoption of overarching strategies and policies, and monitoring notification and exchange of information, among others. See ICJ “Gabčíkovo-Nagymaros Project” *Hungary v Slovakia Op. Cit.* p.78, para. 140. Regarding the aforementioned legal mechanisms the International Court of Justice has neatly said: “Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done with- out consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.”

³⁵⁵ Sands, P. (2003) “Principles of International Environmental Law” (Cambridge University Press) p. 247.

³⁵⁶ Kiss & Shelton (2007) *Op. Cit.* p. 92. The authors mention as examples, Article 2 of the 1992 Convention on the Transboundary Effects of Industrial Accidents; the Preamble of the 1992 Convention on Biological Diversity; Article 5 para.1 of 1986 the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region; Article 2 of the 1992 Convention for the Protection of the Marine Environment; Article 4 para.1 of the 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region; Article 145 of the 1982 United Nations Convention on the Law of the Sea; Article 2 para.1 of the 1985 Vienna Convention for the Protection of the Ozone Layer; Article 2 para.1 of the 1992 The Convention on the Protection and Use of Transboundary Watercourses and International Lakes; Article 4 of the 1991 The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; Article 191 para. 2 of the Treaty of the Functioning of the European Union.

³⁵⁷ Indeed, international treaties did not foresee the migration or even displacement of people due to environmental factors. For a discussion on this see Cournil, C. & Mazzega, P. (2007) “Réflexions Prospectives sur une Protection Juridique des Réfugiés Écologiques” 23 *Revue des Migrations Internationales* pp.7-34, pp.13-14.

6.4.2 Precautionary Principle

The precautionary principle requires that states take measures to protect the environment where there is evidence of serious environmental damage or even if scientific certainty is lacking. The principle gained momentum with the Rio Declaration in 1992³⁵⁸ and can be considered the most developed form of prevention that remains the general basis for environmental law.³⁵⁹ It is also enshrined under Article 3 para. 3 of the UNFCCC of 1992³⁶⁰ and in many other international instruments related to environmental protection.³⁶¹

The Precautionary Principle is action-oriented because it implies preparation for uncertain and hypothetical threats even if there is a lack of scientific uncertainty. This marks a positive step from the traditional approach where states were required to act solely based on scientific knowledge, and recognises that, in certain circumstances, waiting for scientific proof may prevent action from taking place.³⁶² Precaution particularly relates to the consequences of non-action that could be serious or irreversible. The precautionary principle assumes the vulnerability of natural systems rather than their invulnerability or resilience.³⁶³ The Court of Justice of the European Union (CJEU) has on several occasions taken into consideration the precautionary principle.³⁶⁴ In a way, it has laid ground for the recognition of the principle in the EU legal, order but has also defined the conditions that trigger its invocation.³⁶⁵

³⁵⁸ Rio Declaration (1992) Principle 15 reads: “(...) in order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific uncertainty, shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Of notice is that the precautionary principle was initially coined during the First International Conference of the North Sea in 1987.

³⁵⁹ Kiss & Shelton (2007) *Op. Cit.* p. 95.

³⁶⁰ UNFCCC (1992) Article 3 para. 3 reads: “The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.”

³⁶¹ See V of the Preamble of the 1992 Convention on Biological Diversity; Preamble of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; Article 4 para. 3 f) of the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; Article 2 para. 5 of The Convention on the Protection and Use of Transboundary Watercourses and International Lakes; Article 3 para.2 of the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area; Article 3 para. 1 of the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972; Article 191 of the Treaty of the Functioning of the EU.

³⁶² Shaw, M. (2003) “International Law” (5th ed. Cambridge University Press) p.776.

³⁶³ Atapattu (2006) *Op. Cit.* p. 207.

³⁶⁴ See CJEU, Case C-157/96 *The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others* (05 May 1998) and Case C-180/96 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (07 September 2006).

³⁶⁵ See for a discussion on this Alemanno, A. (2007) “The Shaping of the Precautionary Principle by European Courts from Scientific Uncertainty to Legal Certainty” in L.Cuocolo & L.Luparia (eds.), “Valori Costituzionale e Nuove Politiche del Diritto, Scritti raccolti in occasione del decennale della rivista” (Cahiers Européens).

The principle is not directly applicable to EDPs, but if strictly applied, it will safeguard an increasingly responsible exposure to environmental harms, including environmental change. Identifying risks is to a certain extent limited, though, there is not a need to have a perfect and absolute knowledge of the risk but only a risk, which is of probable and conjectured nature.³⁶⁶ The IPCC has in numerous occasions alerted to the consequences of environmental change with increasing proof in their various reports. In 2013 for example, the IPCC acknowledged in their scientific report that “It is *extremely likely* that human activities caused more than half of the observed increase in GMST [Global Mean Surface Temperature] from 1951 to 2010. This assessment is supported by robust evidence from multiple studies using different methods.”³⁶⁷ From this derives the obligations of states to act due to the increasing proof of scientific knowledge that renders the consequences and the effects of potential risks. The increasing recognition of environmental displacement and migration amongst the international sphere could mean, in reality, as Michelot-Draft has appropriately noted, the non-application of the precautionary principle.³⁶⁸

6.4.3 Principle of Sustainable Development

The term sustainable development is now a recognised legal concept.³⁶⁹ It is generally defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”³⁷⁰ It bundles two concepts: first, the concept of present needs, and second, the concept of limitations. States should give overriding priority to meeting the needs of the most deprived and most vulnerable, and beware the limitations of the environment imposed by the state of technology and social organisations in order to meet the needs of future generations.

The principle is therefore, an overarching one and relevant for those displaced by environmental stressors, in that it refers to the present and to the future and to a wide range of economic, environmental, and social factors,³⁷¹ including human rights. Because, after all: “[h]uman beings are at the centre of concerns for sustainable development.”³⁷² From this prism, states must create the conditions to preserve the environment, favour solidarity, improve living conditions, development, and protect human rights (and by large, avoid

³⁶⁶ De Sadeleer, N. (2002) “Environmental Principles from Slogans to Legal Rules” (Oxford University Press) p. 91.

³⁶⁷ IPCC (2013) “Climate Change 2013, The Physical Science Basis” p. 869.

³⁶⁸ Michelot-Draft, A. (2006) “Enjeux de la Reconnaissance du Statut de Réfugié Ecologique pour la Construction d’une Nouvelle Responsabilité Internationale” 4 *Revue Européenne du Droit de l’Environnement* pp. 428-445, p. 435.

³⁶⁹ Sands (2003) *Op. Cit.* p. 231

³⁷⁰ United Nations World Commission on Environment and Development (1987) “Report of the World Commission on Environment and Development: Our Common Future” Chapter 2 para.1 commonly known as the “Brudtland Report.”

³⁷¹ The principle of sustainable development comprises four legal elements enshrined in the various international agreements: preservation of natural resources for the benefit of future generations (principle of intergenerational equity); sustainable exploitation of natural resources (principle of sustainable use); equitable use of natural resources (the principle of sustainable use, or intergenerational equity) and integration of environmental considerations into economic planes and other development programmes (principle of integration). *See* Shaw (2003) *Op. Cit.* p. 779.

³⁷² Principle 1 of the Rio Declaration.

displacement). The International Court of Justice has on at least two occasions mentioned that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development,”³⁷³ recognising that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”³⁷⁴ The Institute of International Law has also affirmed in its resolution concerning the “The Environment” that “the effective realization of the right to live in a healthy environment should be integrated into the objectives of sustainable development.”³⁷⁵

The environmental vulnerability of developing states (among others, but in particular small independent islands) due to tragic consequences of environmental changing conditions, creates a critical barrier to their sustainable development.³⁷⁶ Environmental problems such as transboundary -pollution, climate change, environmental degradation due to pollution or desertification, and drought, have all been mentioned by the U.N. General Assembly as putting in danger the well-being of the populations and the development of states.³⁷⁷ The 2000 Millennium Declaration aiming at improving the living conditions of the population in developing countries stated the necessity of integrating sustainable development policies to deal with climate change.³⁷⁸ A number of other codified legal instruments such as the Desertification Convention highlights the relationship between sustainable development and desertification and drought, including the social repercussions “arising from migration [and] displacement.”³⁷⁹ In this regard, the UNFCCC urges states to engage in the development of an open economic system susceptible to guarantee sustainable growth and development for all parties’ particularly developing countries “thus enabling them to address the problems of climate change.”³⁸⁰

Relating the principle of sustainable development to the wider context of this study means that legal and operational measures (e.g., the adoption of overarching strategies and policies to prevent violation of human rights, action plans to ensure the reduction of risks, early warning systems, emergency alerts, and recovery and reconstruction processes, including the enactment of legal statuses and reintegration measures where necessary) have to be taken by both developing and developed countries to protect people, first and foremost, from displacement but also after displacement occurs. The realization of the sustainable development also highlights the need for cooperation between states to attain these objectives. Particularly, support to developing countries must be guaranteed “to enable them

³⁷³ ICJ, “Gabčíkovo-Nagymaros Project” *Hungary v Slovakia*, *Op. Cit.* p. 78 para. 140.

³⁷⁴ ICJ, “Legality of the Threat or Use of Nuclear Weapons” Advisory Opinion 8 July 1996, para 29.

³⁷⁵ Institute of International Law (1997) “Resolution on the environment adopted by the Institute of International Law” Strasbourg, 4 September 1997, Article 2.

³⁷⁶ UNGA (2010) “Keeping the promise: United to achieve the Millennium Development Goals” Doc. A/65/L.1, 17 September 2010 para. 32, para. 35.

³⁷⁷ UNGA (1989) “United Nations Conference on Environment and Development” RES/44/228, para.6.

³⁷⁸ UNGA (2000) “United Nations Millennium Declaration” RES/55/2, 8 September 2000 paras. 17, 21 & 23.

³⁷⁹ See Preamble of the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), adopted on 17 June 1994, in force since 26 December 1996.

³⁸⁰ Article 3 para. 5 UNFCCC; See also Article 2 para.1 of the Kyoto Protocol

to better deal with the displacement of people as a result of natural disasters (...) and put in place rapid response mechanisms.³⁸¹

6.5 Conclusion and Reflections

While the operational frameworks on disaster risk reduction at the international and regional levels are not particularly targeted at environmental-induced displacement, it is interesting to note that they arguably act as a complementary protection strategy, as they seek to avoid displacement. This is further reinforced by other international mechanisms, in particular those concerning adaptation established under the UNFCCC. Research indicates that states should concentrate on measures to avoid the displacement of populations, and at the same time consider labour migration as a proactive strategy and appropriate measure to face environmental change. In this context, existing normative standards (e.g., at the EU level) that offer a legal migrant status are regarded as an explorative pathway by governments to help environmentally vulnerable communities to adapt to a changing environment.

Overall, the analysis shows that international and regional disaster risk reduction and adaptation structures have splintering effects that seek to reduce the vulnerability of populations and prevent their displacement. In reality, while the disaster risk reduction and climate change agendas have been working separately, their increasing integration and analogous and reinforcing convergent objectives are an essential element in order to increase the resilience of vulnerable populations and tackle displacement.

The tying elements of the prophylactic nature of the state's duty to protect is further grounded, in common principles of environmental law, in particular the principle of prevention of harm, the precautionary principle, and the overarching principle of sustainable development. But why are these principles relevant in the context of displacement? Some authors have sustained that neither hard law nor case law have levelled up those principles to the level of customary status under international law,³⁸² so their relevance to the displacement context is possibly weak. The categorization of a principle as customary law³⁸³ enables its legal power to be enhanced, as it gains strength from universal acceptance as correct bases of action and serves as a backup where states have not ratified treaties. Even if we can agree that the various principles are not consistently applied, nor that there widespread practices, there

³⁸¹UN (2002) "Report of the World Summit on Sustainable Development" DOC.A/CONF.199/20, 2002 Johannesburg, South Africa, 26 August- 4 September 2002 p. 56.

³⁸²Atapattu (2006) *Op. Cit.* P. 286; Leroy, S. F. (2006) "Can Human Rights Bodies be Used to Produce Interim Measures to Protect Environment-Related Human Rights?" 15 *Review of European Comparative & International Environmental Law* 1 p. 67 pp.66-81.

³⁸³In order for a practice or a concept to be considered as part of customary law it must combine two elements which are embodied in Article 38 of the statute of the ICJ: state practice and *opinio juris*. In the 1969, ICJ North Sea Continental Shelf Cases Case concerning the North Sea Continental Shelf Cases (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*), ICJ Reports (20 February 1969) the court has noted that several criteria must be fulfilled for a particular provision to be considered part of customary law: a) the provision should be of a fundamentally norm-creating character and could be regarded as forming the basis of a general rule of law; b) there should be widespread and representative state practice or participation in the convention, including of those states whose interests were affected; and c) the state practice in question should be extensive and virtually uniform, and should be the result of a conviction that such practice is required by law.

are numerous legal instruments (both internationally and nationally) including *opinio juris* and operational frameworks (e.g. DRR and adaptation) that progressively strengthen their content, thus, refining and developing a substantive collective obligation to exercise precaution. The normative value of these principles for EDPs does not lay in the grant of rights, per se, but rather - if strictly applied - safeguarding an increasingly responsible exposure to environmental harm and prevent a state from directly encroaching upon a right and to avoid displacement. They further reflect the cross-fertilization and complementarity between international environmental and human rights law.

7. The Preventative Dimension in the Domain of Protection for Environmentally Displaced Persons: Towards a Customary Norm on the Prohibition of Displacement?

The previous analysis of (quasi-) judicial decisions, international norms (both hard law and soft law), and operational frameworks has put much greater awareness of the preventative dimension in the role of law. In a way, they consolidate the preventative protection feature for EDPs, forming part of the *corpus juris*, which highlights the legal obligation of states to prevent displacement where possible. The core question that should be scrutinised is whether there exists a general consistent state practice and the conviction that this practice is legally required (*opinio juris*)³⁸⁴ that consolidates a customary legal norm to refrain from arbitrary displacement, as well as to both prohibit and prevent displacement caused by the effects of governmental acts and policies, third parties, or natural and human-made risks.³⁸⁵

Authors like Simons have argued that the practice of arbitrary forced displacement, meaning “the use of threat of force to effectuate transfer or resettlement of people, motivated by an illegal purpose or conducted without legal process”³⁸⁶ has emerged as a distinct violation of customary international law.³⁸⁷ In other words, states cannot evacuate (forcibly displace) people from an area unless such evacuation is vital for the safety and health of people potentially or actually affected by environmental changing conditions. The author sustains however, that forced arbitrary displacement should be distinguished from the broader notion of population displacement:

“Although many incidents of arbitrary forced relocation also implicate other human rights norms, arbitrary forced relocation should be recognized as an independent phenomenon. Arbitrary forced relocation has distinct effects on the victims, who are illegally removed from their homes and communities, and is inadequately

³⁸⁴ See Kälin, W. & Kunzli, J. (2010) “The Law of International Human Rights Protection” (Oxford University Press) pp. 67-72.

³⁸⁵ See generally, Morel (2014) *Op. Cit.* p. 228.

³⁸⁶ Simons (2002) *Op. Cit.* p. 96.

³⁸⁷ It is important to highlight that the identification of customary law requires both state practice and *opinio juris*, but with respect to a norm governed by a multilateral treaty ratified by a large number of states, it has become difficult to observe and find state practice and *opinio juris* with respect to that norm other than in relation to the treaty-based norm. This would, according to Richard Baxter (“Baxter’s Paradox”) in his seminal article in the British Yearbook of International Law, make it hard to discern the emergence of a customary norm with respect to a norm dealt by a multilateral treaty that musters a large number of ratifiers (such as the 1949 Geneva Conventions). See Baxter, R. R. (1966) “Multilateral Treaties as Evidence of Customary International Law” British Yearbook of International Law p. 275-300.

addressed by existing domestic institutions. An international human rights norm against arbitrary forced relocation helps identify the governmental conduct as illegal and may thereby constrain state behaviour”³⁸⁸

Apart from the role of the state in displacement, one must bear in mind that the general scope of protection from displacement covers any category of persons and any displacement context (e.g., conflict, development project, natural or human-made disasters) and both internal and, arguably, external displacement. The way in which several international provisions are formulated suggests that the duty imposed on states to prevent displacement requires states both to refrain from displacing people and intervene to stop or minimise displacement where it is caused by natural or human-made risks. For example, the GPID impose on states the obligation to obey their international legal obligations “so as to prevent and avoid conditions that might lead to displacement,”³⁸⁹ and both the Kampala Convention and the IDP Protocol to the Great Lakes Pact lay down explicitly comparable obligations with regards to the responsibilities of states in preventing displacement caused by disasters. In this context, the Kampala Convention compels states to “establish and implement disaster reduction strategies, emergency and disaster preparedness and management measures.”³⁹⁰ As previously explained, many states draw inspiration from these instruments when developing their national legislation and policies. With regards to protection from displacement of EDPs *in concreto*, further guidance on the obligations of states is provided by the Peninsula Principles despite their also limited (internal displacement) scope. At a more operational level, the disaster and adaptation frameworks that were analysed implicitly consolidate what seems to be an explicit preventative dimension of international human rights protection for people (potentially) affected by environmental factors. While the legal value of the implicit recognition of the duty to protect from environmental displacement may be weak because they are not legally binding, they nevertheless complement and reinforce the overarching nature of states’ duty to prevent displacement and protect the human rights of populations vulnerable to environmental change factors.

7.1 International Law Commission Draft Articles on the Protection of Persons in the Events of Disasters

The work carried out by the ILC since 2007 on the preparation of the Draft Articles on the Protection of Persons in the Events of Disasters has aptly put in a memorandum the primary duty of the state affected by the disaster to provide protection,³⁹¹ but also its “obligation to prevent harm to one’s own population, property and the environment generally.”³⁹² More recently, the appointed ILC Special Rapporteur, Eduardo Valencia-Ospina, in his sixth report concentrating on the pre-disaster phase, acknowledges prevention as a principle of

³⁸⁸ *Ibid.* p. 196.

³⁸⁹ Principle 5 GPID; Article 4 (1) of the Kampala Convention.

³⁹⁰ Article 4 (2) of the Kampala Convention; *See also* Article 3 (2), (5) of the IDP Protocol to the Great Lakes Pact.

³⁹¹ ILC (2007) “Protection of persons in the event of disasters- Memorandum by the Secretariat” U.N. Doc A/CN.4/590 (11 December 2007) para.23 “A further corollary of the principle of territorial sovereignty is the recognition that the receiving State has the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control during a disaster.”

³⁹² *Ibid.* Para.24

international law, which “implies rights and obligations both horizontally (the rights and obligations of States in relation to one another and the international community) and vertically (the rights and obligations of States in relation to persons within a State’s territory and control)” and “finds support in human rights law and environmental law.”³⁹³

The ILC Draft Articles are important in that they identify international law norms that are useful to fill in existing gaps in the law, as well as giving precision to general principles to find solutions to what may underpin legal frameworks to avoid environmentally induced cross-border displacement. To that extent, the work carried out by the ILC gradually reinforces the idea of the holistic notion of protection of human rights for those displaced in the event of disasters, and extends protection to measures aimed at preventing and mitigating their effects. Interestingly, the ILC clarifies that these measures are not circumscribed to the state of origin or home state per se (affected or potentially affected by the disaster), but also among states and between states and non-state actors. In this context, the ILC reaffirms in its draft articles the relevance of the duty to cooperate as a relevant principle of international law not only in the context of disaster relief, but also as a duty in connection with prevention.³⁹⁴ More recently, the role of prevention in the promotion and protection of human rights has also been highlighted by the OHCHR pursuant to the Human Rights Council Resolution 24/16, encouraging states and other relevant stakeholders to reflect on and encourage pertinent policies and strategies at the national, regional, and international levels.³⁹⁵

³⁹³ ILC (2013) “Sixth Report on the Protection of Persons in the event of disasters” by Eduardo Valencia-Ospina, Special Rapporteur U.N. Doc. A/CN.4/662 (3 May 2013) para. 36 p. 12; para.41 sq. p. 14. In human rights law, the Special Rapporteur emphasises the positive obligations of states to prevent human rights violations explicitly enshrined in case law and various Treaties already mentioned in the context of this work, such as Article 2 of the CAT; Articles 2 (2); 3 (a), (b); Article 6 of the ICCPR; Article 3 of the UDHR; Article 11 of the ICESCR and Article 27(1),(3) of the CRC. In environmental law, the Special Rapporteur emphasises the general legal obligations of states to prevent, i.e., not to cause environmental harm and to ensure that the activities within their jurisdiction do not harm the environment or areas under the jurisdiction of another state. He also highlights how the ICJ and the ILC have agreed that the principle of prevention stems from two distinct but interrelated state obligations: due diligence and the precautionary principle, which have also been previously highlighted in Section 6.4 of this work. He aptly summarises in paras. 61 and 66 that whilst the due diligence obligation “is one of conduct rather than result [...] cannot guarantee the total prevention of significant harm, but a state must exert best possible efforts to minimize the risk;” the precautionary principle “relates to a more general prevention of environmental harm (including within national boundaries) and essentially creates a rebuttable presumption that an action or policy has a suspected risk of causing harm to the public or to the environment absent evidence that it does not pose a risk.”

³⁹⁴ *Ibid.* paras. 70, 71, 72. Particular reference is made to Draft Articles 5 and 5 (bis) giving a non-exhaustive enumeration of forms of cooperation that may be taken in the context of relief and how cooperation is related to disaster preparedness prevention and mitigation (including cooperation on search and rescue arrangements, early warning systems, capacity building) which derives from numerous UNGA resolutions (42/169 paras. 7-8; 58/215 para. 2 or 60/196 para.2); the Hyogo Framework for Action (Chap. I, Res. I para.4), and other non-binding declarations (e.g. Yogyakarta Declaration on Disaster Risk Reduction in Asia and the Pacific of 2012 or the Declaration of Panama of 2005).

³⁹⁵ OHCHR (2014) “Summary Report on the Outcome of the Human Rights Council panel discussion on the role of prevention in the promotion and protection of human rights” U.N. Doc. A/HRC/28/30 (10 December 2014) paras. 45, 51, 52 and 53. The summary report on the outcome of that discussion highlights that prevention of human rights violations are the primarily responsibilities of states even if other actors play too an important role in prevention efforts (“spirit of cooperation”). The importance of early warnings systems and education are seen as critical to successful prevention efforts. Other conditions include tackling risk factors such as poverty, inequality, providing good governance, a democratic system, and the rule of law, including accountability. An

It can therefore, be argued that a customary legal norm of preventing displacement caused by the effects of governmental acts and policies, third parties, or natural and human-made risks may be emerging. This is because of the *cumulative effects* and the *normative force* of both hard law and soft law instruments previously examined together with the underlying duty of states to prevent (displacement) derived from international and regional jurisprudence. The legal instruments and normative and operational processes under analysis consolidate “the existence to a certain degree or awareness or conviction on the part of states that they are under a legal obligation to prevent displacement where possible.”³⁹⁶ Importantly, judicial review highlights - by analogy - not only the underlying preventative dimension of protection of states for EDPs but also its minimum scope, which - to some extent - is not totally dependent on financial resources. Here, the obligations of states’ procedural rights to protect communities from displacement (right to inform, right to public participation in decision making, right to access to justice) are particularly relevant. As Shelton explains, procedural human rights “[refer] to the reformulation and expansion of existing human rights and duties in the context of environmental protection.”³⁹⁷

8. Conclusion and Outlook

This chapter showed the *cumulative effects* of (quasi) judicial case law of the duty of the states of origin with regards to protecting human rights and ensuring a healthy and safe environment for EDPs. As environmental degradation and change affect the enjoyment of human rights, states have transcendent positive and negative obligations (duty to protect, fulfil, ensure, and promote) to protect the bundle of internationally agreed human rights of displaced persons and the environment surrounding them. This interdependency between human beings and environment, while evident, dissipates especially with regards to EDPs. In many cases, the environment *per se* is one’s life and one’s home (e.g., indigenous populations). A healthy environment is therefore a *conditio sine qua non* for the protection of substantive rights. International and regional jurisprudence have paved the way for recognizing that degradation of the environment violates human rights. While the recognition of a human right to health and safe environment may be implicitly or explicitly recognized in human rights instruments, the analysis shows that courts tend to interpret the wide-range of the aforementioned rights in ways to protect its people from a deteriorating environment.

It was made particularly clear that, from whatever angle the positive and negative obligations of states are approached, the quintessence of protection concerns prevention of human rights violations. The underlying duty to prevent and reduce environmental risks, including displacement risks, is the starting point and one of the principal aspects of states’ positive obligations towards EDPs. Protection as prevention has a significant meaning because states have over the years allowed for increasing risks and uncertainties (tolerating pollution and

interesting view - in line with this study - was that compliance with human rights standards “did not necessarily correlate with countries with high levels of resources.”

³⁹⁶Morel (2014) *Op. Cit.* p. 232. .

³⁹⁷ Shelton, D. (1991) “Human Rights, Environmental Rights and the Right to Environment” 28 *Santford Journal of International Law* p. 117 pp. 103-138.

degradation of the environment) at the expense of new technological and economic development without having envisaged, - from the very beginning, - stabilized institutions and legal standards to deal with the environmental and human related challenges.³⁹⁸ Having said that, it becomes particularly evident in a number of relevant interconnected normative texts and operational frameworks at the international, regional, and sub-regional levels that – explicitly and implicitly- place obligations on states to prevent environmental displacement and ensure the protection of human rights. A protective and enabling human rights framework through labour migration may be considered by states. This one is increasingly seen as a proactive strategy (*new status of protection*) and appropriate measure to face and adapt to environmental changing conditions. The risks of climate change, for example, are becoming increasingly comprehensible (for e.g., the IPCC expert predictions with high confidence the increases in death, disease, and harm as an outcome of flooding, droughts, storms and fires from environmental change) and visible, and can be translated into “systematic uncertainties with possibly serious consequences,”³⁹⁹ including human displacement. Environmental human rights jurisprudence, legal instruments, and operational standards show overall that human rights law is potentially well placed to protect EDPs and at the same time address other environmental related-challenges. While human rights violations are generally established after the harm has occurred, contemporary judicial review and OHCHR has acknowledged that that the impact on a human right does not have to have occurred in order for a violation to exist, but that the effect may be “imminent.”⁴⁰⁰ The increasingly reliable data on environmental change and human displacement can in turn be the basis for states’ response measures, as well as arguably consolidating obligations upon states to implement them.

It is true that some of the relevant international legal (hard law and soft law) standards (see Sections 5 and 6) have limited scope of application because they are particular to the internal displacement, context but this does not diminish their relevance. First because they offer protection against arbitrary displacement and point towards a general rule of preventing (both internal and external) displacement and, where possible, mitigate displacement caused by natural or human-made risks or other third parties. Then, because these instruments provide a set of rights for those displaced and the corresponding duties of the duty-bearers in the pre-in-post displacement phases. More importantly, they formalise the plight of those displaced by environmental conditions.

Finally, while the focus of this chapter lays on the obligations of the country of origin towards EDPs, one cannot entirely sideline the obligations at stake of other actors because, after all, the risks of environmental change are collective. Even if countries of origin have the obligation to satisfy a *minimum content of protection* (see Section 4) towards EDPs, many

³⁹⁸ Sand, I-J. (2001) “The Legal Regulation of the Environment and New Technologies in view of Changing Relations Between Law, Politics and Science” 22 *Zeitschrift für Rechtssoziologie* p. 7 pp 1-38.

³⁹⁹ *Ibid.* p. 8.

⁴⁰⁰ OHCHR (2009) “Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights” UN Doc. A/HRC/10/61 (15 January 2009) para. 70.

national governments, to meet their protection obligations, will need the help of other states and non-state actors. National states may not have the additional resources or the know-how to protect and fulfil the human rights of EDPs (especially of socio-economic rights, which do not have a jurisdictional clause that restricts their scope and application). An additional argument within the literature is that people in the communities that are/will be most affected contributed the least to the problem. In a way, certain countries have not only imposed environmental change, but they have also created the environment of violations of human rights in developing countries.⁴⁰¹ It is against this background that extraterritorial duties of third states and the role of international cooperation and assistance are salient as existing parallel and mutually inclusive obligations.⁴⁰² In this sense, “[i]nternational human rights law complements the United Nations Framework Convention on Climate Change by underlying that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realisation of human rights”⁴⁰³ This may include the reduction of emissions to “safe levels” for the enjoyment of human rights,⁴⁰⁴ the creation of adaptation funds and mitigation strategies for EDPs (including new labour migrations statuses) in well-known vulnerable areas, and appropriate national and international forums where they can participate and be heard. “Climate change cannot be used as an excuse by states not to pursue the full enjoyment of human rights, but equally the fulfilment of human rights by vulnerable states will only be possible in a permissive international environment [of enhanced spirit of cooperation] in which all states also abide by their extraterritorial duties and obligations.”⁴⁰⁵

The understanding of a holistic approach to protection highlights prevention or protection from displacement as an important phase of the protection of EDPs of an emerging customary nature. By looking at prevention as protection, one begins to also find ways to narrow the legal protection gap for those at potential risk from cross-border displacement. While “prevention is better than the cure,” it is necessary to highlight that prevention from displacement does not imply the curtailment of the right to seek asylum abroad. Our comprehensive approach to protection obliges us to also turn our attention to the obligations

⁴⁰¹ Limon, M. (2010) “Human Rights and Climate Change: Constructing a Case for Political Action” 33 Harvard Environmental Law Review p. 572 pp. 439-576 The author cites the declaration of Marghoob Saleem, Butt Counselor, Permanent Mission of Pakistan to the United Nations at Geneva, Panel on Human Rights and Climate Change at the eleventh Session of the Human Rights Council (15 June 2009).

⁴⁰² While Article 2 (1) of the ICCPR requires states parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” Article 2 (1) of the ICESCR requires each party “to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.” The analysis of extraterritorial duties of third states *per se* is beyond the scope of this work, but is relevant to highlight in this context. For more on this See Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (January 2013) *available from:* http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [accessed 04 June 2015].

⁴⁰³ OHCHR (2009) “Report of the Office of the U.N. High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change” *Op. Cit.* para.99.

⁴⁰⁴ Limon (2009) *Op. Cit.* p.455.

⁴⁰⁵ Limon (2010) *Op. Cit.* p.559.

of host states in protecting environmentally induced displacement under human rights law, in particular refugee law. This is the launching point for our next chapter.

Chapter 5. Status and Protection Obligations of States under International Refugee Law

1. Introduction

After inquiring particularly about the underlying duty of the country of origin in protecting the human rights of individuals (potentially) affected by the impacts of environmental conditions, and (by analogy) preventing displacement per se, our attention turns more specifically to the obligations of host states to protect EDPs. The need for protection and the lack of international consensus in determining who EDPs are for the purpose of protection lies in reviewing existing international protection standards. The most relevant legal framework at the international level for the protection of displaced populations is refugee law, in particular the 1951 United Nations Convention Relating to the Status of Refugees (CRSR or Refugee Convention) and its 1967 Additional Protocol.

Refugee law materialises the collective responsibility of host states towards refugees. In the context of this study, the analysis of refugee law is important as a means to explore the extent to which those host state duties are transferrable, in particular, to protecting EDPs. The analysis challenges whether or not EDPs fulfil (at least in some cases) the main elements of the refugee criteria of the CRSR (as amended by the 1967 Protocol) enshrined in Art.1A(2). Using refugee law as a point of comparison it determines whether there is an inclusion or exclusion of EDPs from the rights afforded to refugees. The chapter looks upon the developments of refugee law, particularly the enhancing of the obligations of states to protect people in the event of environmental challenges in the regional context and the relevance of the customary character of the principle of *non-refoulement*. These normative developments, can serve as guidance to advance meaningful ways to (re)conceptualise protection for EDPs, which will be the basis of the next chapter.

2. Determining Host State Obligations: Refugee Law as Point of Comparison

The formalistic reading of the principle of state sovereignty under international law dictates that states are under no obligation to admit persons to their territory except under treaty obligations. The United Nations Convention Relating to the Status of Refugees (CRSR) is one of these treaties establishing such obligations. Traditionally, international protection forms the core of host state' obligations vis-à-vis refugees. In this context, the need for international protection is predicted on the lack of national state protection in other words, on the lack of basic guarantees that states normally afford to their citizens.¹ Those who cross national borders due to environmental change conditions and their aftermath indicate, too, a justifiable need for international protection. The consolidated framework of the protection of refugees serves as a track of reflection in determining host states protection obligations towards EDPs.

¹ McAdam, J. (2007) "Complementary Protection in International Refugee Law" (Oxford University Press) pp.19-20.

The CRSR and the value of its analysis in the context under study, is that it is an international agreement that does not aim at regulating “inter-state” but rather “state-individual” relations. The main purpose of the treaty is not to benefit state parties but quite the opposite: “to impose on them a general obligation of effective protection” (...) “of, inter alia, the life and liberty of a particular vulnerable category of individuals.”² It ultimately constitutes a human rights treaty, given that the centre of gravity of its corpus is a consolidated promise of host states aimed at the protection of the individual and not states’ interests. Despite being a product of the political realm of the Cold war period, it embraces the human rights awareness and sensitivity on the part of international society, epitomised mainly by Western state in the aftermath of World War II.³ It is its human rights core and recognition of the collective responsibility of states, which deems it relevant for EDPs.

As a point of comparison, it is important to ascertain whether environmentally displaced persons fulfil (at least in some cases) the refugee criteria of the CRSR (as amended by the 1967 Protocol) enshrined in Art. 1A(2).⁴ In particular, it is challenged whether EDPs can fulfil the main elements of the refugee definition. The CRSR of 1951 and the 1967 additional Protocol define the scope of refugee status; i.e., those who can be admitted and granted refugee status and those who fall outside the legal remit of the definition. Refugee status grants to persons safe asylum in another territory, enabling rights such as the right to work, right to adequate shelter and the right to health and social security. When this possibility is nonexistent, the provision enables other types of assistance, such as health clinics, shelters and food, education facilities, and monetary funding conditions.

As important as it is to attach a particular status to EDPs under international law, it is equally important to ascertain the evolution of the actual regime of international protection and *inter alia* host states’ obligations. The evolution of international protection has enhanced its autonomy and dynamic, meaning to the present-day conditions. This is reflected not only in the number of signatories to the CRSR,⁵ but also through additional regional protection arrangements and the development of principles of customary character (such as the principle of *non refoulement*).

² Sitaropoulos, N. (1999) Refugee: “A Legal Definition in search of a Principled interpretation by Domestic Fora” 52 *Revue hellénique de droit international* p. 161 pp. 151-190

³ See for a more historical overview Grahl-Madsen, A. (1983) “Identifying the World’s Refugees” 467 *Annals of the American Academy of Political and Social Science*, “The Global Refugee Problem: U. S. and World Response” pp. 11-23.p.13 ; Friedmann, W. (1962)“The Changing Dimensions of International Law” 62 *Columbia Law Review* 7 pp. 1147-1148 pp. 1147-1165.

⁴ Pursuant to Article 1 A (2) of the CRSR as amended by the 1967 Protocol “[...] the term refugee, shall apply to any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it. [...]”.

⁵ As of September 2015 there are 145 states parties to one or both of the instruments.

3. (In)Adaptation of the Regime Established by the Convention Related to the Status of Refugees

3.1 Criteria for Determining Refugee Status versus Environmentally Displaced Persons

Under refugee law, McAdam has argued that protection comprises two features: the qualification threshold (refugee) and the rights attach to it (status). However, even though the author proclaims that the determination whether an individual has international protection is solely based on the scope of threshold qualification (accentuated by the principle of *non refoulement*), it is relevant to highlight that it is the rights attached that fill and give meaning to the qualification threshold in the first place.⁶ Both of these elements crystallise over time to a particular conceptualisation of refugee protection. The term *refugee* entails a specific legal meaning for the purpose of international protection under the CRSR and its Additional Protocol,⁷ which does not explicitly cover EDPs. In turn, non-compliance with the conventional classification criteria of refugees bars EDPs from acquiring any status under international refugee law.⁸

It is Convention Article 1A(2) that sets the benchmark for granting refugee status. It defines a *refugee* as a person who holds a:

“well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The classification has four basic legal requisites: 1) there must be a well-founded fear of persecution; 2) the reasons of persecution are race, religion, nationality, and membership of a particular social group or political opinion; 3) the person must have fled and crossed the border of the country of origin or place of normal residence; and 4) the person is unable or unwilling to return home.

The 1951 Convention does not define the terms either *well founded fear* or *persecution*. Furthermore, there is no explicit mention of environmental degradation as a form of persecution or persecution ground.⁹ Persecution may encompass the threat to life or freedom, the infliction of suffering or harm frequently curbed to torture, substantial economic

⁶ *Ibid.* Refugee status grants to persons safe asylum in another territory enabling rights such as the right to work; the right to adequate shelter; the right to health and social security. When this possibility is nonexistent, the provision enables other types of assistance, such as health clinics shelters and food, education facilities and monetary funding.

⁷ The CRSR, recognises the collective responsibility of states to protect refugees which emerged at the end of the Second World War.

⁸ UNHCR (2009) “Climate Change, Natural Disasters and Human Displacement: A UNHCR perspective” available from <http://www.unhcr.org/4901e81a4.html> [accessed 8 September 2014] p. 9.

⁹ UNHCR (1992) “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol” (Geneva 1979, re-edited 1992) para. 39. According to the UNHCR Handbook the expression “owing to well-founded fear of being persecuted” for the reasons stated excludes persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Nevertheless, other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all circumstances of the case need to be taken into account for the proper understanding of the applicant’s case.

deprivation or systemic violations of human rights under government consent.¹⁰ The well-founded fear of an act of persecution may be based on an existing, looming, or potential circumstances of uncertainty giving rise to a sentiment of vulnerability to serious harm that a reasonable person in the same situation would fear persecution, which the government cannot or will not prevent.¹¹ To help governments and courts to determine who is qualified as a refugee, the UNHCR produced the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook).

The UNHCR Handbook which is the most authoritative interpretation of the CRSR and Additional Protocol, asserts that (emphasis added): “[t]he expression “owing to a well-founded fear of being persecuted”-- for the reasons stated -- by indicating a specific motive automatically makes all other reasons for escape irrelevant for the definition. It rules out such persons as victims of famine or *natural disaster*, unless they also have well-founded fear of persecution for one of the reasons stated. *Such other motives may not, however, be altogether irrelevant* to process of determining refugee status *since all circumstances* need to be taken into account for a proper understanding of the applicant’s case”.

From the literature one can assert the triangulation of opinions between “the fitters”, “the expanders” and “the deniers”. “The fitters” consider that EDPs are categorised as environmental refugees and are already included in the refugee definition.¹² Others assert that the refugee definition should be expanded according to human rights principles to include environmentally displaced persons.¹³ “The deniers” accept neither that protection standards afforded to refugees directly apply to environmentally displaced persons nor that there is a need for a new Convention.¹⁴ Others in this group deny that the CRSR affords protection while proposing the development of a new Convention to bridge the protection gap.¹⁵ Although a number of scholars, governments, NGOs, have used the term environmental or climate refugee there are a number of barriers in qualifying EDPs as refugees under international law. This does not mean that Refugee law is irrelevant. The significance of analysing the CRSR is that as an established body of law it can under certain situations afford protection to some people displaced by environmental factors. Furthermore, the status, which is envisaged for refugees, might be useful and may act as standard setting for any future legal protection developments and/or (re)conceptualise protection for EDPs.

¹⁰ Hathaway, J. (1991) “The Law of Refugee Status” (Butterworth’s) pp. 105, 112.

¹¹ Islam, R. (2013) “Climate Refugees and International Refugee Law” in R. Islam & Bhuiyan J. (ed.) An Introduction to Refugee Law (Martinus Nijhoff Publishers) p. 221. UNHCR (1992) Handbook *Op. Cit.* B (2) (a) para. 37 sq.; Alexander, M. (1999) “Refugee Status Determination by UNHCR” 11 International Journal of Refugee Law 2 p.264 pp. 251-289.

¹² See Cooper, J. B. (1998) “Environmental Refugees: Meeting the Requirements of the Refugee Definition. 6 New York University Environmental Law Journal pp.480-592.

¹³ See Keane D. (2004) “The Environmental Causes and Consequences of Migration: A search for the meaning of Environmental Refugees” 16 Georgetown International Environmental 2, pp. 209-223; Moberg, K. (2009) “Extending the Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection” 94 Iowa Law Review pp. 1107-1136.

¹⁴ Black, R. (2001) “Environmental Refugees: myth or reality?” UNHCR Working Paper N°34.

¹⁵ Conisbee and Simms 2003 Conisbee, M. & Simms, A. (2003) “Environmental Refugees, The Case for Recognition” (New Economics Foundation) p.33.

3.2 ‘Well-Founded Fear’ Requirement

It is generally asserted that “well-founded fear” has a dual component of the assessment of fear of the applicant: a subjective and an objective one. It has been defended by commentators that literally *fear* in the CRSR definition links to a state of mind, a psychological analysis of the claimant’s prospects of return to their country of origin, their “terror of persecution.” In addition, the qualifier *well-founded* corresponds to the fear that is tangibly “supported by an objective situation”¹⁶ that leads a “reasonable person” to reject their state of origin’s protection.¹⁷ It has been generally contested whether EDPs are victims of state persecution and merit protection in another state.

3.2.1 Prospective Risk

“While the word *fear* may imply a form of emotional response, it may also be used to signal anticipatory appraisal of risk.”¹⁸ Hathaway points out that this “forward-looking assessment of risk” was intended if one looks at the draft history of the Convention.¹⁹

He contends that an evaluative approach - i.e. the *prospective risk* - has to be taken into account by the receiving country when examining the special situation of the applicant. The interpretation of *well-founded fear* should be looked upon as an objective assessment of risk in the framework of present and future risk for the applicant. In the context of environmental displacement situations, this sort of mind set is relevant, as receiving states will have to take a holistic approach based on a humanity yardstick in assessing the applicant’s status. It is essential for states to conduct a balancing exercise to objectively take into account the contextual elements and personal background. What objectively is the current state of the mind of the applicant? What is the present and prospective risk of persecution? What are the conditionalisms and harm that a person would face if they returned to their country or origin? Is there evidence of acute and prospective environmental harm that has a reasonable likelihood of posing a severe threat to the individual or his/her community?

From an objective standpoint, those who are forced to move due to the inexistence of fertile land, that lose their home as result of desertification or natural disaster, and are unable to feed themselves and their family, cannot arguably be returned to a situation that would,

¹⁶ UNHCR Handbook *Op. Cit.* para. 38

¹⁷ UNHCR Handbook *Op. Cit.* para. 42 states (emphasis added): “As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant’s country of origin. The applicant’s statements cannot, however, *be considered in the abstract*, and must be viewed in the *context of the relevant background situation*. A *knowledge of conditions in the applicant’s country of origin* – while not a primary objective – is an important element in assessing the applicant’s credibility. In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

¹⁸Hathaway, J. (1991) “The Law of Refugee Status” (Butterworth-Heinemann) p.66

¹⁹ *Ibid.* pp. 66-67 The author reiterates that the predecessor of the contemporary Refugee convention, the Constitution of the International Refugee Organization, “had competence over persons who *already* suffered persecution in their home state, as well as over persons judged by the administering authorities to face a *prospective risk* of persecution were they to be returned to their own country.”

inhumanely, amount to starvation. These situations demonstrate that a “reasonable person” would flee, thus rejecting their state of origin’s protection. The rejection of the state’s protection can be justified by the incapacity (e.g. lack of socio-economic infrastructures) or unwillingness (e.g., cases of war or discriminatory practices based on religion, race, nationality, social group or political opinion) from the government authorities to grant protection.

3.3 ‘Persecution’ Requirement

Even though persecution is an essential element in the refugee determination status, there is no general definition of what persecution is under the CRSR. All attempts to devise such a definition have failed.²⁰ The consensus after 60 years is still miring. This represents a major obstacle to placing EDPs within the refugee law framework and stretch host state obligations, since it is difficult to characterise disasters and other weather-related events as persecution. Marcs has asserted that the intention of the drafters of the CRSR was to give attention to the circumstances of each case and to enable the development of international refugee law to respond to new conditions not yet considered at the time of the drafting.²¹ Hathaway has also argued that the drafters viewed persecution as an “inclusive concept.”²² In reality, as Grahl-Madsen has admitted, a “flexible concept,” would allow its application and adjustment according to state’s political and policy developments and great manoeuvrability in the refugee status determination.²³ In practical terms, this resulted in states interpreting the term more restrictively or liberally according to their own political views.²⁴

In attempting a proper definition, Hathaway explains that “persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community”²⁵ and further affirms that

“[a] well founded fear of persecution exists when one reasonably anticipates that remaining in the country of origin may result in a form of serious harm which the government cannot or will not prevent, including either

²⁰ UNHCR Handbook *Op. Cit.* para. 51

²¹ Marcs, C. (2008) “Spoiling Movi’s River: Towards Recognition of Persecutory Environmental Harm within the Meaning of the Refugee Convention” 24 *American University International Law Review* p.53 pp. 31-71.

²² See Hathaway (1991) *Op. Cit.* pp. 102-103 “From the beginning, there was no monolithic or absolute conceptual standard of wrongfulness, the implication being that a variety of measures in disregard to human dignity would constitute persecution. Refugee status was premised on the *risk of serious harm* (...).”

²³ Grahl-Madsen, A. (1966) “The Status of Refugees in International Law, vol. I (Sijthoff, Leiden) p. 193. Classic work on refugee status acknowledges that the “term ‘persecution’ has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.”

²⁴ See Vevstad, V. (1998) “Refugee Protection A European Challenge” (Tano Aschehoug) p. 63. The granting of refugee status as a “political statement” is illustrated by state practice over time. The fact that traditionally the U.S. more easily granted refugee status to citizens of Cuba as opposed to citizens of Tahiti and that in Europe the granting of refugee status to persons who were victims of persecution or not from the former Soviet bloc during the Cold War, are such illustrative examples.

²⁵ Hathaway (1991) *Op. Cit.* p. 112

“specific hostile acts or (...) an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear”²⁶

He considers the protection within the CRSR to be “surrogate or substitute protection” that is put into action upon failure of protection from the country of origin.²⁷ This means that the recognition as a refugee due to environmental impairment is dependent on the applicant showing that the cause of harm lies in the actions of the government that is unwilling or unable to prevent on-going persecution. In the context of environmental change, it may be difficult to establish this link.²⁸ In connection to this argument, and as previously highlighted, is the statement by the UNHCR Handbook that victims of famine and natural disasters (sea level rise, earthquakes, or flooding) are not within the remit of benefiting from refugee status. The documents therefore suggests, at first glance, “that in isolation, the fear of a threat to life prompted by a major environmental disruption, could not create a state of mind that arouses feelings of persecution in an individual.”²⁹

However, there is an increasing agreement to argue the opposite; i.e., that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group under Articles 31 and 33 of the CRSR, including other serious violations of human rights norms, may also amount to persecution.³⁰ Hathaway has also acknowledged that, “[i]n addition to the Convention’s acceptance of deprivation of basic civil and political freedoms as sufficient cause for international concern, serious social and economic consequences were also acknowledged to be within the purview of persecution.”³¹ This human rights approach to protection focuses on the individual at risk of harm and not so much on the actions of the state of origin in providing protection, thus expanding the necessary criteria for the definition of persecution. The existence or not of persecution must therefore be identified not only as civil and political rights but also increasingly through the prism of economic, social, and cultural rights.³² This human rights approach can be found in

²⁶ *Ibid.* p. 105.

²⁷ UNHCR Handbook para. 65 reads: “Persecution is normally related to action by the authorities of a country.” See on this Goodwin-Gill, G. S. & McAdam, J. (2007) “The Refugee in International Law” (Oxford University Press) pp. 10-12 “While the use of the word “surrogacy” can serve as an introduction to the system of international protection it may be misleading. This is because protection should be driven first and foremost by focusing on the individual at risk of relevant harm (fear of persecution) considered in a social and political context and not so much giving preference to the State of origin and its efforts in providing protection.”

²⁸ See McAdam J. & Saul B. (2009) “An Insecure Climate for Human Security? Climate-Induced Displacement and International Law,” University of Sydney, Faculty of Law, Working Paper No. 4, p. 9 available from: <http://www.peacepalacelibrary.nl/ebooks/files/357399072.pdf> [accessed 20 December 2013]. The authors note that while sea level rise, earthquakes, persistent flooding and storms may be harmful, they do not comprise persecution within the meaning ascribed both in international and domestic law. States are generally willing to protect its people in the aftermath of a disaster.

²⁹ Mercure, P.F. (2006) “A la Recherche d’un Statut Juridique pour les Migrants Environnementaux Transfrontaliers: la Problématique de la Notion de Réfugié”, 37 *Revue de Droit de L’Université de Sherbrooke* pp. 1-39, p. 18 (author’s own free translation).

³⁰ UNHCR Handbook, para. 51

³¹ Hathaway (1991) *Op. Cit.* p. 1033

³² See Juss, S. (2007) “International Migration and Global Justice” (Ashgate Publishing) p. 203.

parallel in the definition of persecution as a “severe violation of basic human rights” under Article 9 of the European Union Qualification Directive.³³

3.3.1 Environmental Harm as a Form of Persecution?

Even if the UNHCR Handbook does not define persecution, there is no direct barrier for considering environmental harm as persecution. There are a number of examples where one can acknowledge environmental harm as persecution. An individual claiming asylum could argue that environmental factors (such as severe pollution), perpetrated by their state of origin or with state consent, constituted a serious threat to life and that this may amount to persecution where harm can be connected to a CRSR ground. Kozol has generally argued: “environmental harm is as capable of being a means of persecution as any other form of harm.”³⁴ As a way of example, residents of the island of Bougainville in Papua New Guinea (PNG) filed a law suit against Rio Tinto under the Alien Tort Claims Act in US federal court in 2000 *Sarei v Rio Tinto*,³⁵ where plaintiffs alleged that Rio Tinto improperly dumped waste rock and tailings from the Panguna mining operations, harmed the island’s environment and the life and health of its residents, and engaged in racially discriminatory labour practices at the mine by paying local black workers lower wages than white workers and by housing black workers in poor conditions. Similarly, the previously mentioned *Social and Economic Rights Action Centre v Nigeria*,³⁶ the African Commission on Human and People’s Rights acknowledged the negligence and complicity of the Nigerian government in committing “massive [environmental] violations” by facilitating the actions of oil giant Shell in Ogoniland impacting on the right to health, the right to food and the right to shelter of the

³³ According to the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast) (EU Qualification Directive) under Article 9 (emphasis added) “Acts of Persecution are” 1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must: (a) be sufficiently serious by their nature or repetition as to constitute a *severe violation of basic human rights*, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, *including violations of human rights which is sufficiently severe as to affect an individual in a similar manner* as mentioned in (a). 2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of: (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2); (f) acts of a gender-specific or child-specific nature. 3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.”

³⁴ Kozol (2004) *Op. Cit.* pp.271-272.

³⁵ *Sarei v Rio Tinto PLC* 9th Cir. Nos. 02-56256, 02-56390 (20 August 2007). In 2002, the company Rio Tinto sought dismissal of the case, which was given by the district court. Rio Tinto argued to the trial court that the case raised questions that are “nonjusticiable” (not appropriate for resolution by a US court) because they involve acts of state and political questions, and because ruling on them would breach standards of international relations. After a long procedure of appeals more recently the court of appeal upheld the dismissal of the claims regarding racial discrimination and crimes against humanity, but it reversed on the plaintiffs' previous claims to the lower regarding genocide and war crimes.

³⁶ ACmHPR, *Social and Economic Rights Action Centre v Nigeria*, Comm. No. 155/96 (27 October 2002).

Ogoni indigenous people, resulting in “malnutrition and starvation among certain Ogoni communities.” Both cases led to the displacement either of poor black people or indigenous populations. They were class actions that aimed at compensating victims due to the destruction of the environment and do not relate to an application for refugee status per se. The judgments are nevertheless relevant, because they reveal important elements to assess persecution. First, they revealed that victims abandoned an environment that they considered uninhabitable (subjective element of well founded fear of persecution). Then, the government or other non-state actors with government knowledge carried out acts deemed persecutory (life threats, including deaths, barriers to access judicial proceedings- objective element of well founded fear of persecution). Finally, that they flee is based upon a fear of persecution on the grounds of their membership in a racial group (of blacks) and the social group of the poor or indigenous.³⁷

More specifically, the New Zealand Refugee Status Appeal Authority (RSAA) has too suggested that, where the right to food can be used as a discriminatory weapon against certain classes or groups of the population (e.g., destruction of crops by the government) resulting in starvation, the right to food in combination with the right to life can potentially meet the persecution standard based on a Convention reason.³⁸ These illustrative examples show that environmental harm in certain circumstances can arguably be conceptualised as amounting to persecution.

Some authors allege that environmental persecution could be translated in “prejudicial actions or threats” even if the margins of what actions constitute prejudicial actions purporting persecutions remain dependent on evidentiary facts.³⁹ In addition, in the process of determination of refugee status, other factors, even though “not in themselves amounting to persecution [e.g. discrimination in various forms and insecurity in the country of origin], may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to a well-founded fear of persecution on “cumulative grounds.”⁴⁰

In case of environmental displacement, the circumstances surrounding the applicant’s case (historical, cultural, and situational, including environmental changing circumstances or “hot spots”) would need to be taken in to account in order to understand and make an informed decision about the applicant’s case. However, “to establish that flight based on environmental harm is based on well-founded fear of persecution, an individual will have to show more than generalised environmental degradation.”⁴¹ Otherwise, an individual might end up being qualified as an economic migrant; i.e., usually characterised by those who voluntarily move for economic reasons.⁴² But even in these cases the reason for flight might be “blurred”

³⁷ See generally, Mercure (2006) *Op. Cit.* p. 14 sq.

³⁸ RSAA, Refugee Appeal 74665/03, RSAA (7 July 2004) para. 89. See further on this Foster, M. (2007) *International Refugee Law and Socio-Economic Rights- Refugee From Deprivation* (Cambridge Studies in International and Comparative Law).

³⁹ Kozoll (2004) *Op. Cit.* p. 282; UNHCR Handbook para. 52

⁴⁰ UNHCR Handbook *Op. Cit.* para. 53

⁴¹ Kozoll (2004) *Op. Cit.* p. 284. See also UNHCR Handbook para. 62-64

⁴² UNHCR Handbook *Op. Cit.* para. 62

because “[b]ehind economic measures affecting a person’s livelihood there may be racial, religious or political aims or intentions directed against a particular group.”⁴³ In this case, the destruction of a person’s livelihood or cultural surroundings or peoples due to environmental harms may, by analogy, amount to persecution.⁴⁴ In the context of this analysis, and to come back to our initial question (if persecution can be determined in certain situations of forced environmental displacement and engage host states obligations), it is wise to clarify our reflection with certain examples of cases where there is a lack of effective home state protection deriving from certain environmental disruptions.

3.3.2 Lack of Effective State Protection: Inexistence, Complicity, Omission or Failure

According to the UNHCR Handbook, a person may either be unable⁴⁵ or unwilling⁴⁶ to avail themselves of state protection.⁴⁷ The inexistence of state protection beyond an individual’s control means that, reasonably, a person can no longer trust the government to provide the necessary protection (e.g., cases of war or grave disturbance). In case of “grave disturbance,” which may include environmental disruptions, it would be reasonable that a person would be unable to avail themselves of state protection, when the country of nationality cannot extend their protection, ensure effective protection, or deny protection to the applicant. The inability for an individual to rely on state protection is highly fact-dependent. As a point of example, in 2011 in the horn of Africa, what was considered the worst drought of the last 60 years put at risk more than 12 million people. In Somalia alone, thousands crossed the border to Ethiopia and Kenya in search of relief.⁴⁸ The impact of drought, high food prices, and generalised insecurity in Somalia resulted in a clear situation where individuals could no longer avail themselves of state protection.⁴⁹ This is mainly due to the incapacity of the

⁴³ *Ibid.* para. 63

⁴⁴ Kozoll (2004) *Op. Cit.* p. 284

⁴⁵ UNHCR Handbook *Op. Cit.* paras. 98-99. “98. Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant’s fear of persecution, and may indeed be an element of persecution. 99. What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g. refusal of national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition.

⁴⁶ *Ibid.* para. 100. “The term *unwilling* refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase “owing to such fear”. Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country “owing to well-founded fear of persecution.” Wherever the protection of the country of nationality is available, and there is no ground on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.”

⁴⁷ Of note however, is the fact that the willingness of an individual to accept protection from their own government terminates his/her refugee claim.

⁴⁸ UN News Centre (2011) “UN ramps up aid in drought-stricken Horn of Africa as number in need rises” (9 September 2011) available from: <http://www.un.org/apps/news/story.asp?NewsID=39495> (accessed 20 September 2011).

⁴⁹ See reasoning behind *Canada (Attorney General) v Ward* 2 S.C.R. 689 (30 June 1993) This is a leading immigration case decided by the Supreme Court of Canada on test for determining a “well-founded fear of persecution” in order to make a claim for Convention refugee status. The court held that persecution need not

government to cope with the situation, resulting in the violation of social and economic rights including other basic rights. When the state is unable to advocate for the protection needs of its own nationals due to the nature of the environmental disaster, one must question this inability.

As previously touched upon, the violation of human rights in general and persecution in particular can also arise in cases of complicity, omission or failure to act by the state.⁵⁰ When states do not take reasonable steps to fulfil their duties and their actions disproportionately impact a particular social group (even in times of resource constraint),⁵¹ this state of conscientious apathy or complicity may amount to persecution.⁵² A relevant example is the desertification of the African Sahel region where it is claimed that states in that area “could have enacted policies and programs to cut population growth, to improve techniques, or to heighten food production,”⁵³ or as previously mentioned when private actors with the consent of national governments have exploited natural resources in many cases, regardless of the environmental and human consequences. This has included perpetrating violations of human rights (e.g., right to life and right to health) and discriminatory practices, in the majority of cases targeted at sectors of the population (e.g. indigenous people). The UNGA has explicitly mentioned, “contemporary forms of victimization (...), may nevertheless also be directed against groups of persons who are targeted collectively.”⁵⁴ In this context, Cooper has acknowledged that environmental persecution can occur “when governments knowingly induce environmental degradation and that degradation harms people by forcing them to migrate.”⁵⁵ In these cases, an applicant that can show evidence of infliction of environmental harm based on a Convention ground will have a powerful claim for refugee status.

originate from the state, and that mere inability to provide protection is sufficient to establish a claim for persecution: “[m]ost states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.”

⁵⁰ See CESCR, General Comment No. 14 *Op. Cit.* at para.49 (emphasis added) Violations of the right to health can also occur through the *omission or failure of States to take necessary measures arising from legal obligations*. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone’s right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.

⁵¹ See CESCR, General Comment No.3 *Op. Cit.* para.12 “(...) even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes,” CESCR General Comment No. 14 at para.49; CESCR General Comment No.5 Persons with Disabilities, U.N. Doc. E/C.12/1994/13 (1994).

⁵² Foster (2007) *Op. Cit.* pp. 201-204

⁵³ Williams, A. (2008) “Turning the Tide: Recognising Climate Change Refugees in International Law” 30 *Law and Policy* 4 p. 508 pp. 502-529.

⁵⁴ UNGA (2005) “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” U.N. Doc. G.A. Res. 60/147 (16 December 2005) Preamble para.9.

⁵⁵ Cooper (1998) *Op. Cit.* p.483.

Other examples worth mentioning are the case of large-scale development projects⁵⁶ that, with the consent of national governments have destroyed the natural environment and led to the disappearance of villages and the displacement of millions of people sometimes, without having endured an adequate relocation process.⁵⁷ Cernea, who has studied the human dimensions of development projects, has concluded that the displacement of populations in these cases has led to deepened poverty situations that can be materialised in the loss of work, property, or housing; food insecurity; or lack of access to collective resources.⁵⁸ Even if in these cases it might be difficult to establish at a first glance an act of persecution, the lack of available resources that puts at stake the survival of the populations can, if taken together, justify a claim for refugee status - as previously highlighted - on “cumulative grounds.”

Intention of the persecutor?

In these cases, it has been suggested by some scholars that an element of intent of the part of the state is required for the act to be deemed as persecutory “[T]he governmental entity must have been negligent or inactive “because of” and not merely “in spite of” its adverse effects upon an identifiable group.”⁵⁹ In contrast, other authors argue that the establishment of intent on behalf of a government entity is not a necessary requirement. Further, the source of persecution or risk may be based on other “non-human” factors, such as the inexistence of adequate economic resources and infrastructures to provide relief to people in a disaster situation.

Only when the state is able to remove the applicant’s *well-founded fear* is the persecutory criterion not established. “In other words, it is not sufficient that the state is endeavouring to fulfil its obligations pursuant to international human rights law; it must provide sufficient protection to remove the well-founded fear.”⁶⁰ This availability of state protection has in our

⁵⁶ See Cernea, M. (1999) “La Dimension Humaine dans Les Projets du Développement: les Variables Sociologiques et Culturelles” (Éditions Karthala) p. 210. According to the author large scale development projects include not only dams for electricity production but also road and airport construction, the construction of irrigation channels, urban infrastructures, factories or industrial areas as well as the construction of biodiversity-protected areas or national parks.

⁵⁷ Vlassopoulou, C. (2008) “Les Migrations Environnementales entre Secteurs d’Action Publique” Revue Asylon(s) No. 6 p. 5 available from: <http://www.reseau-terra.eu/article848.html> [accessed 20 December 2013]. For example, the three Gorges Dams in China.

⁵⁸ Cernea (1999) *Op. Cit.* p. 218.

⁵⁹ Lopez, A. (2007) “The Protection of Environmentally-Displaced Persons in International Law” 37 Environmental Law p. 380 pp. 365- 409, “Thus, the governmental entity must have been negligent or inactive “because of” and not merely “in spite of” its adverse effects upon an identifiable group” [...] The 1951 Refugee Convention considers the lack of state protection as persecutory [...] only if, the persecutory intent on the governmental entity may be established. [...] Persecution may be inflicted directly by the governmental entity or indirectly by the lack of protection from these governmental entities. In any case, the harm must be inflicted or cognizable groups with the particular intent to harm these groups because of a valuation of the lives and cultures of the people harmed.”

⁶⁰ Foster (2007) *Op. Cit.* p.202 The author asserts that this has been emphasized by the New Zealand RSAA in the Refugee Appeal No. 71427/99, 16 august 2000 para 63: “If the net result of a state’s “reasonable willingness” to operate a system for the protection of the citizen is that it is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied that individual.”The persecuted clearly do not enjoy the protection of their country of origin. Further in the same case the New Zealand RSAA clearly states that at paras. 63-64: “The state’s inability to protect the individual from persecution founded on one of the

view an implicit duality: *objective action* – the state of origin must be able to take the necessary and reasonable steps (even if at a minimum), and to provide sufficient protection to the individual; and *subjective action* – remove the well-founded fear from the applicant.

The drafting history of the 1951 Convention was silent about the motive or intent of the persecutor as a *controlling* factor either in the definition or in the refugee status determination procedure.⁶¹ This is of particular relevance, as one might end up defending cases where economic gains and development (including environmental disruption and harm) overrun the overall objective of sustainable development and respect for human rights. Nevertheless, bearing in mind that *fear* is a key element of the refugee definition *owing to well-founded fear of being persecuted for reasons of [...] and the CRSR does not explicitly refer to intention of the persecutor, the preferred approach should be based on the applicant’s fear. The fact that the test is formulated in the passive voice is important as it reiterates the subjective element of the “predicament of the applicant rather than on an assessment of the situation from the perspective of the persecutor.”*⁶² This interpretative point of view also goes in line with the entire humanitarian stand of the treaty.

3.4 ‘For Reasons of’ Requirement

Even if one is able to show that a certain correlation exists between environmental consequences and government actions to fulfil the persecution criteria, this link may be difficult to establish in case of environmental-induced displacement because other requirements still have to be met.⁶³ Persecution must have a causal nexus based on one of the grounds outlined in the 1951 Convention refugee definition: “race, religion, nationality, membership in a particular social group or political opinion.” As evoked by the UNHCR, it is enough that the Convention ground is an essential factor contributing to persecution, and it is not required to be the only or even dominant persecutory factor.⁶⁴ The multiple grounds may even overlay and be used by the applicant. Further, it is not essential that the individual actually encapsulates those features, but that they are attributed to them by the persecutor.⁶⁵

enumerated grounds constitutes failure of local protection;” [and further] “[m]ost states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.”

⁶¹ Goodwin-Gill & McAdam (2007) *Op. Cit.* pp. 100-101.

⁶² Foster (2007) *Op. Cit.* p. 273.

⁶³ See Aleinikoff, A. (1991) “The Meaning of ‘Persecution’ in U.S. Asylum Law” in H. Adelman (ed.) “Refugee Policy: Canada and the United States” (Centre for Refugee Studies & Centre for Migration Studies York University) pp. 292, 296. In his article the author observes for e.g. how the U.S. Board of Immigration Appeals focuses first and foremost on whether persecution is likely to be suffered by the individual applicant according to one of the five grounds enshrined in the CRSR definition. There also seems to be a narrow reading from the adjudicators of the aforementioned persecution grounds.

⁶⁴ Guidelines on International Protection: The application of Article 1A(2) and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, UNHCR, U.N. Doc. HCR/GIP/06/07, 7 April 2006, para. 29 available from: <http://www.unhcr.org/443b626b2.html> [accessed 15 July 2012].

⁶⁵ See Frigo, M. (2011) “Migration and International Human Rights Law” Practitioners Guide No.6 (International Commission of Jurists), p. 50. See also EU qualification Directive Article 10 (2) (emphasis added): “When assessing if an applicant has a well-founded fear of being persecuted it *is immaterial whether the*

When environmental degradation is used as a “weapon” against a particular group or sector of society, this act of “environmental cleansing” may amount to persecution, enabling an applicant to claim refugee status. “Environmental cleansing” is defined as the “deliberate manipulation and misuse of the environment so as to subordinate groups based on characteristics e.g. race, ethnicity, nationality, religion and so forth.”⁶⁶ An over-cited case in the early 1990’s includes the drainage of marshes in Southern Iraq by the Iraqi regime under Saddam Hussein as a way to push out Shi’a opposition groups in southern Iraq and gain prominent political control of the people in the area. The environmental effects in the area of this planned action have been profound, with the loss of fauna and flora, agricultural land, people’s livelihoods including forced displacement, and of thousands of human lives. Scholars posit that the acts of the Iraqi government were considered by some as amounting to “genocide”⁶⁷ as “deliberately inflicting on the group conditions of life calculated to bring about physical destruction in whole or in part.”⁶⁸

However, generally speaking, because environmental conditions affect individuals indiscriminately regardless of religion, nationality, social group, or political opinion, it would be difficult to establish the persecution nexus (based upon serious violations of human rights) on one of the aforementioned grounds. This is particularly true in cases where the state is willing to protect all individuals without discrimination but is unable to do so even if this implicates serious harm. In this context, “[d]etailed and accurate research into state responsibility for both the causes and consequences of environmental degradation will therefore be vital to assist in establishing whether the required nexus exists.”⁶⁹

While asylum claims may more likely focus on other features than environmental ones, individuals may indeed suffer environmental persecution based on any ground under the Geneva Convention. Kozoll argues that victims of environmental change (natural disasters and human-caused degradation) meet the refugee definition as enshrined in international law on at least two occasions. First, when “a government systematically imposes the risks and burdens of decisions impacting environmental quality on members of a particular race, religion, nationality, social group or political opinion on account of one or more of these protected factors,” and second, “where the relevant authority refuses to mitigate or mitigates inadequately environmental disasters, whether of human origin or not, and in so doing

applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such characteristic is attributed to the applicant by the actor of persecution.”

⁶⁶ Drumbl, M. A. (2005) Symposium “The International Responses to Environmental Impacts of War” 17 *Georgetown International Journal of Environmental Law* pp.565-643, p.627.

⁶⁷ See Human Rights Watch (2003) “The Iraqi Government Assault on the Marsh Arabs (Jan. 2003) *available from: <http://www.hrw.org/legacy/background/mena/marsharabs1.htm>* [accessed 18 March 2015]. Tkachenko, A. (2002) “The Economy of the Iraq Marshes in the 1990s, in E. Nicholson & P. Clark (eds.) *The Iraqi Marshlands (Politico’s)* pp. 36,41; Civil Liberty “The War Crimes of Saddam Hussein” *available from: http://civilliberty.about.com/od/internationalhumanrights/p/saddam_hussein.htm* [accessed 15 July 2012].

⁶⁸ See Article II c) Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, in force since 12 January 1951, 78 UNTS 277

⁶⁹ Burson, B. (2010) “Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition” in T. Afifi and J. Jäger (eds.) “Environment, Forced Migration and Social Vulnerability” (Springer- Verlag) p. 13.

‘targets’ a group based on one of the listed factors.”⁷⁰ This can be particularly true in cases where the government does not put into place any mitigation or adaptive strategies in a particular area where a group of indigenous people is living (given the scientific knowledge that is available that displacement is likely to occur in those particular localities), or in cases where there is an inability of the government to manage a situation of a disaster either by intended inaction or blockage of relief to certain groups of the population. The latter was particularly documented during Cyclone Nargis in 2008,⁷¹ where despite the terrible experience of the 2004 tsunami in the Asian coasts, the government of Myanmar not only was incapable of offering assistance to the victims of the catastrophe but also refused to receive aid from humanitarian institutions.⁷²

3.4.1 Environmentally Displaced Persons: A Particular Social Group?

The definition of “membership of a particular social group” is important because it is under this feature that many scholars have suggested that those displaced by environmental factors should fall and merit host state protection.⁷³ Though subject to extensive analysis, a social group essentially encompasses individuals with similar undeniable characteristics, social position, or habits. This is generally referred to as the *protected characteristics* approach.⁷⁴ A comprehensive understanding of what constitutes a social group is starting to develop.⁷⁵ The group must exist as an independent entity prior to the persecution itself.⁷⁶ The group does not have to be of any specific size, nor does it need to be a certain intentional affiliation between members of the group. Further, not all individuals must be at risk of being persecuted. It is sufficient that certain members of that social group are at risk.⁷⁷ Often the way the group is externally perceived by society can be added to the criteria elements.⁷⁸ This is the so-called

⁷⁰ Kozoll (2004) *Op. Cit.* pp. 273-274.

⁷¹ Tripartite Core Group Report comprised of Representatives of the Government of Myanmar, Association of South Asian Nations and United Nations (2008) “Post-Nargis Assessment” (July 2008) p 37-38. According to the report Cyclone Nargis was one of the worst catastrophes in the history of Myanmar, devastating villages next to coastal areas, as well as, housing, road, and communication infrastructures that led to the official death and displacement of millions of people.

⁷² See Cohen, R. (2009) “The Burma Cyclone and the Responsibility to Protect” 1 *Global Responsibility to Protect* 2, pp. 253-257, p. 256.

⁷³ See generally, Cooper (1998) *Op. Cit.*

⁷⁴ UNHCR Handbook *Op. Cit.* para. 77

⁷⁵ UNHCR, Guidelines on International Protection: “Membership of a Particular Social Group” within the context of Article 1A (2) of the 1951 Convention and/or its Protocol Relating to the Status of Refugees: HCR/GIP/02/02, 7 May 2002 available from: <http://www.unhcr.org/3d58de2da.html> [accessed 20 December 2011]. These Guidelines define a particular social group as: “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identify, conscience or exercise of one’s human rights.”

⁷⁶ Foster (2007) *Op. Cit.* p.293.

⁷⁷ Goodwil-Gill & MacAdam (2007) *Op. Cit.* p. 85

⁷⁸ See Council of Europe (2004) Committee of Ministers “Recommendation Rec (2004) 9 of the Committee of Ministers to Member States on the Concept of “Membership of a Particular Social Group” (MPSG) in the Context of the 1951 Convention Relating to the Status of Refugees, Rec (2004) 9 (30 June 2004), available from: <http://www.refworld.org/docid/4278d1524.html> (accessed 18 March 2015). The Committee of Ministers Recommendation considers that “a particular social group” is a group of persons who have, or are attributed with, a common characteristic other than the risk of being persecuted and who are perceived as a group by society or identified as such by the state of the persecutors. Persecutory action towards a group may however be

social perception approach, which “moves beyond protected characteristics by recognising that external factors can [too] be important to a proper social group definition.”⁷⁹

Cooper argues that environmentally displaced persons are victims of environmental injustice and thus bear the disproportionate impact of environmental damage upon them. Under the grounding of environmental justice theory, this group of persons belongs to a social group since they are politically disenfranchised and powerless to protect their environment.⁸⁰ This power imbalance allows states to adopt policies that are in crux persecutory. The persecutory acts perpetuated against this group (e.g., failing to take measures to prevent disasters and displacement, destroying crops and poisoning water or refusing to receive aid or withholding or obstructing assistance) may indeed be determinant in the visibility of a group in a particular society. However, it is relevant to highlight that power imbalance can be challenged as it may well be an outcome of a number of contextual elements, sometimes not under the control of governments (for e.g., international pressures from non-state actors, the political environment, an established rule of law system or democratic approach). Further, some argue that not all environmentally displaced people are politically powerless and that environmental change would impact on individuals indiscriminately, not specifically targeting a group of people with common features.⁸¹ In any case, this does not disenfranchise the state from a “minimum content of protection” that should be afforded by them to promote and protect the human rights of people in its territory or subject to its jurisdiction in the event of environmental changing conditions or in the aftermath of a disaster (see Chapter 4 Section 4.1 and 4.2).

While the condition that the group persecuted should “have existed prior to the occurrence of persecution” might be difficult to establish, it is not impossible to challenge. The IPCC has been conclusive in establishing which areas of the world will be mostly affected by the impacts of environmental change. People living in these areas are particularly vulnerable to environmental stresses and are increasingly recognisable in society as a particular group in need of protection. The inherent common immutable characteristic is one that unites them in a particular territory, and in a particular society making them particularly vulnerable to external environmental impacts (see on this our discussion about about “vulnerability layers” Chapter 2 Section 4.2). It is not an event that affects more strongly a certain part of society that creates a social group, but the shared past, current, and even future characterized environmental change experiences that unites them and makes them vulnerable. Within the categorization of EDPs, there may be other sub-groups or parts of the population more

a relevant factor in determining the visibility of a group in a particular society.”

⁷⁹ Aleinikoff, A. (2003) “Protected Characteristics and Social Perceptions: an Analysis of the Meaning of ‘Membership of a particular social group’ in E. Feller, V. Türk & F. Nicholson (eds.) “Refugee Protection in International Law” (Cambridge University Press) p. 297.

⁸⁰ Cooper (1998) *Op. Cit.* p. 523-26

⁸¹ Falstrom, D. Z. (2001) “Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment” 1 Colorado Journal of Environmental Law & Policy pp.5-6 pp.5-21; McAdam, J. (2011a) “Climate Change and International Law: Complementary Protection Standards” (UNHCR Legal and Protection Policy Series May 2011) available from: <http://www.unhcr.org/4dff16e99.html> [accessed 11 March 2015].

vulnerable or with different needs of protection that must be especially catered to (e.g. children, women, and older people among others). A particular social group is not defined only by the fact that all its members suffer persecution or by a common fear of persecution. “[T]here is no rational basis for denying protection to individuals who even divided in lifestyle, culture, interests and politics, may yet be linked across another dimension of affinity.”⁸² The *protected characteristics* approach might have in this day and age a new meaning.

In fact, Kalin⁸³ has used a “vulnerability analysis” as a basis to determine as to when a certain situation has reached such a point that a person is forced to leave his or her home. This so-called “vulnerability test” is extracted from the refugee definition in article 1A (2) of the CRSR (1. being outside of the country of origin; 2. because of persecution on account of specific reasons; 3. being unable or unwilling to avail oneself of the protection of one’s country of origin). Even though the author acknowledges that only in exceptional circumstances people displaced by certain effects of environmental change meet the refugee determination criteria under international law, he highlights, nevertheless, that EDPs suffer from the consequences of environmental change (storms, flooding, salinization of groundwater and soils among others) and conditions of its aftermath (limited access to food, drinking water, health services) similar to persecution. This in turn may constitute a serious threat to the right to life and the right to health. Whereas all of us are generally vulnerable to the effects of environmental change, there are *localized vulnerabilities* that are obvious, given the characteristics of a person or group and their capacity to resist and recover from environmental hazards. From this perspective, EDPs can potentially be characterized as a vulnerable social group in need of protection.

3.5 The ‘Cross the Border of the Country of Origin or Place of Normal Residence’ Requirement

Under refugee law, the person must have fled and crossed the border of the country of origin or place of normal residence in order to benefit from international protection. This generally “is a factual issue which is easily determined and, in most cases, uncontroversial.”⁸⁴ It is not our intention here to contest such criteria. As a point of fact, we have incorporated the cross-border element in the conceptualisation of EDPs under this study. Borders, of course, are important from a theoretical and practical point of view of the exercise of sovereignty and are at the heart of absolutised territorial claims of sovereign states and, more importantly, their obligations towards individuals. However, it is fair to acknowledge that, in reality, there is no real conceptual difference between those who are displaced by environmental factors internally or externally. In both situations a need of protection may be imminent. Indeed, for the person whose life is in danger the cross-border element maybe irrelevant altogether as

⁸² Goodwin-Gill & McAdam (2007) *Op. Cit.* p. 85.

⁸³ Kālin, W. (2010) “Conceptualizing Climate-Induced Displacement” in J. McAdam (ed.) “Climate Change and Displacement: Multidisciplinary Perspectives (Hart Publishing) pp. 81-103.

⁸⁴ UN High Commissioner for Refugees (2001) “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees” (April, 2001) para. 33 p.9.

their ultimate goal is safety. This is because, as Schanove affirms, refugeehood is “exclusively a political relation between citizen and the state, not a territorial relation between countryman and his homeland.”⁸⁵ More precisely, “the relationship between the state and the citizens may have broken down without a border crossing having taken place, hence the false dichotomy between *refugee* and *internally displaced person*. The idea of crossing an international border may therefore be both literal and fictitious.”⁸⁶ It is true that the precarious conditions following a disaster may leave people vulnerable without protection from their government and that they may be physically unable to cross an international border. At the same time, international boundaries divide the line between the international and the domestic protection realm and ensure that states guarantee the protection of their citizens, when the state is no longer able to do this the international community of states must step in. However, it is necessary to highlight that protection needs to be seen from a holistic point of view and not only granted once the person has relocated. A preemptive approach to protection for those who are at risk from environmental displacement is necessary (see Chapter 4 and our conceptualisation of protection in Chapter 2 section 6) and it is on this point that the CRSR reveals its weakness.

3.6 Refugee Status Determination Procedure

The general assumption within the Geneva Convention is that people meeting the outlined criteria automatically qualify for refugee status. This means that the intake of refugees by a state is not a constitutive element. Thus, the domestic Refugee Status Determination (RSD) procedures are in essence declaratory. The system of adjudication for asylum claims is left to each of the contracting states to establish the procedures that it considers most suitable according to its constitutional and administrative structures. The Executive Committee of the High Commissioners Programme (ExCom) has suggested the establishment of minimum procedural standards, taking into account the special situation of the applicant, which would equip him with certain essential guarantees.⁸⁷ In practice, however, processes vary

⁸⁵ Schacknove, E. A. (1985) “Who is a Refugee?” 95 Ethics, 2 pp. 274- 284 p. 283.

⁸⁶ Haddad, E. (2004) “Who is (not) a Refugee?” European University Institute, Working Paper N° 2004/6 pp. 1-28, p. 24.

⁸⁷ UNHCR Handbook *Op. Cit.* para. 192 reads (emphasis added): “In view of this situation and of the unlikelihood that all States bound by the 1951 Convention and the 1967 Protocol could establish identical procedures, the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements. These basic requirements, which reflect the special situation of the applicant for refugee status, to which reference has been made above, and which would ensure that the applicant is provided with certain *essential guarantees*, are the following:

- (i) The *competent official* (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have *clear instructions for dealing with cases* which might come within the purview of the relevant international instruments. He should be required to act in accordance with the *principle of non-refoulement* and to refer such cases to a higher authority.
- (ii) The applicant should receive the *necessary guidance* as to the procedure to be followed.
- (iii) There should be a clearly identified authority-wherever possible a *single central authority-with responsibility* for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the *necessary facilities*, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

extensively from formal procedures of admission of aliens to informal or ad hoc arrangements. This leaves a great deal of discretion to states and puts in jeopardy the protection of the applicant. In certain regions, potential third country recipients of environmentally displaced persons have sub-standard RSD frameworks.⁸⁸

In most countries, the RSD is carried out on a case-by-case basis. This individualised procedure generally leaves the burden of proving the *well founded fear* with the applicant. However, because the applicant may not be able to support his statements with documentary or other evidence, the duty to ascertain and evaluate all relevant factual evidence is shared between the applicant and the authorities of the host country.⁸⁹ In the context of EDPs, the individual applicant would have to demonstrate that there has been serious hardship and fear caused by environmental factors, which forced him/her individually to move (analogous to a claim based on the refugee criteria). The starting point of this analysis is the applicant's statement, which, if credible, would constitute the subjective assessment of the element of fear. The objective element (the risk that the applicant would face if returned) is put upon the RSD decision-making authorities since they are supposed to have access to relevant informative material (government, specialist and NGOs reports, and impact assessments, among others). In this case it is likely that government authorities would largely benefit from scientific environmental expertise in their analysis especially from, for example, the IPCC reports that have determined in which areas people are most likely to be affected by environmental change. An applicant would have to show that "severe environmental harm" threatens his or her life and/or freedom or amounts to another serious human rights violations or is of such level or nature that would "reasonably induce fear."⁹⁰ In addition, the individual would have to demonstrate that environmental harm affects him/her as member of a particular protected group more than other individuals⁹¹. As previously mentioned, the persecutory intent on the part of the state is not necessary, but the well-founded fear of persecution is linked to one of the Convention grounds. If the applicant's statement is trustworthy, the benefit of the doubt standard might work in his favour.⁹² However, one questions to what extent an individual approach would be appropriate with regard to EDPs, as in some circumstances, especially in case of sudden environmental disasters and serious

(v) If the applicant is recognized as a refugee, he should be *informed* accordingly and issued with documentation certifying his refugee status.

(vi) If the applicant is not recognized, he should be given a reasonable time to *appeal* for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending".

⁸⁸ Burson (2008) *Op. Cit.*

⁸⁹ UNHCR Handbook (1992) para. 1195-196

⁹⁰ Kozoll (2004) *Op. Cit.* p. 284.

⁹¹ *Ibid.*

⁹² See Ammer, M. (2009 "Climate change and Human Rights: The Status of Climate Refugees in Europe" (Ludwig Boltzmann Institute of Human Rights).

drought, the displacement of the population can occur in the masses.⁹³ Group determination of refugee status on a *prima facie* basis could offer an alternative answer.

3.6.1 *Prima Facie* Group Refugees

Instead of individual determination procedures, a response to large-scale influxes of people could lead to a *prima facie* group refugee status determination.⁹⁴ In this case, states can grant refugee status on the basis of objective and urgent factors in the country of origin, which led to the large-scale displacement. The main objective is to ensure safety admittance, protection against *refoulement*, and the provision of basic humanitarian treatment to those in need of it. It is assumed that *prima facie* refugees are individually characterised as refugees and therefore within the meaning of the Refugee Convention unless exclusion clauses or other relevant evidence disenfranchises the individual from that status. Within this context, they are afforded all the rights that are granted under the Refugee Convention or other relevant human rights instruments. EDPs could, in fact, benefit from a global status determination procedure from an institution that could maintain its neutrality and allow an assessment of the particular environmental circumstances that lead to the displacement. Other circumstances could lead to hybrid solutions, such as a global determination procedure by a neutral entity followed by an individualized RSD at national level. *Prima facie* status determination has been used earlier for Asian refugees in Vietnam after the fall of Saigon, in Africa, and in Europe for Hungarian refugees fleeing the failed revolution in 1956.

3.7 Refugees and Environmentally Displaced Persons: Two Sides of the Same Coin? Realities and Limits of States' Obligations under the International Protection System

From the above analysis, it might not be unreasonable to say that, in some situations, the refugee criteria as it stands may arguably include EDPs in need of protection. In these cases, host states have the obligation to provide international protection according to the commitments made under the CRSR and its additional Protocol. Authors like McAdam, who has been very critical of categorising EDPs as refugees, candidly admit that there are several examples where exposure to environmental impacts might amount to persecution under the Convention grounds. As previously mentioned, these could include cases in summary of:

- “Victims of natural disasters flee because their government has consciously withheld or obstructed assistance in order to punish or marginalise them on the five Convention grounds;

⁹³ As in the case of Somalia where thousands of people were displaced and crossed the border to Kenya and Ethiopia due to disasters. See Kolmannskog, V. & Afifi, T. (2014) “Disaster Related Displacement from the Horn of Africa” Report No.15 United Nations University Institute for Environment and Human Security (UNU-EHS) available from: <http://www.nrc.no/arch/img/9189961.pdf> [accessed 10 October 2015].

⁹⁴ The UNHCR Handbook *Op. Cit.* para. 44) emphasis added: *While refugee status must normally be determined on an individual basis, situations have also arisen in which **entire groups** have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often **extremely urgent** and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called “**group determination**” of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.*

- Government policies target particular groups reliant on agriculture for survival, in circumstances where climate change is already hampering their subsistence;
- A government induces famine by destroying crops or poisoning water, or contributes to environmental destruction by polluting land or water;
- A government refuses to accept aid from other States when it is in need, such as in the aftermath of a disaster;
- A government does not establish appropriate measures of prevention of disasters.⁹⁵

Furthermore, if one understands the refugee concept as an “entity in movement” that is able to transform itself and satisfy the humanitarian requirements of our times an expanded interpretative approach to the CRSR and its Protocol might be able to secure - in some situations - effective rights for EDPs.

There has been reluctance however, by states and the UNHCR to accept any attempts to expand the Refugee Convention definition to include EDPs, as this could potentially open a wave of “refugee floodgates” given the scope of the problem, in addition to fears of potentially diluting the conceptual meaning of refugees.⁹⁶ States such as New Zealand have recently made useful contributions to our jurisprudential understanding of how refugee law is too strict to apply in this embryonic area. In two cases, *Teitiota v The Chief Executive of the Ministry of Business and Employment*⁹⁷ and *AD (Tuvalu) v New Zealand Immigration and Protection Tribunal*⁹⁸ the applicants were considered not to be in need of international protection due to environmental factors.

From the analysis of the first case, which concerned an applicant from Kiribati,⁹⁹ the High Court of New Zealand took on board the applicant’s concern that millions of people suffering from economic deprivation or the “presumptive hardships caused by climate change”¹⁰⁰ are topics that individual states and the international community have to consider. However, on the point of whether the applicant would be entitled to an enlarged scope of protection under CRSR under the applicant’s argument, the court was clear in that it was not for them to alter the scope of the CRSR, but rather the task of the sovereign states.¹⁰¹ Interestingly, the court

⁹⁵ McAdam (2011) *Op. Cit.* p. 47

⁹⁶ Hong, J. (2001) “Refugees of the 21st Century: Environmental Injustice” 10 *Cornell Journal of Law & Public Policy* pp. 323- 348, p. 340 The author contends that “reinterpreting or revising the refugee definition to include all environmentally-displaced persons who lack the protection of their States would open the door to a flood of refugees far beyond what the international community is able to manage. Such an interpretation, therefore, would have to be limited by specific requirements, such as the occurrence of certain threshold levels of environmental destruction in the country of origin, and the existence of specific circumstances rendering the applicants to unable to avail themselves of their government’s protection within a designated period of time.”

⁹⁷ New Zealand High Court (NZHC), *Teitiota v The Chief Executive of the Ministry of Business and Employment*, NZHC 3125, (26 November 2013).

⁹⁸ New Zealand Immigration and Protection Tribunal (NZIPT) *AD (Tuvalu) v New Zealand Immigration and Protection Tribunal*, NZIPT 501370-371 (04 June 2014).

⁹⁹ The case concerned an application by a Kiribati man, Ioane Teitiota, for leave to appeal against a decision of New Zealand’s Immigration and Protection Tribunal, which declined to grant him refugee and/or protected person status. The Republic of Kiribati, is an island nation in the central Pacific Ocean currently considered by scientists as sinking islands due to the impacts of climate change. The nation comprises 33 atolls and reef islands and one raised coral island, Banaba.

¹⁰⁰ NZHC, *Teitiota v The The Chief Executive of the Ministry of Business and Employment Op. Cit.* para.44

¹⁰¹ *Ibid.* paras. 44, 54, 56.

cited a decision from the Australian Refugee Review Tribunal, where it was held that there is no basis for concluding that countries who are high emitters have no motivation to have any impact on residents of low-lying countries such as Kiribati, either for their race, religion, nationality, membership of a particular social group or political opinion.¹⁰² The court did not elaborate on whether the use of fossil fuels and *inter alia* the emission of high levels of green house gases by states has the effect of discrimination against people belonging to a particular social group.¹⁰³ In the second case, which focused on a family from Tuvalu¹⁰⁴ who claimed they were refugees and that their lives, would be endangered if they would return to their country the court did acknowledge that the “exposure to the impacts of natural disasters, can, in general terms, be a humanitarian circumstance”¹⁰⁵ and under a certain context could make it unreasonable or disproportionately harsh to deport individuals back to their country of origin in particular, young children, who are “inherently more vulnerable to natural disasters and the adverse impact of climate change.”¹⁰⁶ The court acknowledged that Tuvalu was an island particularly at risk from the impacts of environmental change, including “coastal erosion, flooding and inundation, increasing salinity of fresh ground-water supplies, destruction of primary sources of substance, and destruction of personal and community property.”¹⁰⁷ Despite the above reasoning and the potential harm that those individuals might face due to the potential effects of environmental change the Tribunal was clear in stating that they were not related to the criteria outlined in the CRSR but rather an “exceptional circumstance of a humanitarian nature.”¹⁰⁸

At the institutional level, the UNHCR has also discouraged an extensive interpretation of the existing refugee definition, as this could lead to a renegotiation of the CRSR and a lowering the current protection standards for refugees under the existing definition.¹⁰⁹ A coupled argument is that the U.N. agency approaches the issue of EDPs from a different moral and

¹⁰² Ibid. para. 55.

¹⁰³ On 20 July 2015, the claimant was declined application for leave to appeal to the New Zealand Supreme Court however, it did leave an open door for future (re)interpretation of the CRSR when it said that the ruling on Mr Teitiota does not mean that those affected by climate change would never be recognised as refugees. New Zealand Supreme Court (NZSC) *Teitiota v The Chief Executive of the Ministry of Business and Employment*, NZSC 107 (20 July 2015). The court notes in paras. 12 and 13 (emphasis added): “[12] (...) In relation to the Refugee Convention, while Kiribati undoubtedly faces challenges, Mr Teitiota does not, if returned, face “serious harm” and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can. (...) [13] That said, we note that both the Tribunal and the High Court, emphasised their decisions *did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case.*”

¹⁰⁴ Tuvalu is a Polynesian island nation located in the Pacific Ocean, currently considered by scientists as sinking islands due to the impacts of climate change. It comprises three reef islands and six atolls.

¹⁰⁵ NZIPT, *AD (Tuvalu) v New Zealand Immigration and Protection Tribunal Op. Cit.* para.27.

¹⁰⁶ Ibid. para. 25.

¹⁰⁷ Ibid. para. 29.

¹⁰⁸ Ibid. para. 30.

¹⁰⁹ Parliamentary Assembly Council of Europe (2008) “Environmentally induced migration and displacement: a 21st-century challenge” Report Committee on Migration, Refugees and Population Rapporteur: Mrs Tina Acketoft, Sweden, Alliance of Liberals and Democrats for Europe Doc. 11785 (23 December 2008) para. 55 available from: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12098&Language=EN> [accessed 12 March 2015].

legal responsibility compared with the common refugee: “[w]hereas political and war refugees are victims of home state or regionalised conflict, with no direct responsibility for their plight with the countries that eventually offer refuge, the moral responsibility for climate change is different.”¹¹⁰ While the UNHCR does not offer any further solutions to tackle the issue,¹¹¹ it continues to offer *in situ* protection for those affected by environmental disasters and overstressing its already limited human and financial capacity.

Authors like Cooper¹¹² and Christiansen¹¹³ have suggested adding to Article 1 of the Geneva Convention definition to include environmental degraded conditions that imperil the right to life, livelihood and natural resources, subsumed to the values and principles enshrined in the wider human rights framework (UDHR, ICCPR, and ICESCR). However, this is not free of challenges. In addition to the above, pragmatic difficulties include the lack of human and financial capacity of host states to deal with the situation. Overall, “conceptual confusion – about the meaning of refugeehood, its causes, and its management – also contributes to the misery of both refugee and host and to the inflammation of international tension.”¹¹⁴ In reality, states have increasingly seen the entitlement to pertinent rights and benefits “within reasonable limits,” making resource scarcity a political rather than a physical element.¹¹⁵

This difficulty is further complicated by the abundance of words and terminology of the refugee label within legal, sociological and anthropological remits.¹¹⁶ The different labels used in the everyday parlance in particular the media¹¹⁷ created the “image of dependence, helplessness and misery,”¹¹⁸ a stereotype that most people do not want to be associated with.

¹¹⁰ *Ibid.* para. 56.

¹¹¹ Gomilova, M. & Jagers, N. (2013) “Climate Change Induced Displacement and International Law” in J. Verschuuren (ed.) “Research Handbook on Climate Change and Adaptation Law” (Edward Elgar Publishing) p. 87.

¹¹² Cooper (1998) *Op. Cit.* pp. 480-488.

¹¹³ Christiansen S. (2010) “Environmental Refugees A legal Perspective” (Wolf Publishers) p. 69.

¹¹⁴ Schacknove (1985) *Op. Cit.* P. 276.

¹¹⁵ Martin, D. (1991) “The Refugee Concept: On Definitions, Politics, and Careful Use of Scarce Resource” in H. Aldelman (ed.) “Refugee Policy: Canada and the United States” (York Lanes Press) p. 36.

¹¹⁶ Suhrke, A. (1983) “Global Refugee Movements and Strategies of Response, in M. Kritz (ed) “U.S. Immigration Policy: Global and Domestic issues” (Lexington Books) pp.153-173. According to the author the notion of refugee can be defined in three different ways juridically (designated by the national laws and the international agreements), politically (interpreted to satisfy the political requirements) and sociologically (reflecting the empirical reality).

¹¹⁷ For example, economic migrants, illegal immigrants, asylum-seekers, displaced persons, stateless-persons, de facto refugees, B-refugees, bogus asylum seekers political refugees and so on. *Ibid.* Suhrke refers to the fact that “in everyday speech the word refugee is used to describe a person who is forced to flee his or her home for any reason for which the individual is not responsible, be it persecution, public disorder, civil war, famine, earthquake or environmental degradation.” See also on this Balabanova, E. (2015) “The Media and Human Rights. The Cosmopolitan Promise” p. 105 “While human rights issues appear in the debates over immigration and asylum, they are often implied rather explicit with cosmopolitan and communitarian justification underlying the ethical arguments in the media. What is clear from the studies is that the media tend to employ

¹¹⁸ Harrell-Bond, B. & Voutira E. (1992) “Anthropology and the Study of Refugees” 8 *Anthropology Today* 4 pp. p.6-10, p. 7. See also on this Balabanova, E. (2015) “The Media and Human Rights. The Cosmopolitan Promise” (Routledge) p. 105 “While human rights issues appear in the debates over immigration and asylum, they are often implied rather explicit with cosmopolitan and communitarian justification underlying the ethical arguments in the media. What is clear from the studies is that the media tend to employ a discriminatory discourse that that separates “us” from “them”, using stereotypes and metaphors to stigmatize migrant groups.

The words put forward by the President of Kiribati as the island-state is faced with the possibility of disappearance due to increase sea-level rise clearly reflect this point of view: “[w]e do not to lose our dignity. We’re sacrificing much by being displaced, in any case. So we don’t want to lose that, whatever dignity is left. So the last thing we want to be called is *refugee*”.¹¹⁹ By classifying EDPs as refugees, one is “putting the stigma on the victims, not the offenders.”¹²⁰

The actual notion of refugee is characterised by a “cluster approach” that bundles a number of specific criteria that, in conjunction, allows applying it in certain circumstances but *sensu strictu* does not include EDPs. First, because in most cases, while conventional refugees have an absence of home state protection, for EDPs, this protection may be present, although they may have a lack of effective and necessary financial and human resource capacity to put it in to place. Second, the persecutory element by the state must be founded in one of the specific grounds, which explicitly does not include environmental changing conditions. The international protection regime under the Refugee Convention has been traditionally geared towards the narrow class of those fleeing political persecution. It does not leave much room for interpreting the reasons of persecution, but instead it sets clear boundaries of the legal application of the treaty.¹²¹ Finally, the 1951 Convention is based on an individual status determination procedure, which might not be entirely suitable for those EDPs who collectively (in a village, state/province, or region) are affected by a particular disaster.¹²²

So in this “definitional cycle,” the system of protection of the human person – and by extension of EDPs - finds itself at a crossroads. In the words of Haddad (emphasis added): “A wide definition of who falls into the category ‘refugee’ increases the potential burden on the host state, while accepting a greater failure on the part of the state of origin. A narrow definition, on the other hand, runs the risk of denying protection and assistance to individuals in need and thus not fulfilling basic moral and humanitarian obligations. In other words, as with any definition, *contexts are crucial*.”¹²³

It is this focus on *context* that has enabled the normative evolution and expansion of the refugee concept at the regional level, but more importantly, the progress of the protection of the law of the human person. In other words, the progressive development of regional protection frameworks comes to existence in order to fill in an existing gap in the international protection regime. This situation stems from the fact that many who flee situations no longer encompass the traditional international meaning of political persecution.

The media also tends to simplify a complex issue by drawing from a narrow range of “expert” sources (which can be politicized) and aggregating statistics to generate sensational headlines.”

¹¹⁹ McAdam *Op. Cit.* (2012) p. 41

¹²⁰ *Ibid.*

¹²¹ Williams (2008) *Op. Cit.* p. 508.

¹²² European Parliament (2008) “Climate Migration” Seminar organised by the Green European Free Alliance Brussels, 11 June 2008, Speech by Frank Biermann p. 16: “La Convention de Genève est fondée sur l’idée de persécution personnelle, sur des droits individuels. Dans le cas des réfugiés climatiques, on ne parle pas d’individus, mais de villages, de zones littorales, de villes, voire de provinces, de régions, ou même de nations entières. Ce sont donc des entités collectives qui sont en jeu ici.”

¹²³ Haddad (2007) *Op. Cit.* p. 5.

It is the expansion of the refugee notion and its parallel interpretation of host states to protect EDPs per se that is relevant to explore in the following sections.

4. Evolution of the Law of Protection of the Human Person: The Regional Twist

4.1 Enhancing the Protection of Persons ‘in Events Seriously Disturbing Public Order’

The 1969 Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa (African Refugee Convention),¹²⁴ was adopted to respond to the particular needs of the African continent after national liberation struggles and the creation of new states. The Convention reveals an enlarged definition and scope of application *rationae personae*. Because of this development, it can arguably, be interpreted as encompassing situations of environmental distress and *inter alia* enhanced protection obligations of the host state.

The African Refugee Convention is complementary to the 1951 CRS¹²⁵ as it outlines the universal conditions of refugeehood under Article 1(1) but then contains a broader refugee protection under Article 1(2) than other man-made disasters (which do not target individuals *per se* but create victims of generalized violence and potentially environmental harm). Under this item it acknowledges that the term refugee can also apply to every person who (emphasis added):

“owing to external aggression, occupation, foreign domination *or events seriously disturbing public order in either part or the whole of his country of origin or nationality*, is compelled to leave his place of habitual residence in order to seek refuge *in another place outside his country of origin or nationality.*”

The definition’s inclusion of people who flee “events seriously disturbing public order” has an obvious wider scope than the “well-founded fear” of the 1951 CRSR. In the words, of Zolberg *et al.* the African Refugee Convention reflects the instability and displacement in situations where the interaction between natural and man-made disasters can put at risk the lives of entire communities.¹²⁶

The innovation of the Convention is that the *persecution* element is no longer a necessary requirement to determine the qualification as a refugee. The extension clauses in the convention apply to those in need of protection against acts perpetuated not only by the home state but also by civil wars or in cases of foreign aggression, occupation, domination or events disrupting public order. This can potentially include critical situations involving the violation of human rights and the displacement of populations occurring in the aftermath of an environmental disaster. Evidently for EDPs, whose primary concern is the protection of

¹²⁴ Convention governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention), adopted on 10 September 1969, in force since 20 June 1974, 1001 UNTS 45.

¹²⁵ See Preamble para.9, of the African Refugee Convention “Recognising that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment.”

¹²⁶ Zolberg, R. A., Suhrke, A. & Aguayo, S. (1989) “Escape from Violence: Conflict and the Refugee Crisis in the Developing World” (Oxford University Press) p. 29.

their life and of family, it does not really matter if the threat comes from a state, a foreign government, or a non-state actor, including an environmental threat. In the same vein, Leighton has considered that displacement of populations that occur as a result of sudden-onset disaster (such as tsunami or earthquake) could potentially demand refugee status in the host state.¹²⁷

Furthermore, the African Refugee Convention definition leaves it to the individual to judge the circumstances that have seriously disrupted public order and provoked that flight. It also allows an individual to cross the border and seek protection without resorting to first seeking protection in another part of the country (commonly known as internal inflight alternative). “In order words, international protection is afforded on the basis of individual judgement”¹²⁸ – a criterion centred on the needs of protection of the individual.

By adopting the definition in the 1951 CRSR and then by adapting it to Africa’s realities, where mass exoduses are more common, the definition also represents a significant development in international law, as it introduces the *group eligibility concept*, or *prima facie*.¹²⁹ This reflects the humanitarian character of the Convention that can potentially protect a massive displacement of population affected by sudden environmental factors.

Regional practice has shown that African countries have allowed people who cross the border due to environmental disasters to remain temporarily (e.g., in 2002, the Congolese displacement to Rwanda due to the eruption of Mount Nyiragongo). Edwards has argued, however, that the African receiving state rarely considers this as an obligation arising under the African Refugee Convention.¹³⁰ At most, she adds, this general practice can be seen as contributing to the right to temporary protection for humanitarian grounds and as a development of international customary law rather than treaty law.¹³¹ Hathaway, in turn, has come to the same conclusion from the interpretation of refugee definition under the legal instrument. According to the author, the refugee definition does not suggest the obligation of states to accept victims of environmental disaster, but a more generalised obligation of states to offer temporary protection for humanitarian reasons.¹³² In addition, authors like Kälin similarly, point out that it is “rather unlikely that the States concerned would readily accept

¹²⁷ Leighton, M. (2010) “Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons” in “Syllabus, Protecting Environmental Migrants: Creating New Policy and Institutional Frameworks,” (United Nations University Institute for Environment and Human Security) p. 5.

¹²⁸ Vevstad (1998) *Op. Cit.* p. 104.

¹²⁹ *Ibid.*

¹³⁰ Edwards, A. (2006) “Refugee Status Detremination in Africa” 14 *African Journal of International & Comparative Law*, pp. 204-233, p. 227.

¹³¹ *Ibid.*

¹³² Hathaway, J. (1991) “The Law of Refugee Status” (Butterworth-Heinemann) p. 17 reads: “The OAU definition does not for example, suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community as a shift away from concern about the adequacy of state protection in favour of a more generalized humanitarian commitment might have dictated.”

such an expansion of the concept beyond its conventional meaning of public disturbances resulting in violence.”¹³³

Nevertheless, given the recent sudden inflows of thousands of people from Somalia to neighbouring countries such as Kenya, Ethiopia, Djibouti and Yemen due to drought, one could argue that the African Refugee Convention could potentially include victims of environmental stressors since such events, put at stake normal public order when the home state is unable or fails to provide assistance.¹³⁴ Regional voices, in particular, from the African Commission on Human and People’s Rights (ACmHPR) have stressed that urgent action is required by African leaders and the international community to combat environmental change including “families [that] are already being forced to flee their homes as climate refugees.”¹³⁵ In addition, the regional consultation carried out under the Nasen’s Initiative’s Horn of Africa¹³⁶ has also recognised the potential applicability of the African Refugee Convention in particular, subsuming to “events seriously disturbing public order” disaster situations in part where the protection and assistance available to the affected populations is hindered by conflict.

4.2 Enhancing the Protection of Persons in Events of ‘Massive Violations of Human Rights or Other Circumstances Which Have Seriously Disturbed Public Order’

The particular context of massive human rights violations and generalised violence allied with the flux of substantial numbers of refugees in Latin America (particularly in Central America), led to the development of the Cartagena Declaration on Refugees (CDR).¹³⁷ The CDR bases its principles on the “commitments with regards to refugees” defined in the Contadora Act on Peace and Cooperation in Central America (which are based on the 1951 UN Refugee Convention and the 1967 Protocol).¹³⁸ It was formulated in September 1984 and includes a range of detailed commitments to peace, democratization, regional security, and economic co-operation along with regional compliance mechanisms, thus, paving the way for an enlarged protection scope. The definition of who constitutes a refugee encompasses elements of the CSRS refugee definition as well as of the African Refugee Convention but is also open and adaptable to (emphasis added):

¹³³ Kälin, W. (2010) “Conceptualizing Climate-Induced Displacement” in J. McAdam (ed.), “Climate Change and Displacement: Multidisciplinary Perspectives” (Hart Publishing), p. 88.

¹³⁴ It is noteworthy that these people received *prima facie* refugee status in most of those countries. See generally, Kolmannskog & Afifi (2014) *Op. Cit.*

¹³⁵ African Commission on Human and People’s Rights (2009) Final communiqué of the 46th ordinary session of the African Commission on Human and People’s Rights. (Banjul, Republic of the Gambia from 11 to 25 November 2009) p. 3.

¹³⁶ Nansen Initiative (2014) “Natural Hazards, Climate Change, and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move” Summary of Conclusion Nansen Initiative Greater Horn of Africa Regional Consultation. (Nairobi, Kenya 21-23 May 2014) p. 9 available from: <http://www.nanseninitiative.org/greater-horn-africa-consultation-intergovernmental/>

¹³⁷ The Cartagena Declaration on Refugees (1984) was adopted by “Colloquium on the International Protection of Refugees in Central America, Mexico,” held at Cartagena, Colombia from 19 - 22 November 1984.

¹³⁸ The Contadora Act on Peace and Cooperation in Central America is a result of the foreign ministers of Panama, Colombia, Venezuela, and Mexico’s efforts aimed at persuading the states of Central America to make peace with each other and with their guerrillas, on the Panamanian island of Contadora January 8-9, 1983.

“persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”¹³⁹

The International Conference on Central American Refugees Legal Experts (Conferencia Internacional sobre Refugiados, Desplazados y Repatriados de Centro América - CIREFCA) 1989 report that interpreted the Cartagena Declaration was conclusive in affirming that events “seriously disturbing public order” do not include “victims of environmental disasters” but human made-events such as accidents.¹⁴⁰ However, bearing in mind that environmental change has a human-made component, it does beg the question whether today a more progressive interpretation would have been taken by the CIREFCA. In reality, as scholars have admitted “[i]t is perhaps this definition of a situation of seriously disturbed public order that comes closest to some form of official international recognition, which could potentially encompass those compelled to leave their country of origin due to environmental factors.”¹⁴¹

Beyond the subjective element of public order circumstances, an additional supplementary element was included within the scope of the refugee definition: the massive violation of human rights. The inclusion of this component creates an obligation to host states to extend protection and grant refugee status to those who find themselves in a situation of “denial of civil, political, economic, social and cultural rights in a gross and consistent pattern.”¹⁴²

There are numerous accounts where, in the aftermath of an environmental disaster vulnerable groups of populations are exposed to a risk of violation of human rights. The absence of state protection may trigger different risks for the groups in question. The operational guidelines and field manual on human rights protection in situations of natural disaster are revealing on this point:

“The tsunamis, hurricanes and earthquakes, which hit parts of Asia and the Americas in 2004/2005, highlighted the need to be attentive to the multiple human rights challenges victims of such disasters may face. All too often the human rights of disaster victims are not sufficiently taken into account. Unequal access to assistance, discrimination in aid provision, enforced relocation, sexual and gender-based violence, loss of documentation, recruitment of children into fighting forces, unsafe or involuntary return or resettlement, and issues of property restitution are just some of the problems that are often encountered by those affected by the consequences of natural disasters.”¹⁴³

In this context, human rights emerge as guiding tenets for the attribution of refugee status under the CDR, but they can also open doors for enhanced obligations of host states to protect those displaced by environmental factors. It is true that the CDR has a soft law value

¹³⁹ The Cartagena Declaration on Refugees (1984) III, Conclusion 3.

¹⁴⁰ Espiell, H. G., Picado, S. & Lanza, L. V. (1990) “Principles and Criteria for the Protection of and Assistance to Central American Refugees and Displaced Persons in Latin America” 2 *International Journal of Refugee Law* para. 34 pp.83-117, pp. 96-97.

¹⁴¹ Renaud, F. *et al* (2007) “Control, Adapt or Flee: How to Face Environmental Migration?” *Intersection Publications* No. 5 (United Nations University Institute for Environment and Human Security) p. 12 pp.1-47.

¹⁴² Espiell *et al. Op. Cit.* p.94.

¹⁴³ Brookings Bern Project on Internal Displacement (2008) *Human Rights and Natural Disasters, Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, p. 1.

because of its limited enforcement possibilities. While not legally binding, the principles of the CDR have been widely accepted by states within the region and implemented into domestic legislation,¹⁴⁴ and have codified what the IACHR has considered to be the refugee definition within the whole region.¹⁴⁵ For this reason, they may even be considered as regional principles with customary character.¹⁴⁶ A more progressive interpretation, allied with state practice, would allow space for manoeuvring protection obligations of host states towards EDPs. This evolutionary approach is feasible given that Latin American states tend to apply the extended definition in practice,¹⁴⁷ and only a few countries have explicitly limited the public order ground.¹⁴⁸

4.3 Enhancing the Protection of Persons in ‘the Occurrence of Natural Disasters or Grave Events’

Both the OAU Convention and the CDR may provide some sort of protection to EDPs if they find themselves in analogous situations of conventional refugees, but the 1994 Arab States Refugee Convention¹⁴⁹ primes for its innovation. An outcome of talks and recommendations held by a number of Arab experts on asylum and refugee issues,¹⁵⁰ it is the first official document that clearly offers protection to those people affected by environmental disasters.

The core of its innovation was preceded by the Arab states’ general recognition in the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World (emphasis added):

“[i]n situations which may not be covered by the 1951 Convention, the 1967 Protocol, or any other relevant instrument in force or United Nations General Assembly resolutions, refugees, asylum seekers and displaced persons *shall nevertheless be protected* by: (a) the humanitarian principles of asylum in Islamic law and Arab

¹⁴⁴ See UNHCR- Regional Legal Unit of the Americas (2005) “Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees 1984-2004” (UNHCR) *available from:*

<http://www.acnur.org/biblioteca/pdf/3868.pdf?view=1> [accessed 10 December 2013]. Countries that have included the broader definition of the 1984 CDR into their national legislation include: Argentina, Belize, Ecuador, Bolivia, El Salvador, Guatemala, Honduras, Mexico, Paraguay and Peru.

¹⁴⁵ IACHR (1982) Annual Report 1981-82, OEA/Ser.L/V/II.57 doc.6 rev.1 (1982), Chapter IV, para.11(d).

¹⁴⁶ It should be highlighted that ICJ, *Colombia v Perú* (20 November 1950), commonly known as the asylum case, the court did not find that the custom of asylum was uniformly or continuously executed sufficiently at a to demonstrate that the custom was of a generally applicable character at regional level. Nevertheless, the ICJ did recognise that the scope of Article 38 of the Statute of the International Court of Justice encompassed bilateral and regional international customary norms as well as general customary norms, in much the same way as it encompasses bilateral and multilateral treaties.

¹⁴⁷ See Arboleda E. (1991) “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism” 3 *International Journal of Refugee Law* 2 pp.185-207, p. 205.

¹⁴⁸ See Article 2 of Bolivian High Decree N°19640 of 4 July 1983 which only includes events of political nature threatening public order; See Brazilian Law N° 9474 of 22 July 1997 and Hondurian Decree N° 208 of 3 March 2003, which exclude public order grounds.

¹⁴⁹ Arab Convention on Regulating Status of Refugees in the Arab Countries adopted 1994 by the League of Arab States, not in force.

¹⁵⁰ The Arab Experts Group on Aylum and Refugee Issues had its first meeting in San Remo 16-17 January 1984. The subsequent meetings were held in Tunisia 15-18 May 1989, in Jordan 2-4 December 1991, and finally in Egypt 16-19 November 1992. For more details and on the suggested recommendations see UNHCR (2007) “Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern of UNHCR” (UNHCR).

values, (b) the basic human rights rules, established by international and regional organisations, (c) other relevant principles or international law.”¹⁵¹

The Arab States Refugee Convention recognises the essential objective of protection - the human person in all circumstances - using existing legal frameworks and principles of international human rights law to help those displaced. It may perhaps come as no surprise that, in the subsequent development of the convention, “the occurrence of natural disasters or grave events” is a foundational element for refugee protection.¹⁵² The treaty reveals a dynamic understanding of the concept of refugee protection, adapted to the contemporary needs of our times. This evolutionary approach is somewhat an outcome of the collective understanding by host states of their expanded obligations towards individuals or communities, including of those potentially displaced by environmental factors. It should be noted, however, that so far, no states have ratified this legal instrument, which narrows its authoritative character. Nevertheless, and beyond the conceptual wrangling of the attribution of refugee status for those displaced by environmental factors, the Arab States Refugee Convention paves the way to the expansion of host states’ obligations beyond the 1951 Convention and puts the individual needs and their human rights at the centre core of protection.

The interpretation of extended refugee definitions (*inter alia* host states’ protection obligations), while feasible, would in practice mean that EDPs would most likely remain excluded from the legal framework in any region. Furthermore, it has been previously pointed out that, in the regional context, an extended understanding of the refugee notion is usually applied in situations of mass influx on an ad hoc basis and outside any legal framework.¹⁵³ It is therefore, doubtful that the issue would be treated in a systematic and coherent matter. At the same time, one cannot disregard the evolution of circumstances and contexts that has paved the way for a normative evolution of the notion of protection underpinned by human rights principles, to include the issue of environmental displacement.

4.4 Extension of States Protection Obligations: The Principle of *Non-Refoulement* a Common Ground of Protection

While EDPs may have limited protection under the CRSR and the aforementioned regional refugee instruments, those who are forcibly displaced from their residence to another state may find protection from other obligations deriving from human rights law that host states may have. It is widely accepted that the prohibition of *non-refoulement* i.e., the prohibition on returning anyone to an area where she/he would face persecution, torture, or other serious-

¹⁵¹ Declaration on the Protection of Refugees and Displaced Persons in the Arab World, 19 November 1992, Article 5.

¹⁵² The 1994 Arab Convention on Regulating the Status of Refugees in the Arab Countries states under Article 1 paragraph 2 (emphasis added): “Any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of sustained aggression against, occupation and foreign domination of such country or because of *the occurrence of natural disasters or grave events* resulting in major disruption of public order in the whole country or any part thereof.”

¹⁵³ Durieux, J.F. (1992) “Capturing the Central American Refugee Phenomenon” 4 International Journal of Refugee Law 3 pp. 301-325 p. 323 and Edwards (2006) *Op. Cit.* p. 227.

ill-treatment constitutes the cornerstone of the legal framework of international protection. As a fundamental principle of international law is one of the strongest limitations to state's sovereignty: on their right to control entry into their territory and to return individuals.

The origins of the principle can be traced back to refugee law¹⁵⁴ and international extradition regulations,¹⁵⁵ and is enshrined in other human rights, instruments such as Article 3 (1) of the Convention Against Torture (CAT). The *non-refoulement* principle is also a crucial implication flowing from the prohibition of torture and other forms of ill treatment under Article 3 ECHR and Article 7 of the ICCPR. It is correspondingly found in common humanitarian principles (principle to provide assistance to persons fleeing from generalized violence) and in international criminal law (on the grounds that there may be a real risk of exposure of the individual to acts forbidden under the Rome Statute: genocide, crimes against humanity, war crimes, and crimes of aggression).¹⁵⁶ Over the years, non-refoulement came to be considered as a principle of customary international law itself, even beyond the application of treaties of refugee law and human rights law.¹⁵⁷

Under the CRSR, the principle is expressly laid down in Article 33, pursuant to which state parties must not return a refugee in any matter whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.¹⁵⁸ While at first glance it appears that the scope of Article 33 is limited to refugees it is also applied to asylum seekers who have a "presumptive or prima facie claim for refugee status,"¹⁵⁹ meaning that a formal decision on refugee status is, not a pre condition for claiming protection against return under CRSR. The provision nevertheless excludes those individuals whose protection needs fall outside the CRSR, and this may well include EDPs. Furthermore, under the CRSR, *non-refoulement* is not non-derogable.¹⁶⁰ Rather, it may be restricted on the grounds of danger and

¹⁵⁴ Article 33 CRSR; and Article II, African Refugee Convention

¹⁵⁵ See for example, Article 9 International Convention Against the Taking of Hostages, adopted on 17 December 1979 by the G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp.No.46, U.N. Doc. A/34/46; Article 3, European Convention on Extradition, adopted on 13 of July 1957; Article 5 of the European Convention on the Suppression of Terrorism, adopted on 27 January 1977; Article 4, Inter-American Convention on Extradition, adopted on 25 February 1981; and Article 3, UN Model Treaty on Extradition.

¹⁵⁶ The Rome Statute of the International Criminal Court was adopted 17 July 1998, entered into force 1 July 2002; See McAdam (2007) *Op. Cit.* p.9.

¹⁵⁷ See International Institute of Humanitarian Law (2001) "San Remo Declaration on the Principle of Non-Refoulement" (2001) pp.1-2 on the occasion of the fiftieth anniversary of the CRSR; Cançado Trindade (2010) *Op. Cit.* pp.520-524.

¹⁵⁸ See generally, on non-refoulement under the CRSR Goodwill-Gill, G. & McAdam J. (2007) "The Refugee in International Law" (3rd edition Oxford University Press). Hathaway, J. (2005) "The Rights of Refugees under International Law" (Cambridge University Press) pp.279-363.

¹⁵⁹ Goodwill-Gill & McAdam (2007) *Op. Cit.* p. 232-233; Lauterpacht, E. & Bethlehem, D. (2003) "The Scope and Content of the Principle of Non-Refoulement" in E. Feller, V. Türk and F. Nicholson (eds.), "Refugee Protection in International Law" (Cambridge University Press) p. 136.

¹⁶⁰ Article 33(2) of the CRSR. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country."

security to the host country, though these restrictions have to be applied in a proportional matter and must balance the interests of the state and the individual concerned.¹⁶¹

Compared with the CRSR, in human rights law, the definition of prohibition of *non-refoulement* has a larger scope. It is not required for the person in question to prove fear of individual persecution related to a specific CSRS ground. What matters is the existence of the risk of ill treatment and not, the reasons for it. It focuses, therefore, on the needs of the individual (i.e. to anyone exposed to a risk of torture or other forms of ill-treatment through removal from the host state)¹⁶² and constitutes the application of a preventative method to the protection of human rights.¹⁶³ Unlike the *non-refoulement* protection under Article 33 of the CRSR, Article 3 of the ECHR, Article 3 of the CAT, and Article 7 of the ICCPR are not subjected to derogations. It is due to these characteristics i.e., broad personal scope and non-derogability that the principle of non-refoulement clenches potential for those who do not qualify as refugees, but still, – as EDPs, - have protection needs. It reflects the stretching of the host state’s “protection obligations beyond the ‘refugee’ category to include (at least) people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment of punishment.”¹⁶⁴

One of the primary differences between the CSRS and the aforementioned legal instruments is that their implementation is monitored by judicial (e.g., the ECtHR), or quasi-judicial bodies (e.g., the ICCPR and the CAT).

Despite its potential in practical terms, the provision of *non-refoulement* is hollow since it does not confer a right to residence or any specific legal status in a foreign country, and this allows considerable discretion to states in how they treat foreigners in their territory. As McAdam has observed:

“[t]hough a number of States have traditionally respected these additional non-refoulement obligation, they have been reluctant to grant beneficiaries a formal legal status analogous to that enjoyed by Convention Refugees. While such States have abided by their international duty not to deport people to certain conditions, they have tended to be less diligent in looking to international law to define what legal status those people should be given.

¹⁶¹ See Goodwin-Gill & McAdam (2007) *Op. Cit.* p. 240 and Lauterpacht & Bethlehem (2001) *Op. Cit.* p. 169.

¹⁶² Perhaps it is necessary to clarify that human rights treaties other than the ACHPR do not contain the right of asylum seekers for *non-refoulement*. There is no definition of this concept in treaty-based rules of international human rights law. Instead, it is the case law of the various treaty bodies (whether judiciary or quasi-judiciary) that have enunciated the criteria for *non-refoulement* (but not the definition of this) in relation to anti-torture provisions. Then while it is not required for the person in question to prove fear of individual persecution related to a specific CSRS ground, this does not mean that there is no burden of proof. On the contrary, there is a burden of proof and onerous standard of such proof incumbent on the applicant invoking the anti-torture provisions to show the substantive risk of persecution. The list of such grounds has been developed by human rights monitoring bodies inevitably relate to torture or other maltreatment conditions, but the conceptual ambit of those grounds does not necessarily overlap with the ground of persecution, which may include treatment that falls short of torture, cruel/inhumane, or degrading treatment. Some grounds of ill-treatment that can be invoked by asylum-seekers under anti-torture provisions may stem from non-human factors (including the environment), that are not included in the CRSR.

¹⁶³ Suntinger, W. (1995) “The Principle of Non-Refoulement: Looking rather to Geneva than to Strasbourg” 49 *Austrian Journal of Public International Law* pp. 203-224.

¹⁶⁴ McAdam (2012) *Op. Cit.* p. 53.

Accordingly, protection has varied over time from identical rights to Conventional refugees, to a tolerated status with protection from refoulement but a little more.”¹⁶⁵

Some have acknowledged that within the environmental displacement context the prohibition of non-return of EDPs does not seem totally justified because environmental change is not in line with the international definition of torture.¹⁶⁶ At the same time, even if environmental change impacts or threatens human rights, it may not be sufficient to justify a demand for protection.¹⁶⁷

Nevertheless, the humanitarian character of the principle of *non-refoulement* dictates that host states have a legal obligation not to remove people from their territory if that would lead to a violation of the principle under human rights law. Essentially, as UNHRC has rightly stated, protection must be “available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”¹⁶⁸ The U.N. High Commissioner for Refugees has also acknowledged the *jus cogens*¹⁶⁹ nature of the principle of *non-refoulement* and its applicability to ensure the protection of those displaced by environmental factors.¹⁷⁰

This may include cases not only where an environmental disaster leads to a situation of indiscriminate violence but also in case where life is no longer sustainable due to environmental changing conditions (e.g., disappearing island states due to sea level rise), impacting not only on the right to life but on a number of codified human rights at the same time (see the previous chapter). In Europe, Article 3 of the ECHR has gained particular relevance through the judgments of the ECtHR, which has enlarged the scope of the principle of non-refoulement and has acted as a source of protection for displaced persons, which may arguably include EDPs. This will be highlighted in the next chapter.

If the principle of *non-refoulement* implies the obligation of states not to return an individual whose life may be at risk by analogy the same responsibility lies on states to accept victims of environmental disasters thereby offering them a minimum level of protection.¹⁷¹ “In sum, it may be concluded that an obligation of non-denial of entry arises in all cases where return to the state of origin would jeopardise the achievement of human rights, including cases

¹⁶⁵ McAdam, J. (2007) “Complementary Protection in International Law” (Oxford University Press) p. 5.

¹⁶⁶ McAdam J. & Saul B. (2009) “An Insecure Climate for Human Security? Climate-Induced Displacement and International Law,” University of Sydney, Faculty of Law, Working Paper No. 4, p. 12 available from: <http://www.peacepalacelibrary.nl/ebooks/files/357399072.pdf> [accessed 20 December 2013].

¹⁶⁷ *Ibid.*

¹⁶⁸ UNHRC (2004) General Comment No. 31 “The nature of the general legal obligation imposed on States Parties to the Covenant” (26 May 2004) para. 10.

¹⁶⁹ Goodwin-Gill & McAdam (2007) *Op. Cit.* p. 290.

¹⁷⁰ UHCR (2009) “Forced Displacement in the Context of Climate Change: Challenges for States under International Law” 6th session Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) 1-12 June Bonn p. 11; UNHCR (2005), “Providing International Protection Including Through Complementary Forms of Protection” EC/55/SC/CRP (2 June 2005) para. 22.

¹⁷¹ Magniny, V. (2008) “Des Victimes de l’Environnement aux Réfugiés de l’Environnement” *Revue Asylon(s)* No. 6 p. 12 available from: <http://www.reseau-terra.eu/article845.html> [accessed 20 December 2013].

where the jeopardy stems from environmental degradation.”¹⁷² While in theory the scope of such obligation deriving from the principle of *non-refoulement* should not be underestimated, in practice, however, it should not be overestimated either, as it does not entitle EDPs to stay in a foreign territory. In an effort to overcome this, it is necessary, as the Council of Europe has suggested, that EDPs benefit from “subsidiary protection, for example granting them a status of temporary humanitarian resident or a permanent status in case of impossibility of return.”¹⁷³ In reality, codified forms of subsidiary or complementary protection already exist and can be found under the European Union legal framework. The personal scope and an extended interpretative value of this framework of obligations (outside the remit of the CRSR and its additional Protocol) will be touched upon in the next chapter, as they form part of the holistic approach to protection that we proclaim for EDPs.

5. Conclusion

In the current chapter, we investigated the protection obligations of host states deriving from the CRSR and other relevant regional protection frameworks, and examined the limitations, opportunities and relevance of the evolution of the law of protection of the human person in providing legal protection for EDPs. The analysis that was undertaken thus allows us to draw the following conclusions.

Residual Protection afforded by CRSR

The CRSR as the main instrument at the international level that focuses on the protection of displaced populations, materialises the collective responsibility of host states towards human kind. It shows, however, its limitations in its interpretative approaches as to how the polity of states can come together to offer protection for those in need. The main barrier is that the definition of refugee under the CRSR formally does not include people displaced by environmental factors. While scholars moved by the global nature of the environmental change problem have paved the way for extended interpretative approaches of the concept of refugee to include EDPs, this solution is intrinsically weakened in particular by financial, political and social factors. Further, suggesting the amendment of the CRSR may undermine the protection of political refugees altogether. The analysis therefore reinforces the protection needs of EDPs but also the current limitations of the international system of protection.

Even if not in full agreement with characterising EDPs as refugees in some circumstances, EDPs may potentially be considered a social group that could be granted protection by host states under obligations deriving from the CRSR, such as when environmental degradation is carried out as a persecutory act by the country of origin (“environmental cleansing”) or if the government intentionally lacks action, blocks aid against a certain group in disaster situations (e.g., children, women, older, or disabled people), or does not put in place adequate adaptation programmes leading to displacement. Applicants will generally have to prove that no protection is available in their country of origin because their country of origin was,

¹⁷² Epiney, A. (2011) “Environmental Refugees: Aspects of International State Responsibility” in E. Piguet, A. Pecoud & P. Guchteneire (eds.) “Migration and Climate Change” (Cambridge University Press) p.400.

¹⁷³ Council of Europe (2009) “Environmentally Induced Migration and Displacement: a 21st-century Challenge” Parliamentary Assembly Resolution 1655 (2009) 30 January 2009 (9th Sitting), para. 24,5.

unwilling or unable to protect them. However, a gap in protection would still remain for those people in states that currently are not signatories to the CRSR and its Protocol, but seen as important reception countries for EDPs. This includes countries like India and Bangladesh, which are considered vulnerable areas to environmental displacement.¹⁷⁴

The Stance on the Principle of Non-Return

The limited protection under the CRSR may be surpassed by other obligations deriving from human rights law that host states may have. The principle of *non-refoulement* as a fundamental principle of international law is of special relevance to EDPs, as it redefines sovereignty and curbs states' discretion to transfer individuals by force to his/her state of origin, where he/she would be persecuted or exposed to torture; cruel inhumane or degrading treatment, or face a serious risk of violations of human rights. Even if the principle does not confer legal status, it nonetheless highlights the needs of the individual (as he/she does not have to prove fear based on a specific ground) and acts as preventative method to the protection of human rights.

Enhancing Protection for EDPs: The Regional Outlook

It was revealed that international human rights law plays a key role, as it will normally not prevent EDPs from being denied protection abroad. In an attempt to close the EDPs' protection gap, host states may find that resorting to regional protection arrangements may be one way forward: allowing the individual, based on their own judgement, to cross the border and seek protection without resorting to first seeking protection in another part of his/her country of origin; (needs approach); dealing with regional and localised environmental degradation and changed realities, values and cultures (contextual approach); and tailoring legal (hard and soft law) and policy solutions that are more likely to gain states' acceptance (tailored legal approach). Neighbouring countries of the country of origin are already the ones where most refugees/displaced persons are hosted. Albeit limited, regional (e.g., Africa) practices have demonstrated that countries have allowed people who cross the border due to environmental disasters to remain temporarily. The extended interpretation and understanding of the refugee notion within the regional context is reinforced by the human rights paradigm and has recognised people displaced by environmental factors worthy of protection. Nonetheless, both the CRSR and the analysed regional regimes lack a pre-emptive approach to protection for those who at risk of environmental displacement. In other words, they fail to see protection as a holistic enterprise. Therefore, in order (re)conceptualise protection for EDPs, the scope of additional regimes must be considered. In this regards, the EU regional protection regime may offer tangible protection solutions and arguably serve as a model to consolidate - home and host states' - obligations towards EDPs, both to prevent and deal with cross-border displacement.

¹⁷⁴ For example, Burson (2008) *Op. Cit.* p.9 refers to the case of India who is not signatory to the CRSR but is seen as a key host country with regards to its neighbouring country Bangladesh.

Part III – (Re)Conceptualising Protection of Environmentally Displaced Persons: Towards a New Protection Paradigm?

Chapter 6. Consolidating Protection for Environmental Displacement

1. Introduction

The previous two chapters fleshed out existing international protection standards and the concomitant human rights obligations of states towards EDPs. They constitute foundational chapters to the present one because they embody the holistic approach to protection that we claim for EDPs. They identify the existing legal protection gaps of environmentally induced displacement but also reflect the continuous convergence of the law of protection of the human person. The human rights framework highlights that states have the obligation to take preventative action to respect, avoid the violation of and take positive steps to fulfil human rights and more importantly, that there are *cumulative legal effects* from the analysis of (quasi) jurisdictional decisions and legal and operational frameworks that (explicitly and implicitly) solidify the underlying duty of states to avoid the violation of human rights and *inter alia* prevent environmental displacement. This acknowledgement does not imply the curtailment of the right to seek asylum abroad by those displaced by environmental factors. While the traditional international system of protection (based on the CRSR and its Protocol) is limited to providing effective protection mechanisms when someone crosses an international border due to environmental factors, its evolutionary approach towards the protection of the human person (reflected at the regional level, together with the customary character of the principle *of non-refoulement*) brings about important elements to (re)conceptualise protection for EDPs. International human rights law will normally not prevent EDPs from being denied protection abroad. Therefore, the scope of additional complementary regimes must be considered.

Against this background, this chapter attempts to devise pragmatic - proactive and reactive - protection strategies for EDPs by looking at the European Union's regionally orientated complementary protection regime. It is not particularly focused on discussing the pros and cons of the EU immigration and asylum policy per se there is plenty of academic material specifically dealing with that. The objective is rather to highlight protection - as a way of reflecting the international human rights obligations of states - by way of a process of consolidation of existing: proactive (*ex ante*) and reactive (*ex post*) protection measures. *Ex ante* protection encapsulates protection of EDPs as prevention from displacement. It looks at strategies to deal with the predicted effects of environmental change (e.g., circular labour migration through the Seasonal Workers Directive and/or Mobility Partnerships). *Ex post* protection deals with the effects of environmental change and the various modes of legal protection that are available and that can be adapted to protect EDPs once they cross an international border (e.g., temporary protection under the Temporary Protection Directive and subsidiary protection through the Qualification Directive). This regional protection

framework, underpinned by the paradigm for the protection of human rights, can remedy the current protection gap that exists within the international legal system. It offers an analysis of effective and pragmatic solutions that can consolidate protection for EDPs within the European Union and beyond its borders, and helps the global polity of states to look at protection as a dynamic guiding concept.

2. Regional Protection Frameworks: An Ultimate Test

There have been a number of regional efforts, that have attempted to look at the impact of environmental change and human displacement. Examples include the Niue Declaration on Climate Change at the Pacific Islands Forum in 2008;¹ the Anchorage Declaration, adopted in Alaska at the Indigenous People's Global Summit on climate change in 2009;² and the Ambo Declaration, agreed to at a high-level conference held in Kiribati in 2010.³ All these non-binding agreements highlight in one way or another the need to raise awareness of the impacts of environmental change, the need to prevent local populations from being forcibly displaced to preserve their territorial and cultural integrity and existence, and to develop strategic frameworks to protect people affected by environmental events within and across international borders.

¹ Niue Declaration on Climate Change 39th Pacific Islands Forum, Forum Communiqué, Annex B (19 – 20 August 2008). The declaration highlights the following (emphasis added): “DEEPLY CONCERNED by the serious current impacts of and growing threat posed by climate change to the economic, social, cultural and environmental well-being and security of Pacific Island countries; and that current and anticipated changes in the Pacific climate, *coupled with the region's vulnerability, are expected to exacerbate existing challenges and lead to significant impacts on Pacific countries' environments, their sustainable development and future survival*; (...) RECOGNISING the importance of retaining the Pacific's social and cultural identity, and *the desire of Pacific peoples to continue to live in their own countries, where possible*; (...) HEREBY: COMMIT Forum members to continue to develop *Pacific-tailored approaches to combating climate change*, consistent with their ability to actively *defend and protect their own regional environment*, with the appropriate support of the international community (...)”

² Anchorage Declaration of the Indigenous Peoples' Global Summit on Climate Change (24 April 2009). The declaration highlights the following (emphasis added): Preamble “We are deeply alarmed by the accelerating climate devastation brought about by unsustainable development. *We are experiencing profound and disproportionate adverse impacts* on our cultures, human and environmental health, human rights, well-being, traditional livelihoods, food systems and food sovereignty, local infrastructure, economic viability, and *our very survival as Indigenous Peoples*. (...) Para.11. We call on States *to recognize, respect and implement the fundamental human rights of Indigenous Peoples*, including the collective rights to traditional ownership, use, access, occupancy and title to traditional lands, air, forests, waters, oceans, sea ice and sacred sites as well as to ensure that the rights affirmed in Treaties are upheld and recognized in land use planning and climate change mitigation strategies. In particular, States must ensure that Indigenous Peoples *have the right to mobility and are not forcibly removed or settled away from their traditional lands* and territories, and that the rights of Peoples in voluntary isolation are upheld. In the case of *climate change migrants, appropriate programs and measures must address their rights, status, conditions, and vulnerabilities*. (...)”

³ Ambo Declaration adopted at the Tarawa Climate Change Conference (10 November 2010). The declaration highlights the following (emphasis added): “Para 1. *Alarm* at the impacts of the climate change crisis already being felt in our countries threatening the sustainable development and security of our countries, especially the *immediate threat to the livelihood and survival of the most vulnerable States* on the frontline, including Small Island States, Least Developed Countries and countries susceptible to drought and desertification; Para 15 *Support* consideration of the development and implementation of strategies and *actions directed at protecting people displaced within or across borders as a result of adverse effects arising from climate change extreme events*.”

In fact, a number of international fora have highlighted that regional approaches maybe the best way to tailor and implement adequate solutions and programmes for the assistance and protection of those affected by environmental factors.⁴ The Migration Policy Framework for Africa,⁵ adopted by Members of the African Union (AU) in 2006, for example, recommends that displacement caused by disasters and other environmental factors should be addressed through national and regional migration policies. Recently, a study carried out by the Brookings Institution and the London School of Economics Project on Internal Displacement also highlighted the increasing role of regional organisations in disaster management but the potential of regional organizations can also be extended to deal with the long-term effects of environmental change.⁶ Further, some scholars have put great hope on regional normative arrangements, which could operate under a wider international umbrella framework given the reluctance of states to commit to a formalized treaty that could collide with their socio-economic and political interests.⁷ Not only can regional solutions be more personalised to local needs, but states can sign up to different levels of commitment, depending on their human and financial resource capacity and flexible timeframes. They also facilitate better-coordinated efforts and a forum for exchange of expertise and best practices. The elevation of regional solutions also goes in line with the general development, which sees regional collaboration as a better path in light of the current or perceived failure at the international and national levels to deal with common challenges.⁸ Policy and institutional cooperation at the regional level can generate peer pressure and serve to enhance countries' governance and capacity to act.

At a more normative level, regional protection solutions have converged to protect the human person as a way of reflecting international human rights obligations (see Chapters 4 and 5) to both prevent and deal with displacement.⁹ The growth of complementary forms of protection, - such as the ones developed within the European Union - is a notable example to explore, as it may also help states to revisit and reorient the international protection regime for EDPs.

⁴ See for e.g. UNHCR (2011) "Climate Change and Displacement: Identifying Gaps and Responses Expert Roundtable Concept Note" (Bellagio, 22-26 February 2011), p.3 "Regional instruments relating to refugee protection, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration would possibly offer wider protection, given that they also protect those displaced due to "events seriously disturbing public order". But practice and jurisprudence based on these definitions are scarce. Complementary protection arising from the application of the *non-refoulement* principle, enshrined in various international and regional human rights instruments, would not, based on current jurisprudence and practice, provide suitable protection either, although it is arguable that in this instance, there is latitude for progressive interpretation."

⁵ African Union (2006) "The Migration Policy Framework for Africa" Executive Council, Ninth Ordinary Session EX.CL/276 (IX) (Banjul, 25 – 29 June 2006).

⁶ See Ferris, E. and Petz, D. (2013) "In the Neighborhood: The Growing Role of Regional Organisations in Disaster Risk Management" (The Brookings Institution, London School of Economics Project on Internal Displacement), (February 2013).

⁷ Williams (2008) *Op. Cit.* p. 518.

⁸ Wetzel, J. (2012) "The EU as a "Global Player" in Human Rights?" (Routledge) p. 16

⁹ As previously highlighted regional refugee crises have lead regional organisations to revisit the international refugee protection regime and broaden their scope of protection on human rights grounds (See Chapter 5 Section 4).

The development of *proactive and reactive* normative frameworks to protect EDPs was particularly evident in a staff working document published by the European Commission in 2013, entitled “Climate Change, Environmental Degradation and Migration.”¹⁰ This document, while not legally binding, is important as it is the first comprehensive text issued by the EU dealing with the effects of environmental change and displacement. Although the document clearly states that at present there is no legal framework that can offer adequate protection for EDPs, it emphasises that there are “legally binding and soft-law” national and international legal instruments that can offer some form of status and/or forms of protection depending on the context.¹¹ The document is silent on how these standards can be legally operationalised. The understanding that protection of EDPs is a holistic enterprise transpires from the text. This is a remarkable step to find short and medium-term solutions to safeguard EDPs.

From a legal point of view, it is possible to identify within the asylum and immigration policy framework of the EU particular standards that may serve our purpose. While not directly geared toward protecting EDPs, they may well be a reference point for devising a normative proactive and reactive protection framework for EDPs.

3. Europe’s Normative Power for Protecting Environmentally Displaced Persons

3.1 The European Union’s Overarching Normative Framework and Human Rights

Many discussions have gravitated around the role of the EU as a global actor and promoter of values internally and externally.¹² Even though the purpose here is not to discuss in depth this issue, it is important to highlight some aspects of the discussion, as it can help us understand how the EU’s overarching normative framework, underpinned by human rights (“Europe of human rights”), is beneficial as a guiding tenet when examining and consolidating existing proactive and reactive protection standards for EDPs.

3.1.1 General Objectives of the European Union

The EU is generally recognised as having “global clout” as the world’s largest trading stage, biggest donor of humanitarian aid, and the protector of the environment.¹³ While the EU cannot be characterised as a purely human rights organisation, it became a key player in international affairs and has acquired the responsibility to defend and protect human rights.¹⁴ What initially started as an economic integration of states has evolved into a broader structure

¹⁰ European Commission Staff Working Document (2013) “Climate Change, Environmental Degradation and Migration”, SWD (2013) 138 Final (16 April 2013).

¹¹ *Ibid.* p. 16.

¹² *See generally*, Bretherton, C. & Vogler, J. (2006) “The European Union as a Global Actor” (Routledge); Söderbaum, F. & Van Langehove, L. (eds.) (2008) “The EU as a Global Player: the Politics of Interregionalism” (Routledge 2008); Lucarelli, S. & Fioramonti, L. (eds.) (2010) “External Perception of the European Union as a Global Actor” (Routledge).

¹³ Wetzel (2012) *Op. Cit.* p. 1.

¹⁴ *See generally*, Besson, S. (2006) “The European Union and Human Rights: Towards a Post-National Human Rights Institution” 6 Human Rights Law Review 2 pp.323-360.

of values.¹⁵ When pinpointing the values of the EU, the starting point are the two principal treaties on which the EU is based the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and their respective legal definitions.¹⁶

The Lisbon Treaty,¹⁷ which came into force on 1 December 2009, has both introduced and enhanced provisions that reinforce the protection of human rights. Article 2 TEU highlights the foundational values of the Union: human dignity, freedom, democracy, equality, the rule of law, and respect for human rights (including the rights of minorities). This provision is backed up by a sanctions procedure in Article 7 TEU.¹⁸ Among the EU's aims and objectives are the protection of the environment and the promotion and protection of human rights and the well-being of its peoples, offering its citizens an area of freedom, security and justice (Article 3 TEU). This innovation brought by the Lisbon Treaty is important for EDPs. It emphasises that the internal action of the Union (such as protection of the environment) is oriented towards wider external objectives that directly impact EDPs.

Importantly, human rights within the EU have evolved from a tangential issue to a formalised, legally binding black-letter standard.¹⁹ Article 6 of the TEU clearly stipulates the recognition of rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (CFREU). The binding character of the CFREU implies the ratification by the EU of the ECHR and favours an increasing role of the EU on the international scene. Of notice is the mainstreaming of fundamental rights as guaranteed by the ECHR that “shall constitute general principles of Union’s law” (Article 6(3)).

Human rights also condition the exercise of the EU’s wider competences. Since 1969,²⁰ the CJEU has highlighted that integration project should not prejudice fundamental rights, which are part of the common constitutional foundations of the Member states and the ECHR. The Court has also been an active player with regard to determining which values the EU should

¹⁵ See generally, Williams, A. (2010) “The Ethos of Europe: Values, Law and Justice in the EU” (Cambridge University Press) for a discussion on values and the EU. By focusing on the realisation of human rights as a core institutional value, the author argues that the EU can better define its moral limits so as to evolve as a more just project.

¹⁶ The two principal treaties on which the EU is based are the Treaty on European Union (TEU; Maastricht Treaty, effective since 1993) and the Treaty on the Functioning of the European Union (TFEU; Treaty of Rome, effective since 1958). These main treaties (plus their attached protocols and declarations) have been altered by amending treaties at least once a decade since they each came into force, the latest being the Treaty of Lisbon which came into force in 2009.

¹⁷ The Treaty of Lisbon, amending the Treaty on European Union and the Treaty Establishing the European Community was signed in the Portuguese capital on 13 December 2007 by the representatives of the 27 Member states. It entered into force on 1 December 2009, after being ratified by all the Member States.

¹⁸ The provision asserts that Member States rights maybe barred if it engages in a “serious and persistent breach (...) of values mentioned in Article 2”. However, to date the provision has never been used to date.

¹⁹ Of notice is the fact that human rights started to receive official recognition with the Treaty of Maastricht of 1992 where the new Treaty of the European Union provided that the EU would respect fundamental rights as listed in the ECHR and common to the constitutional traditions of the Member States. In 1997 this was changed by the Treaty of Amsterdam which began highlighting the common values and principles underpinning the EU: the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.

²⁰ CJEU, Case 26/69 *Stander v Ulm* (12 November 1969) ECR 419, para.7.

promote.²¹ Particularly in the *Kadi* case,²² the CJEU puts on evidence the dynamic consideration of the fight against terrorism and human rights. The case constitutes an example where the EU places protection of fundamental rights at the centre of the discussion, stressing their importance as the “very foundations of the Community legal order,” from which Member states cannot deviate and which even the Charter of the United Nations cannot override.²³ According to the court, human rights are said to be part of the constitutional principles of the EU treaty. In doing so, the court highlighted the significance of the EU that not only respects human rights but also actively safeguards them in a legal order based on the rule of law and respect for due process rights. Over the years, the CJEU has recognised that human rights are part not only of the integration project but that are independent values, which are an integral part of the EU system and constitute general principles of law.²⁴

It is important to highlight that human rights have been used as the main driver for institutional change. The enlargement process obliges candidate countries to comply with the normative and legal “Copenhagen Criteria,” which were adopted by the European Council in 1993.²⁵ Among other things, it makes membership dependent on two important benchmarks: democracy and adequate protection of human rights.

3.1.2 External Objectives of the European Union

3.1.2.1 Human Rights as a Cross-Cutting Principle on the Union’s External Action

Of note here is that the EU’s role as an external agent of human rights also plays a significant part for the protection of EDPs. Indeed, Article 3(5) of the TEU has been identified as the “missionary principle” of the EU in its relations with the rest of the world.²⁶

Article 3(5) TEU reads (emphasis added):

“In its relations with the wider world, the Union shall uphold and *promote its values and interests* and contribute to the protection of its citizens. It shall *contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of*

²¹ See e.g. CJEU, Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd. v Grogan* (04 October 1991) ECR 4685; Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (14 October 2004) ECR I-9609; Case C-208/09 *Sayn-Wittgenstein v Von Wien* (22 December 2011) ECR I - 13693.

²² CJEU, Joint Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission* (03 September 2008) para. 285.

²³ *Ibid.* paras 303-308.

²⁴ CJEU, Case 5/88 *Wauchaf v Germany* (13 July 1989) ECR 2609; CJEU, Case C-438/05, *International Transport Workers’ Federation and the Finnish Seamen’s Union v Viking Line* (11 December 2007) ECR 10779; Case C-341/05 *Laval v Svenska Byggnadarbetsareföbundet* (18 December 2007) ECR 11767; CJEU, Joined Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat v Council and Commission* (03 September 2008) ECR I-6351.

²⁵ More on the Copenhagen Criteria or the general conditions of Membership is available from: http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm [accessed 2 March 2014].

²⁶ Broberg, M. (2012) “Don’t Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union’s Development Policy” in P. James Cardwell (ed.), “EU External Relations Law and Policy in the Post-Lisbon Era” (Springer) pp. 185-187; pp.181-196.

human rights, in particular the rights of the child, as well as to the *strict observance and the development of international law*, including respect for the *principles of the United Nations Charter*.”

In their relations with third countries, the EU has a duty to take into account these objectives. From the EDPs’ standpoint, these holistic objectives are relevant, as environmental displacement and migration may represent a threat to peace, security, human rights, poverty, and sustainable development.

These objectives are further highlighted and developed under Article 21 TEU. Inserted by the Treaty of Lisbon Article 21 (1) and (2) TEU²⁷ proclaims *inter alia* that the protection of human rights is a cross-cutting, overarching principle underpinning all of the EU’s international activities. The EU promises to have an active role in the development of relationships and partnerships between third states and regional, international, and global organisations and to promote multilateral solutions to common problems. The EDPs’ problem is without a doubt a global problem where international cooperation is essential.

Within the framework of foreign policy, the EU repeatedly calls upon the core principles and treaties of international human rights law and humanitarian law (Article 23 et seq. TEU). Furthermore, the rise of human rights to general principle is also valid in the areas of foreign common commercial policy, development, financial and technical cooperation and humanitarian aid (Articles 205 et seq. TFEU). The EU also has an obligation to combat discrimination (based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation,) going beyond the mere promotion of these social rights (Articles 151 et seq. TFEU).

Treaties, which are negotiated under the umbrella of the EU with states, groups of states, and other international organisations on cooperation issues, have a “general clause” on human rights. These clauses have been included in treaties between the EU and more than 120 states.²⁸ Other human rights mechanisms include political “Human Rights Dialogues” between the EU and individual countries or regions that are an essential part of the EU’s overall strategy aimed at promoting sustainable development, peace and stability.²⁹

This is why the TEU clearly claims that, operationally, the EU’s mission is to work for a high degree of cooperation, but also defines common policies and actions in all areas of

²⁷ Article 21 (1) TEU refers (emphasis added): “The Union’s action on the international scene shall be *guided by the principles* which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: *democracy, the rule of law, universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law*”.

²⁸ European Parliament (2006) Report on Human Rights and Democracy Clause in European Union Agreements. A6-0004/2006 Final (23 January 2006) para. F available from: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0056&language=EN> [accessed 08 March 2012].

²⁹ EU Guidelines on Human Rights Dialogues with Third Countries where adopted in 2001, by the European Council were reviewed on 19 January 2009 available from: http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf [accessed 08 March 2012]

international affairs in order to (among others) consolidate human rights and the principles of international law; develop international measures to secure and improve the quality of the environment and sustainable management of global natural resources; to foster the sustainable economic, social, and environmental development of developing countries and most importantly, to assist populations, countries and regions confronting natural or man-made disasters (Article 21 (2)(b), (d), (f), and (g)). The innovations brought about by the Lisbon Treaty in particular made human rights visible as a guiding factor in external relations with third countries. Furthermore, this reveals an obvious evolution of the common values and objectives of the EU, as well as adaptability within the scope of the EU's legal and political platform to actions in areas of transversal interests.³⁰ This fact interestingly underscores the potential value that the EU's normative framework can have for EDPs.

Whether we see human rights a product of natural law or as a notion embedded in the variety of religions and cultures, individuals have for centuries been defining rights to which they are morally entitled. The dynamics of social, cultural and religious, vectors have produced attempts to define human rights and how they should be protected.³¹ The Universal Declaration of Human Rights of 1948 was the first effort to codify the rights to be promoted and protected, but it has been largely criticized as biased towards the West. Nevertheless, the basic principles that underpin the Declaration are universal.³² By endorsing the Declaration, every U.N. member converted it into universal acknowledgement and of commonality to all cultures, notwithstanding their diversity. States not only officially accepted that human rights are inherent in humankind³³ but also that the protection and promotion of human rights are truly an international matter.³⁴ As previously mentioned, the EU borrows notions of the Declaration's concepts of universality and indivisibility.³⁵ The promotion of human rights as a universal principle enables the EU to link the protection of fundamental rights with a wide range of policies, such as humanitarian, trade, environment and development, and migration policies, -particularly if they are deemed indivisible. The acknowledgement that all human rights are interdependent and interrelated is important for EDPs.³⁶ It means that it is

³⁰ The entry into force of the Lisbon Treaty has once again raised the question of the existence of a general competence of the EU to lead a human rights policy. While some say that it can be difficult to assert from the existing legal framework a united EU competence on human rights, this competence where it exists can be extrapolated from the EU's doctrine on "implied powers" (internally and externally). This doctrine recognizes the implied powers of EU intervention for the Union on human rights matters based on Article 352 TFEU as long as the protection of human rights is considered as an "objective" of the EU in the sense of the provision. See Eeckhout, P. "EU External Relations Law" (2nd edition Oxford University Press) p. 572.

³¹ Belo, C. (1998) "The Dignity of the Individual" in B. Van Der Heijden & B. Tahzib-Lie (eds.), "Reflection on the Universal Declaration of Human Rights" (Kluwer Law International) p. 62; pp. 59-64.

³² Sané, P. (1998) "The Unfinished Revolution" in B. Van Der Heijden & B. Tahzib-Lie (eds.), "Reflection on the Universal Declaration of Human Rights" (Kluwer Law International) p. 281; pp. 279-287.

³³ McDonald, G. (1998) "The Universal Declaration of Human Rights: The International and the American Dream" in B. Van Der Heijden & B. Tahzib-Lie (eds.), "Reflection on the Universal Declaration of Human Rights" (Kluwer Law International 1998) p. 180; pp. 179-186.

³⁴ Pfaff, W. (1998) "Everyone has a Responsibility" in B. Van Der Heijden & B. Tahzib-Lie (eds.), "Reflection on the Universal Declaration of Human Rights" (Kluwer Law International) p. 237; pp. 237-239.

³⁵ Brandtner, B. & Rosas, A. (1998) "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" 9 European Journal of International Law p. 484-487; pp.468-490.

³⁶ See Chapter 4.

impossible to separate civil, political and economic and social and cultural rights, giving the EU “a moral justification for externally projecting its human rights policies.”³⁷

The challenge at the EU level is that EU Member states are caught between the goal of safeguarding human rights (internally and externally) and the request to tighten up immigration and EU external border control. The “fortress of Europe” lens can be extremely damaging to find adequate solutions for people seeking protection due to environmental factors that arrive at EU borders. This is because of how migration is seen on the one hand as a human rights or humanitarian issue because states are obliged to grant protection under international law to all of those who are within their jurisdiction while on the other hand, it is seen as an immigration issue, which might place a strain on the labour market and social facilities (housing, education, healthcare).³⁸ This tension between international and national law to protect human rights of third-country nationals can put them in vulnerable situations, including human rights abuses *vis-à-vis* the nationals of the state. Therefore, it is important that, in the context of EDPs, human rights are seen as the guiding tenants that take precedent against the background of restrictions and limitations.

3.2 The Consistency Imperative as Guidance

The EU’s legal framework credibility rests on what it can achieve unilaterally by pursuing greater consistency between internal practices and announced external objectives. Importantly, the need for consistency is linked with the quest for solidarity.³⁹ With the advent of the Lisbon Treaty, consistency became a guiding principle for EU action at home and abroad. This means that the EU must promote policy coherence by connecting internal and external policies and its multileveled institutional framework. Article 7 of the TFEU stipulates that the EU “shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral powers.” In the same manner, article 13 (1) TEU provides that the EU’s institutional framework “shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.” A closer reading of both articles suggests that consistency is an important path of ensuring the EU action *intra vires*, but also that consistency acts as a support in the drafting and negotiation of EU proposals.⁴⁰

The consistency token is an important guideline for looking at and interpreting existing EU protection standards and policy developments against a human rights backdrop, as it ensures the construction of a principled and holistic protection framework for EDPs. Displaying

³⁷ See Duquette, E. (2001) “Human Rights in the European Union: Internal Versus External Objectives” 34 Cornell International Law Journal p. 376; pp. 364-395

³⁸ Brinkmann, G. (2004) “The Immigration and Asylum Agenda” 10 European Law Journal 3 p. 184; pp. 182-199.

³⁹ See Eleftheriadis, P. (2011) “The Moral Distinctiveness of the European Union” 9 International Journal of Constitutional Law 3-4 pp. 695-713.

⁴⁰ Herlin-Karnell, E. (2013) “EU values and the shaping of the international legal context” in D. Kochenov & F. Amtenbrink (eds.) “European Union’s shaping of international legal order” (Cambridge University Press) p. 97.

European normative consistency with the EDPs debate can help us build powerful protection foundations.

3.3 The European Union's Normative 'Ripple Effect'

The EU's legal normative framework and competence vectors, cushioned by human rights, reflect the importance that the EU can play in developing preventative or proactive measures of protection, as well as being a key partner in building long-term or reactive protection measures for EDPs. While the TEU generally refers to values, which are part of the objectives of the EU, and principles, which are of paramount importance in international relations, these must be seen as interchangeable rather than conflicting.⁴¹ Both values and principles reflect and embody certain normative values or claims that the EU encourages domestically and internationally.⁴²

More importantly, and relevant in the context of this work, is that the EU's normative platform has been identified by scholars as having a "ripple effect" beyond the EU.⁴³ Its formalised regional protection regime is considered the most advanced in the world because it blends asylum, refugee law principles, and human rights geared towards greater uniformity in the law and practice of EU Member states.⁴⁴ Furthermore, the CJEU is the first supranational court to interpret and clarify provisions of the CRSR, and these rulings have enormous influence or "jurisprudential glow" in promoting the standard interpretation in all EU Member states which are party to the CRSR and its Protocol.⁴⁵ But its influence does not stop here. There is a wide academic literature identifying the possible global impact (positive and negative) of the EU in areas such as socio-legal literature,⁴⁶ political science/political sociology,⁴⁷ and international relations.⁴⁸

⁴¹ See Cremona, M. (2011) "Values in EU Foreign Policy" in M. Evans & P. Koutrakos (eds.) "Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World" (Hart Publishing 2011) p.275 on the values in EU foreign policy.

⁴² See generally, Sartor, G. (2007) "A Teleological Approach to Legal Dialogue" in G. Pavlakos (ed) "Law, Rights and Discourse: The Legal Theory of Robert Alexy" (Hart Publishing) on the discussion of Alexy and the legal reasoning behind the concepts principles and values.

⁴³ See generally, Lambert, H., McAdam, J. & Fullerton, M. (2013) "A Global reach of European Refugee Law" (Cambridge University Press) p.1. This is particularly visible with the evolution of the content of international refugee law by means of altering customary law and UNHCR's practice.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* p. 19.

⁴⁶ See, e.g. Twining, W. (2000) "Globalisation and Legal Theory" (Cambridge University Press); (2004) "Difusion of Law: a Global Perspective" 49 *Journal of Legal Pluralism* pp. 1-45; (2005) "Social Science and Difusion of the Law" 32 *Journal of Law and Society* pp. 203-240; (2010) "Normative and Legal Pluralism: A Global Perspective" 20 *Duke Journal of Comparative and International Law* pp.473-517; Teubner, G. (1998) "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" 61 *Modern Law Review* pp.11-32.

⁴⁷ See, e.g. Thieleman, E. & El-Enany, N. (2010) "Refugee Protection as a Collective Action Problem: Is the EU Shrinking its Responsibilities" 19 *European Security* pp. 209-229; Geddes, A. (2008) "Immigration and European Integration: Beyond Fortress Europe?" (2nd ed. Machester University Press 2008) pp. 170-185. Manner, I. (2002) "Normative Power Europe: A Contradiction in Terms?" 40 *Journal of Common Market Studies* pp. 235-258.

⁴⁸ See, e.g. Betts, A. (ed.) (2011) "Global Migration Governance" (Oxford University Press); Meyer, J. *et al.* (eds.) (1997) "The Structuring of a World Environment Regime, 1870-1990" 51 *International Organisation* pp. 623-651.

Our aim in the third part of this thesis is to use the EU's overarching framework as a stepping-stone to consider its potential value for devising and consolidating protection strategies for EDPs. This seeks to accomplish the following: 1) consolidate the protection of EDPs pulling out the advantages of the existing proactive and reactive protection mechanisms; and 2) analyze their potential effectiveness in protecting EDPs thereby narrowing the legal protection gap.

The first driver for this path is to reach tangible solutions where there is a new challenge and legal uncertainty, exemplified by the EDPs problematic. The second driver stems from the growing transnational possibilities of existing EU policy development and legal standards - that liberally (re)interpreted and/or adapted - potentially provide protection for EDPs within the EU and beyond.

4. Consolidating a Proactive Approach to Protection for Environmental Displacement

As highlighted in Chapter 4, the notion of a proactive approach to protection for EDPs emphasises the pre-emptive human rights protection orientation. It deals with states' obligations to protect EDPs from displacement by taking preventative measures to avoid the negative effects of environmental disruption and the violation of human rights. The only way to do this is to act upon the root causes of environmental displacement, i.e., "prevent the preventable." In theory, the notion of preventative protection can encompass a wide range of activities from environmental and human rights monitoring, disaster risk-based assessments, and climate adaptation programmes to development insofar as they avoid the violation of human rights. Anything that can prevent the root causes of displacement can potentially be seen as a preventative protection strategy. In this work, we have asserted that the obligations of states to prevent displacement and ensure the protection of human rights due to environmental factors is emerging as a customary legal norm. This is because such a legal obligation is progressively recognised both explicitly and implicitly in both hard and soft law instruments at the international, regional, and sub-regional levels in various relevant operational frameworks where the *opinio juris* keeps on enlightening the content of such obligation.

Framing Migration through Labour Mobility

The EU has highlighted that "facilitating well-managed mobility and labour migration from degraded areas can represent an effective strategy to reduce environmentally-induced displacement". In addition to this, "when environmentally induced migration is undertaken voluntarily, it is far more likely to produce benefits for both receiving and sending communities (...)." ⁴⁹ From this angle, labour mobility is put forward as an *ex ante* measure to prevent environmental displacement. As previously mentioned elsewhere in this work, rather than seeing migration as a failure to adapt to environmental change, migration is now seen as a legitimate strategy, a triple-win situation benefiting countries of origin, host countries and

⁴⁹ European Commission Staff Working Document SWD (2013) 138 Final *Op. Cit.* p. 26

the individuals (see Chapter 4, Section 6.2.2), while at the same time giving effect to the emerging legal obligation of states to prohibit and prevent displacement of EDPs. Migration is seen as part of the optimal mix of responses to environmental change.⁵⁰ Scholarship establishing this positive link for people who are vulnerable to environmental stressors has abounded.⁵¹ Access to work is a crucial component of any preventative protection strategy because work will avoid displacement, while at the same time allowing individuals to diversify their income source and send remittances back to family members, which in turn would build resilience and meet EDPs' economic needs. Building on existing strategies that support labour migration is the most likely to succeed in preventing displacement, lessening vulnerability, and achieving the broader development goals. It will also avoid the development of irregular migration channels in order to secure a de facto solution to their environmental challenges. Migration in this context is seen as a preventative measure rather than a reactive one.⁵²

Circular and Temporary Migration

To a certain extent, cyclical non-regulated migratory movements have always existed. But cyclical regulated migratory movements and return as part of moving between countries are seen as a potentially effective tool to all parties concerned. At the international level, organisations such as the United Nations,⁵³ the World Bank⁵⁴, the International Organization for Migration⁵⁵ and the Global Commission on International Migration⁵⁶ have advocated for the concept of circular migration.

⁵⁰ Johnston, J. S. (2008), "A Looming Policy Disaster," 31 Regulation 3 p. 44 pp.38-44. Arguing in favour of immigration policies that would enable people in developing countries that are most vulnerable to environmentally changing conditions to immigrate to developing countries.

⁵¹ See generally, Davies, S. (1993) "Are Coping Strategies a Cop Out?" 24 Institute for Developing Studies Bulletin 4 pp. 60-72; Adger, W. N. *et al.* (2003) "Adaptation to Climate Change in the Developing World" 3 Progress in Development Studies pp. 179-195; McLeman, R. & Smit, B. (2006) "Migration as an Adaptation to Climate Change" 76 Climate Change pp.31-53; Tacoli, C. (2009) "Crisis of adaptation? Migration and Climate Change in a Context of High Mobility" 21 Environment and Urbanization pp. 513-525; Barnett J & O'Neil, S. J. (2012) "Islands, Resettlement and Adaptation" 2 Nature Climate Change pp. 8-10.

⁵² See Ober, K. (2014) "Migration as Adaptation: Exploring Mobility as a Coping Strategy for Climate Change" (UK Climate Change and Migration Coalition) for a discussion on the advantages and pitfalls of migration as adaptation in particular around the definition of adaptation which is beyond the scope of this study.

⁵³ United Nations (2006) "International Migration and Development", Report of the Secretary General (New York, 2006) p. 18. In 2006 the UN Secretary General in its Report on International Migration and Development described "a new era of mobility" characterised by more temporary movements. The report highlights that temporary migration schemes are "beneficial synergies for migrants, countries of origin and countries of destination."

⁵⁴ World Bank (2006) "International Labour Migration: Eastern Europe and the former Soviet Union" (World Bank, Europe and Central Asia Region) p. 98, p.109. The World Bank has advocated that circular migration can not only encourage the transfer of knowledge and skills but also can reduce the negative economic effects of brain drain. It allows us to match supply and demand for international labour and to satisfy the preferences of migrants who wish to spend sometime abroad.

⁵⁵ International Organization for Migration (IOM) (2005) "World Migration 2005: Costs and Benefits of international Migration" (Geneva 2005) p. 296. The IOM has encouraged circular movement by receiving countries and to include measures (incentives and sanctions) to ensure that migration remains temporary (e.g. scholarships for students with attached conditions to return; reimbursement of social security contributions upon departure).

⁵⁶ Global Commission on International Migration (2005) "Migration in a Interconnected World: New Directions for Actions" (Geneva 2005) p. 31. The Global Commission on International Migration was set up by Kofi Annan in 2003 with the aim of setting up a framework coherent global response to the issue of international migration. In October 2005, the Commission presented its report encouraging states "to formulate policies and

The concept of circular migration appeared during the 1980's,⁵⁷ but historically this inspired labour rotation scheme is claimed to have its origins in the "guest worker" programmes of the post war period.⁵⁸

In the European context, circular migration has regained increasing popularity in light of Europe's ageing population and economic necessities, but also as a stimulus for migrants from developing countries to return and invest in their country of origin, thus, avoiding the negative effects of "brain drain" for developing countries. Further liberalising temporary migration in the so-called "Fortress of Europe" can be "politically easier to sell to electorates that have come to feel threatened by more immigration."⁵⁹ Despite the entanglements between Member states regarding the concept,⁶⁰ in 2007 a Communication entirely devoted to circular migration and mobility partnerships between the EU and third countries the European Commission proposed a definition for circular migration.⁶¹ Essentially, "[c]ircular migration can be defined as a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries."⁶² The 2007 Communication builds on earlier Commission initiatives to fight illegal immigration, in particular barring illegal work and exploitation of migrants by employers. It also aimed at giving operational substance to the EU's Global Approach to Migration.⁶³ Over the past years, circular migration has been particularly encouraged in a number of legislative initiatives at the EU⁶⁴

programmes that maximize the development impact of return and circular migration." The Commission considered that this new paradigm of facilitating the movement of migrants between their country of origin and destination would progressively replace the old paradigm of permanent migrant settlement.

⁵⁷See generally, Ozkul, D. (2010) "Circular Migration Schemes Renewed interest of the Destination Countries" CARIM – VI Summer School on Euro-Mediterranean Migration and Development. Robert Schuman Centre for Advanced Studies, European University Institute (Essay Series).

⁵⁸See Scheinder, H. & Wiesbrock, A. (2011) "Circular Migration: A triple win situation? Wishful thinking or serious option for sustainable migration policy?" in D. Schiek, U. Liebert & H. Schneider (eds.), "European Economic and Social Constitutionalism after the Treaty of Lisbon" (Cambridge University Press) p. 126 pp. 123-147. Both authors discuss the origin of circular migration in the guest worker programmes developed by Germany, the Netherlands, and Sweden after World War II.

⁵⁹Abella, M. (2006) "Policies and Best Practices for Management of Temporary Migration" International Symposium in International Migration and Development, (United Nations Population Division Department of Economic and Social Affairs, June 2006)p. 1.

⁶⁰*Ibid.* pp. 139-144. Disagreements still remain amongst Member states regarding the concept of circular migration and how it should be in fact operationalised. Some Member states see circular migration as a way to manage migration and limit the entrance of third country nationals to particular sectors (UK, France, Spain, Germany, the Netherlands) while others think that circular migration should be seen as form of spontaneous migration broadly defined as temporary or more permanent.

⁶¹European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2007) "On circular migration and mobility partnerships between the European Union and third countries" COM (2007) 248 Final (16 May 2007).

⁶²*Ibid.* p. 8.

⁶³The European Commission, Communication COM (2007) 248 final *Op. Cit.* builds on earlier European Commission initiatives in particular the European Commission "Communication on Migration and Development: some concrete orientations", COM(2005) 390 (1 September 2005) where the concept of circular migration appear for the first time followed by European Commission Communication on "Policy priorities in the fight against illegal immigration of third-country nationals", COM(2006) 402 (19 July 2006) and "The Global Approach to Migration one year on: Towards a comprehensive European migration policy", COM (2006) 735 Final(30 November 2006).

⁶⁴The Council of the European Union Directive (2003) "Concerning the status of third-country nationals who

and national⁶⁵ levels.

Though each context is different, it is important to explore two current EU normative standards, as they may be useful for their juridical value and potential replication, not only within the EU but also as a future model to promote regional and international migration for people who live in environmentally vulnerable areas. The first one is circular migration proposed under the so-called EU's Seasonal Workers Directive.⁶⁶ Seasonal work is also the most common form of temporary migration.⁶⁷ The second one is Mobility Partnerships,⁶⁸ proposed under the EU's Global Approach to Migration.⁶⁹

4.1 Seasonal Workers Directive

4.1.1 Rationale

For some time, the European Commission has been willing to make progress on establishing a common entry and residency for seasonal workers outside the Union since the idea of a Directive appeared in the 2005 Policy Plan on Legal Migration.⁷⁰ The rationale behind this Directive was to set minimum conditions for an estimated 100,000 third-country national seasonal workers who enter the EU every year, some of whom are irregular migrants. In February 2014, the Council adopted the Directive “on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers,” hereinafter the Seasonal Workers Directive.⁷¹ Member states will need to transpose the Directive into their national legislation within two and half years after publication in the official journal.

4.1.2 Personal Scope of Application

Essentially, the Directive shows a flexibility approach of conditions of stay and entry of third-country nationals.⁷² This aims at meeting the structural need for low-skilled seasonal

are long-term residents that allows a period of absence” 2003/109/EC (25 November 2003) (less than 12 consecutive months Article 9 (1) (c)) of third country nationals within EU territory without compromising their attainment of a long-term residence status (Article 4 (3)). The Council of the European Union Directive (2009) “On the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment” 2009/50/EC (25 May 2009) that enables periods of absence up to 18 months without losing their status (Article 16 (3)).

⁶⁵See e.g., European Migration Network (2011) “Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States” (September 2011). Circular migration has been introduced at national level by issuance of temporary permit to work in countries such as Portugal, Belgium, Spain, United Kingdom France, Italy, the Netherlands (June 2011).

⁶⁶European Parliament and the Council of the European Union Directive (2014) “on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers” 2014/36/EU (26 February 2014).

⁶⁷McLoughlin, S. *et al.* (2011) “Temporary and Circular Migration: opportunities and challenges” Working Paper No. 35 European Policy Centre p. 29.

⁶⁸European Commission, Staff Working Document (2009) “Mobility Partnerships as a tool of the Global Approach to Migration” SEC (2009) 1240 final (18 September 2009).

⁶⁹European Commission (2006) COM (2006) 735 Final, *Op. Cit.*

⁷⁰European Commission, Communication from the Commission (2005) “On a Policy Plan on Legal Migration” COM (2005) 669 final, (21 December 2005).

⁷¹Directive 2014/36/EU *Op. Cit.*

⁷²*Ibid.* para. 6 (emphasis added): “The Stockholm Programme, adopted by the European Council on 11 December 2009, recognises that labour immigration can contribute to increased competitiveness and economic

workers, as well as at preventing a temporary stay from becoming permanent. The Directive also shows its external impact, as it exclusively targets third-country nationals residing outside the EU. This is of particular relevance if we look at seasonal labour migration as a preventative measure for EDPs. More importantly, the Directive puts emphasis on the rights of seasonal workers during their period of stay, equal treatment, and their redress possibilities, providing - albeit with inherent limitations - a human rights dimension to seasonal work. The following sections explore the three vectors of the Directive their temporal, territorial, and substantive scope of application .

4.1.3 Temporal Scope of Application

The conditions of stay and entrance for third-country nationals for the purpose of seasonal work are guided by flexibility for all interested parts. Applications for admission to seasonal work are dependent upon a valid work contract or a binding job offer to work as a seasonal worker with an established employer in the Member state. To avoid exploitation of workers from employers, this contract should specify the place and type of employment, duration, salary, number of working hours and paid leave (Article 5). “The meaning of flexibility in this context is the availability and willingness of sufficient number of workers to work at prevailing wages.”⁷³

In order to limit overstays and enhance the potentials of circular migration, the Directive only allows stays for a minimum of five months and not more than 9 months in any 12-month period (Article 14). It does, however, allow an extension of the contract or change of employer during that period (Article 15). This ensures that workers are not dependent on a given employer and allows them to not lose their social and as economic ties with their country of origin. It is also a way to enhance the flexibility of the labour market without permanent settlement by workers.

The question of the length of stay was much debated by the European institutions prior to the Directive. They argued that a flexible approach was deemed necessary because short time frames would not answer the needs of employers, especially in particular sectors or in countries that only have two seasons.⁷⁴

To safeguard the added value of mobility for the employee and the employer, Article 16 of the Directive reiterates that Member states shall facilitate the admission of non-EU workers

validity and that, in the context of the important demographic challenges that will face the Union in the future with an increased demand for labour, *flexible immigration policies* will make an important contribution to the Union’s economic development and performance in the long term; and para.26 (emphasis added) “Provision for a single procedure leading to *one combined permit, encompassing both stay and work*, should contribute to *simplifying the rules* currently applicable in Member States”.

⁷³ Abella (2006), *Op. Cit.* p. 22.

⁷⁴ See for e.g. European Economic and Social Committee (2010) “Opinion Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment” “Rapporteur Christa Schweng COM(2010) 379 final - 2010/0210 (COD) (27 July 2011); Committee of the Regions (2011)” Opinion of the Committee of the Regions on Seasonal workers and intra-corporate transfer” Rapporteur Graziano Ernesto Milia CoR 2011/C166/10 (31 March - 1 April 2011).

who were admitted for seasonal employment at least once in the same Member state in the last five years and who fully respected the relevant conditions in every stay. Within this context, a “several seasonal worker permit” in a single administrative act may be issued. This administrative flexibility opens mobility opportunities that can be explored by people who are at risk of environmental stressors.

4.1.4 Territorial Scope of Application

The Directive mainly targets third country nationals living outside the EU. The fact that it does not cover immigrants, be they regular or not, already residing in the EU territory has been heavily criticized up to the adoption of the Directive, particularly by the British Member of the European Parliament, Claude Moraes, who was in charge of the draft report.⁷⁵ This externality can, however, open possibilities for EDPs to come to work in Europe and send back remittances, which may constitute a preventative strategy to avoid displacement.

Conversely, the Directive does seem vague in defining what constitutes a seasonal worker. The fact that the work is an “activity dependent on the passing of the seasons” meaning an activity that is tied to a certain time of the year or a pattern linked to seasonal conditions, where labour is more solicited, does not provide much guidance as to when third-country nationals may expect to work. This uncertainty may also demotivate potential workers from applying, as they are unable to organise their family life prior to departure because seasons may vary from country to country. To overcome this barrier, an attempt was made to define the sectors that are seasonally dependent, such as agriculture, horticulture and tourism, but a large margin of appreciation is still left to states.⁷⁶

4.1.5 Substantive Scope of Application

The human rights underpinning is one of the relevant features of the Seasonal Workers Directive. The document is guided by the principle of equal treatment, i.e., guaranteeing the same rights for migrant temporary seasonal workers as EU nationals (Chapter IV - Rights). The equality banner plays an important role in the management of migration and can act as an essential legal safety net to those potentially using this framework, in particular those who face environmental stressors.

The equality flagship for those taking up seasonal work abroad pervades the document and includes working conditions, the right to strike, back payments, access to social security and to public goods and services, access to advice services on seasonal work, recognition, and tax benefits (Article 23 (1)). The rules also provide for the inclusion of education and training opportunities for seasonal workers even though they exclude them from family and

⁷⁵European Parliament (2011) “Draft report on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment”, COM(2010)0379 – C7-0180/2010 – 2010/0210 (COD) (8 June 2011) Committee on Civil Liberties, Justice and Home Affairs *available from*: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/869/869849/869849en.pdf [accessed 25 April 2014].

⁷⁶Directive 2014/36/EU *Op. Cit.* para. 13.

unemployment benefits (Article 23 (2)(i)) and restrict equal treatment only to education and training linked to the specific employment activity (Article 23 (2)(ii)). It seems that the final version of the Directive has taken into account at least some of the International Labour Organisation's recommendations with regards to equal treatment⁷⁷ (in particular some of those outlined in the revised international labour standard on Migration for employment, Convention No. 97 and Convention No. 143).⁷⁸ Under Article 25, the Directive effectively urges Member states to provide access to seasonal workers to complaint mechanisms against employers, as well as to measures protecting against dismissal or adverse treatment by the employer as a reaction to a complaint.

An important protection standard for seasonal workers worth mentioning within the human rights realm includes the right to benefit from accommodation that ensures an adequate standard of living according to national law and/or practice for the duration of their stay. Article 20 of the Directive urges Member states to take the necessary steps to require evidence that such measures are in place. How the generally known "right to adequate housing" can be put into action was extensively discussed under the development of the draft Directive. Some considered that touching upon the right to adequate housing for seasonal workers was impractical,⁷⁹ while others considered it to be problematic⁸⁰ or going too far.⁸¹ At the end, the provision was included, and useful guidance to Member states was provided by NGO's at the time of the discussions. They insisted that the notion of adequate housing can be found under the U.N. Committee on Economic, Social and Cultural Rights' General Comment No. 4, which expands on the provisions of Article 11 of the International Covenant on Economic, Social and Cultural Rights.⁸²

Moreover, the accommodation provision wishes to avoid exploitation by employers when

⁷⁷ See Council of the European Union (2011) "Note received by the Council General Secretariat and Presidency Delegations from the ILO's Office for the European Union and the Benelux countries" Doc 9564/11, (2 May 2011). The note analyses the Proposal for a Directive on seasonal employment in light of relevant international labour standards, and in particular of the core ILO Conventions, as well as of the specific conventions in the field of migration and social security.

⁷⁸ Convention concerning Migration for Employment N° 97 (*Revised*) adopted 01 July 1949 entry into force: 22 January 1952 C97; Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers N° 143 adopted 24 June 1975 entry into force 09 December 1978 C143. As of 15 of August 2015 Convention No. 97 has been ratified by 49 States Parties, including ten EU Member States (Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, United Kingdom), while Convention No. 143 has been ratified by 23 States Parties, including five EU Member States (Cyprus, Italy, Portugal, Slovenia, Sweden).

⁷⁹ See generally, European Economic Social Committee Opinion (2010) COM(2010) 379 final - 2010/0210 (COD) *Op. Cit.* para. 4.12. The provision was deemed impractical if it was interpreted as an obligation for employers to provide accommodation for seasonal workers. If however, should an employer provide accommodation this should be inspected by the competent authorities.

⁸⁰ See European Trade Union Confederation (ETUC) "Seasonal work and Intra-corporate transfer Executive meeting" (Brussels, 13-14 October 2010), available from: http://www.etuc.org/documents/seasonal-work-and-intra-corporate-transfer#.U1hs2_2-31o [accessed 24 April 2014].

⁸¹ See generally, Committee of the Regions Opinion on Seasonal Workers (2011) CoR 2011/C166/10 *Op. Cit.* para. 24.

⁸² Joint NGO Statement (2011) "EU Seasonal Migrant Workers' Directive: Full Respect of Equal Treatment Necessary," (20 April 2011) available from: http://picum.org/picum.org/uploads/file_/EU%20Seasonal%20Migrant%20Workers%20Joint%20NGO%20Statement%202004%202011.pdf [accessed 24 April 2014].

lodging is arranged by or through them. This is to ensure that rents are not excessive, that they meet a certain quality standard, and are not automatically deducted from the wage of the seasonal worker. However, no clear guidance is provided as to what constitutes an excessive rent. NGO's at the time of the discussions alerted to the fact that a ratio between salary and rent should have been foreseen in the Directive.⁸³

4.2 Cascading Current State Circular and Temporary Mobility Practices to Environmentally Vulnerable Communities: Some Illustrative Examples

Given that the EU has a potentially favourable legal framework for seasonal and circular migration for EDPs, it is interesting to see what the current state practice is. The European Commission has particularly emphasised that building on the experience gained within a number of relevant labour migration schemes implemented by the EU and its Member states and by non-EU countries can promote the use of migration as adaptation, cascading examples that can act as a preventative strategy for those who are affected by environmental change. The analysis below sketches out three temporary migration schemes as a result of bilateral agreements and their potential added value for EDPs.

Seasonal Agricultural Workers Program between Canada and the Caribbean: An International Open and Multileveled Cooperative Model

Canada's Seasonal Agricultural Workers Program (SAWP) has been running for over 40 years and started in the late 1960's when the government of Canada signed the first bilateral agreement with certain Caribbean countries⁸⁴ and in 1974 with Mexico. The program is implemented within bilateral administrative arrangements between Canada and the countries of origin. These arrangements are formalised in Memoranda of Understanding (MOUs) and Employment Contracts between the agricultural sector and migrant workers and the government agents of the supply country. The legal status of these agreements is defined as "intergovernmental administrative arrangement" and not as a binding international agreement (though the Canadian government's decisions may still be examined under the Canadian *Charter of Rights and Freedoms* and general principles of administrative law).⁸⁵ In Canada, a two-tier institutional framework governs the programme. At the federal level, the programme is implemented within the framework of the Immigration and Refugee *Protection Act* and *Regulations*. At the provincial level, statutes relating to employment standards, labour, and health govern program implementation.⁸⁶

Each year, more than 20,000 migrant workers from those geographical areas are allowed to travel to Canada mainly to work in the agricultural sector. The beneficiaries are workers with low-level skills who are allowed to stay for up to 8 months if required and can return to the same place of employment the following year.

⁸³ *Ibid.*

⁸⁴ Countries included: Anguilla, Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago. The first SWAP began as a pilot programme between Canada and Jamaica in 1966.

⁸⁵ Verma, V. (2010) "The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices and the Future of the Program under Unionization" Executive Summary Prepared for the North-South Institute *available from: <http://www.nsi-ins.ca/wp-content/uploads/2012/11/2002-The-Mexican-and-Caribbean-Seasonal-Agricultural-Workers-Program-Regulatory-and-Policy-Framework-Executive-Summary.pdf>* [accessed 10 April 2014].

⁸⁶ *Ibid.*

Preference is given to workers with young families. The temporary nature of the programme appears to be successful, as the majority of workers return to their countries of origin at the end of their contracts.⁸⁷

Added Value for Environmentally Displaced Persons

The program governance has been crucial in involving key stakeholders and establishing their obligations and responsibilities. The programme's ownership by both the country of origin and the host country is relevant in the context of environmental vulnerable geographical areas. The country of origin is responsible for the recruitment process and establishes a pool of workers who are willing to work in Canada. National contact points must be available for potential workers to clarify questions regarding their rights and entitlements in Canada (e.g., adequate housing, working conditions, visa requirements, access to health services, and repatriation). This can later ease the integration of individuals in the host community for the posted working period and clarify any doubts prior to departure. Employers in the host country must guarantee the same pay to migrant worker as they would to a Canadian worker and ensure that they are covered by medical insurance. Furthermore, employers must also provide adequate accommodation and transportation costs to and from the country of origin. Importantly, the SWAP is an open model regarding the number of people that can benefit from it as it has no quota limits.⁸⁸

Seasonal Employers Programme between New Zealand and Insular States in the Pacific: A Model with Regional Potential

New Zealand's Recognised Seasonal Employer (RSE) was established in 2007 for temporary migration and aims at allowing workers from the Pacific Islands to enter New Zealand to overcome the shortage of labour, just like the SWAP, in the agricultural sector.⁸⁹ The programme stands out because of its ambition to develop a "triple-win" framework benefiting the individual migrant and the sending and receiving countries.⁹⁰ It allows up to 8,000 Pacific Island citizens from Kiribati, Samoa, Tonga, Tuvalu, and Vanuatu to engage in seasonal work for a maximum of 7 months per 11-month period, yet consenting employers can request the return of the same worker for more than one season.⁹¹ An effort has been made to recruit people from more remote and poor areas of the Pacific, to enable the programme to have a real impact in the local communities of origin. This enhanced circular migration scheme can be relevant and used as an *a priori* scheme for environmentally displaced persons particularly in a region like the Pacific which is increasingly fustigated by environmental changing conditions.

Under the scheme, New Zealand employers must obtain permission to become RSEs and then apply for an Agreement to Recruit (AtR) island workers. Employers become accredited to the scheme if they meet several criteria: cover at least half the travel costs; provide housing, health insurance, and pastoral care (e.g., ability to practice a religion), and more importantly, that they pay minimum wage and guarantee a minimum of 240 hours

⁸⁷ McLoughlin S. & Münz R. (2011) "Temporary and circular migration: Opportunities and Challenges" Working Paper No.3 (European Policy Centre March 2011) p. 30.

⁸⁸ See generally, Henneby, J. & Pribisch, K. (2010) "A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program." (International Organization for Migration). Discussing the advantages and challenges by the SAWP.

⁸⁹ See Ramasamy, S. *et al.* (2008) "The Recognised Seasonal Employer Policy: seeking the elusive triple wins for development through international migration" 23 Pacific Economic Bulletin 3 pp. 171-186; Lovelock, K. & Leopold, T. (2008) "Labour Force Shortages in Rural New Zealand: Temporary Migration and the Recognised Seasonal Employer Work (RSE) Policy" 33-34 New Zealand Population Review pp. 213-234, for the origins and aims of the RSE programme.

⁹⁰ Ramasamy *et al.* (2008) *Op. Cit.* p. 171.

⁹¹ See McLoughlin *et al.* (2011) *Op. Cit.* p. 31. Quota established as of March 2009. See also Thornton, F. (2011) "Regional Labour Migration as Adaptation to Climate Change? Options in the Pacific" in M. Leighton, S. Xiaomeng & K. Warner (eds.), "Climate Change and Migration: Rethinking Policies for Adaptation and Disaster Risk Reduction", Source No. 15/2001 UNU-EHS (April 2011) p. 85; pp. 82-91.

work overall (and 30 hours a week).⁹² Governments supplying labour must also prepare a list of available workers. An island worker with an offer from an employer linked to AtR can apply for a work visa, but workers must undergo police and health checks and follow a pre-orientation departure programme.

Added Value for Environmentally Displaced Persons

The added value of this scheme is not only to fill in jobs, but most importantly, it also aims to have a development impact in nearby home countries (particularly in way of remittances).⁹³ In this context, it can be seen as a valued model in areas that are affected by environmentally changing conditions. As McAdam puts it the scheme was not developed with environmentally displaced people in mind, so its impact can be limited.⁹⁴ The quota and the visa systems can be the main barriers. Few workers means fewer remittances. Limited visa access means that visa renewal is only permitted once the worker is no longer in New Zealand's territory. This can be a demotivating factor for workers. Furthermore, it has been pointed out that those who engage in temporary work abroad find it difficult to reintegrate into their country of origin and to find work between seasons.⁹⁵ Nevertheless, this regional circular migration schemes is important, as it can offer short and medium-term solutions to regional communities vulnerable to environmental factors. The easiness of reach of the scheme can allow the migrant to not feel the sense of an outsider due to regional cultural ties.

Temporary and Circular Labour Migration Scheme between Spain and Colombia: A Targeted Model

An interesting short-term temporary circular migration programme was established in a bilateral agreement between Spain and Colombia (TLCM) in 2001.⁹⁶ A federation of employers from the region of Catalonia (Unió de Pagesos and Fundació Pagesos Solidaris) created the programme to fill the gaps in the agriculture sector.

The program allows workers from vulnerable areas of Colombia to engage in temporary and seasonal agriculture work for a period of 6 up to 9 months in the Catalonia region. As the agriculture sector requires flexibility the scheme allows for e.g. seasonal workers to work for different employees and encourages circular migration.⁹⁷ Colombian authorities organize the pool of candidates but the selection process is carried out by the Spanish authorities or together with the employer.⁹⁸ The human rights and entitlements of migrant workers are particularly highlighted and guided by the principle of equal treatment (right to adequate working conditions, right to equal pay as nationals; right to social protection).⁹⁹ To avoid exploitation by employers the rules stipulate that the seasonal worker contract should always mention the salary and the working conditions attached to it.¹⁰⁰

⁹² Thorton (2011) *Op. Cit.* p.86.

⁹³ See generally, World Bank (2011) "Migration and Remittances: Factbook 2011." (World Bank) The World Bank has asserted that remittances or transfers of money from migrant workers resident in host countries to recipients in their countries of origin make up one of the biggest financial flows in the world. In 2010, around US\$325 billion was transferred to developing countries alone. One should note, however, that the evidence of the impact of remittances still remains conflicting because of the different methodologies used within a matrix of ongoing change.

⁹⁴ McAdam, J. (2011a) "Climate Change and International Law: Complementary Protection Standards" (UNHCR Legal and Protection Policy Series May 2011) p.45. available from: <http://www.unhcr.org/4dff16e99.html>

⁹⁵ Lovelock & Leopold (2011) *Op. Cit.* p. 19.

⁹⁶ Agreement between Spain and Colombia on the Regulation and Organisation of Migratory Flows for Employment 21 May 2001, Official State Bulletin No. 159, 4 July 2001 available from:

http://www.migreurop.org/IMG/pdf/accord_Espagne_-_Colombie.pdf [accessed 25 April 2014].

⁹⁷ *Ibid.* Articles 10, 11.

⁹⁸ *Ibid.* Article 4.

⁹⁹ *Ibid.* Articles 6, 7, 8.

¹⁰⁰ *Ibid.* Article 11.

Like the RSE, the TLCM has a multilayered governance structure to meet the needs of all stakeholders involved (employers, country of origin, host country and individuals). This is particularly reflected in the notion of “co-development,” which has been introduced by the Spanish authorities in its migration policy. It “aims at identifying and promoting development opportunities for the countries of origin while incorporating co-development strategies in the process of integrating migrants”.¹⁰¹ Importantly the TLCM puts emphasis on workers as agents of development, a result of spillover effects of remittances (in the form of money and skills) once back in their country of origin. To achieve this prior to departure the worker is invited to outline a detailed plan on how he expects to spend the money.¹⁰² This procedure also allows measuring the level of success of the programme and facilitates the reintegration of the worker into the labour market once back in the country of origin.¹⁰³

Added Value for Environmentally Displaced Persons

The European Commission has praised this scheme precisely because of its strong migration and development component, particularly targeting communities affected by recurring environmental disruptions (e.g. drought, floods and volcanic eruptions).¹⁰⁴ In fact, when the Galeras volcano in southwest Colombia erupted in 2006, the TLCM was used to provide migration opportunities to the thousands of people affected by the disaster. It allowed Colombians to temporarily migrate to Spain and earn money and to reconstruct their communities, being therefore “an important source of post-disaster rehabilitation.”¹⁰⁵ The programme was later expanded to rural populations whose livelihoods were particularly vulnerable to floods, droughts, and other environmental stressors.¹⁰⁶ What makes this scheme so special is that it can reduce the vulnerability of the population of the country of origin to environmental disruptions avoiding forced and/or permanent displacement.¹⁰⁷ The scheme has, however, three obvious limitations. The first limitation is that it is subject to the Spanish immigration rules that determine the recruitment and annual quotas of foreign workers. This limitation can favour some migrants to the detriment of others in the same vulnerable situation. Second, it makes countries of origin dependent on the will of countries of destination. Then it regulates seasonal work, outlining which areas of activity the employment of foreign workers are authorized to perform. Third, it only employs third-country nationals as a last resort measure. Foreigners can only benefit from the scheme if Spanish residents cannot occupy/are unwilling to accept a particular job.

In 2007, IOM joined the TLCM project both to strengthen its base and to make it replicable. Under the EU-AENEAS¹⁰⁸ funding programme, IOM enlarged the initial project and beneficiaries. One of the conditions for

¹⁰¹ Magri, N. (2009) “Temporary Circular Labour Migration between Colombia and Spain: A model for consolidation and replication” Mpp Masters Thesis, Maastricht Graduate School of Governance, Maastricht University (2008-2009) pp.72-73.

¹⁰² International Organization for Migration (2009) “Temporary and Circular Labour Migration: Experiences, Challenges and Opportunities” (IOM December, 2009) p. 19.

¹⁰³ Agreement between Spain and Colombia, Official State Bulletin N° 159 (4 July 2001) *Op. Cit.* Article 12

¹⁰⁴ European Commission, SWD (2013) 138 Final, *Op. Cit.* p.28.

¹⁰⁵ IRIN Humanitarian News and Analysis “Fleeing Disaster Can be a Good Thing” (30 March 2010). In particular Koko Warner statements available from: <http://www.irinnews.org/report/88627/refugees-fleeing-disaster-can-be-a-good-thing> [accessed 25 April 2014].

¹⁰⁶ De Moor, N. (2011) “Temporary Labour Migration for Victims of Natural Disasters: The Case of Colombia” in M. Leighton, X. Shen & K. Warner (eds.) “Climate Change and Migration: Rethinking Policies for Adaptation and Disaster Risk Reduction” Source No. 15/2001 (United Nations University for Environment and Human Security April 2011) p. 94, pp.92-103.

¹⁰⁷ Engleman, R. (2009) “The State of the World Population 2009: Facing a Changing World: World, Population and Climate Change” (United Nations Population Fund UNFPA 2009) *available from:* http://www.unfpa.org/webdav/site/global/shared/documents/publications/2009/state_of_world_population_2009.pdf [accessed 25 April 2014].

¹⁰⁸ Aeneas program - Program for financial and technical assistance to third countries in the area of migration and asylum, Project Name: “Temporary and circular labour Migration (TCLM) between Colombia and Spain: a model for consolidation and replication” (MIGR/2006/120/237) *available from:* https://ec.europa.eu/europeaid/aeneas-programme-programme-financial-and-technical-assistance-third-countries-area-migration-and_en [accessed 25 April 2014].

selecting communities of origin was their vulnerability to natural disasters.¹⁰⁹ This represents an important step, both as a targeted model to consolidate and replicate, as it has the potential to work as a proactive protection measure for EDPs. IOM and the Spanish government have judged the programme as having a positive impact in the country of origin, together with its innovation component.¹¹⁰ Migration is now included in the national development programmes of the country of origin, and innovative techniques have been imported and used in the national agriculture sector.

4.3 Seeking the Added Protection Value of the Seasonal Workers Directive

The Positives

The importance of the status of a seasonal migrant worker is that it is a fast-track procedure of common entry, residence conditions, and a set of rights for migrant seasonal workers embodied in a legal framework, and therefore, of key importance to EDPs. It shows how a formalised EU legal seasonal workers framework can be used as an expedite scheme for the benefit of EDPs also when no other targeted measures exist, particularly, when seasonal circular migration can act as a preventative strategy to reduce environmentally-induced displacement and increase resilience to environmental disruptions. The multi-seasonal permit (“several seasonal worker permit”) in a single administrative act reduces bureaucracy, opens mobility opportunities, and facilitates re-entry that can be explored by people who are at risk of environmental stressors. While it is important to stress that circular migration does not reduce vulnerability to environmental change, it allows the pressure on natural resources to be reduced and permits knowledge-building and income diversification that can be used and transposed by individuals and households to adapt to a changing environment.¹¹¹

The Directive sets out the minimum standards of treatment that states should afford to migrant workers within their territory of jurisdiction. This human rights orientation prevents seasonal workers from being exploited. In addition, it can ensure that the human rights of EDPs are less compromised by environmental change.

The Negatives

The EU seasonal migration Directive does suffer from a number of recognized *lacunae*. Unlike the aforementioned examples from Colombia and Canada, the instrument is silent with regards to transportation or visa costs. It does not cater to integration measures in the host country (e.g., language courses or training) or reintegration measures once the seasonal worker is back in his country of origin. The possibility of family reunification is also neglected, but is an equally pressing issue for third-country nationals coming to the EU as seasonal workers. Here the learnings from the TLCM programme can be useful. The denial of these integration measures for seasonal workers is in contradiction with the objectives of the EU Integration Agenda and differentiated treatment regarding the right to family life. Furthermore, it risks discriminating between third-country nationals on the grounds of the

¹⁰⁹European Commission, SWD (2013) 138 Final, *Op. Cit.* p. 29.

¹¹⁰IOM (2009) *Op. Cit.* p. 7.

¹¹¹Tacoli (2009) *Op. Cit.* p. 517.

type of work and period employed.¹¹²

Furthermore, the multi-track approach in terms of employment translates into a system where States have discretionary powers to discriminate against third-country nationals in favour of EU nationals with particular regard to unemployment and family benefits. Equal treatment to third-country nationals can also be limited in relation to tax benefits and to education and vocational training. This can be a discouraging factor to engage in seasonal work, particularly for those who are from environmentally vulnerable areas. In reality, it can act as an increasing rather than decreasing factor of vulnerability.

Principle of Preference: Preferring who?

The principle of preference for EU citizens with regards to access to Member states' labour markets gives the right to Member states to determine the volumes of admission of third country nationals coming from third-countries to their territories as indicated in the TFEU. In the European context, there seems to be some contradiction between making the European market a competitive one and at the same time the barriers to entrance of workers.

Overcoming these barriers would be crucial to devising a comprehensive preventative and proactive strategy for EDPs. The development of a seasonal migration programme focusing on the needs of environmental migrants (in a true win-win-win) rather than focusing on the effective management of migration flows, would help with devising an adequate legal framework to avoid environmentally induced-displacement.

Hope for EDPs lays with Member states, as they have the right to maintain or establish more favourable standards for the entry and stay of third-country nationals for the purpose of employment as seasonal workers. This is particularly outlined in Article 4 of the Seasonal Workers Directive.¹¹³ Advantageous provisions do stand out from the above state circular and temporary mobility practices in the form of bilateral agreements. Blending the main advantages of each scheme, such as unlimited quotas, facilitation of family reunification, and overall targeted measures (both in the country of origin, the host country, and for the migrant himself) could be valuable for people coming from areas prone to environmental stressors.

Members states could be encouraged to negotiate bilateral and multilateral agreements for seasonal work with third countries vulnerable to environmental changing conditions. As with the TLMC between Spain and Colombia, the selection criteria can be targeted at communities of origin who are most vulnerable to environmental degradation. Furthermore, Member states with particular ties with third countries, at risk from environmental changing conditions could apply favourable treatment to nationals of specific third countries (if so provided under

¹¹²Joint NGO Statement (2011) *Op. Cit.* As foreseen by the proposal for a directive on conditions of entry and residence of third-country nationals in the framework of intra- corporate transfer intra-corporate transferees, for example, are guaranteed the right to family reunification even for postings of short duration. *See* Proposal for a Directive of the European Parliament and of the Council "On the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer" COM/2010/0378 final - COD 2010/0209, (13 July 2010).

¹¹³European Commission, SWD (2013) 138 Final, *Op. Cit.* Article 4.

national law and in accordance with the principle of non-discrimination as set out in Article 10 TFEU).¹¹⁴

4.4 Mobility Partnerships

4.4.1 Rationale

The EU migration policy agenda has been shaped in recent times by the need to focus on mobility with particular sending countries, grounded in dialogue and cooperation.¹¹⁵ This EU externalisation agenda, based on partnership-building with third countries, is an outcome of the so-called Global Approach to Migration and Mobility (GAMM).¹¹⁶ Mobility Partnerships (MPs) is the first instrument proposed to give legal shape to this cooperation mechanism.¹¹⁷ In other words, it is a legal scheme that fleshes out the potentials of circular and temporary labour migration with third countries but also works as an incentive for third countries to cooperate on the prevention of illegal migration. It offers visa facilitation and readmission agreements. Given its global reach, an analysis is deemed necessary given its potential to be used as a preventative tool to adapt to environmental changing conditions and potential displacement. As the European Commission pointed out in 2011, “[a]ddressing environmentally induced migration (...), should be considered part of the Global approach.”¹¹⁸ In this context, seasonal labour mobility and other labour mobility patterns could theoretically be explored for EDPs.

4.4.2 Personal Scope of Application

MPs aim at being a comprehensive policy tool that make a contribution into all aspects of migration: migration and development, legal migration, and illegal migration. As Parkes acknowledges, it is by nature a composite instrument situated at the intersection between social, migration, economic, foreign, and development policy.¹¹⁹ The EDPs problem is

¹¹⁴*Ibid.* para.14.

¹¹⁵Following the European Council’s call in December 2006 (to combine efforts against illegal migration with concrete proposals for incorporating legal migration opportunities into the Union’s external policies, in order to develop a balanced partnership with third countries adapted to EU Member States’ labour Market needs), the Commission launched a Communication “On Circular Migration and Mobility Partnerships between the European Union and third countries” European Commission 16 May 2007, COM (2007) 248 Final, *Op. Cit.*. Nellen-Stucky, R. (2010) “Partnering for Migration: The ambiguous case of Mobility Partnerships between the European Union and selected third countries” Working Paper, Universität Luzern, Kultur-und Sozialwissenschaftliche Fakultät, Politikwissenschaftliches Seminar p. 28 pp 1-28, even though this author stresses that the concept of MPs can be traced back to the beginning of communitarisation of migration and asylum policy under the Maastricht Treaty of 1991.

¹¹⁶European Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee “The Global Approach to Migration and Mobility” COM (2011) 743 final (18 November 2011). The Global Approach to Migration and Mobility (GAMM) aspires to be Europe’s overarching framework for external migration policy, complementary to foreign policy and development. The approach addresses four thematic dimensions promoting labour migration, addressing irregular migration, and enhancing the links between migration and development and those in need of international protection.

¹¹⁷ European Commission Staff Working Document “Mobility Partnerships as a tool of the Global Approach to Migration” SEC (2009) 1240 final (18 September 2009).

¹¹⁸ European Commission COM (2011) 743 final, *Op.Cit.* p. 7.

¹¹⁹Parkes, R. (2009) “EU Mobility Partnerships: a Model of Policy Coordination?” 11 European Journal of Migration and Law p. 328; pp. 321-345.

horizontal by nature, touching upon these different levels; therefore, migration that is based on an external component of “triple-win” (country of origin, host country and individual migrant) can benefit those who are at risk of displacement. The programme encompasses a cohesive migration approach between receiving, sending, and transit countries within Europe, Africa, and along the Mediterranean, with the word *partnership* referring to the mutual commitments and shared responsibility, management, and ownership of the initiative for all parties involved, which includes the mutual respect for human rights and fundamental freedoms.¹²⁰ In 2008, two pilots were launched, one with Cape Verde¹²¹ and another with the Republic of Moldova.¹²² A year later, another was launched with Georgia,¹²³ followed by Armenia¹²⁴ in 2011. Initial talks with Senegal stalled in 2009. More recently, however, the EU has made further progress in establishing MPs with Tunisia¹²⁵ and Morocco.¹²⁶

4.4.3 Temporal Scope of Application

MPs are not international agreements; they are political declarations¹²⁷ of a non-legally binding nature and “are little more than declarations of intent.”¹²⁸ Authors have in fact criticized their relevance due to their lack of enforcement (or foreseen sanctions in case of non-compliance) in particular when the EU has the competence to sign legally binding agreements in the field of migration.¹²⁹ But their value cannot be minimized. They are in a sense an innovative soft law tool, as they allow third states and EU Member states to adhere according to their own set of policy objectives; because of this, its *modus operandi* is pragmatic. It is a cooperation agreement based on flexibility for all parties concerned. This

¹²⁰ See for e.g. Council of the European Union (2008) “Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde” Doc 9460/08 ADD 2 (21 May 2008). All common declarations with thirds countries indicate the areas of action of the MPs (emphasis added): “REAFFIRMING the strong commitment of the Signatories to conclude and effectively implement future agreements concerning the facilitation of the issuance of visas and the readmission of persons residing without authorisation; HAVE DECIDED to establish a Mobility Partnership *based on reciprocity*. The Mobility Partnership will have the purpose of *better managing legal and labour migration*, including circular and temporary migration, within the limits of the respective competences of the Signatories and taking into account their labour market and socio-economic situation, enhancing cooperation on migration and development and preventing and combating irregular migration and trafficking in and smuggling of human beings, as well as promoting an effective return and readmission policy, while respecting human rights and the relevant international instruments for the protection of refugees and taking into account the situation of individual migrants and the socioeconomic development of the Signatories.”

¹²¹ *Ibid.*

¹²² Council of the European Union (2008) “Joint Declaration on a Mobility Partnership between the European Union and the Republic of Moldova Doc 9460/08 ADD1 (21 May 2008).

¹²³ Council of the European Union (2009) “Joint Declaration on a Mobility Partnership between the European Union and Georgia” Doc 16396/09 (20 November 2009).

¹²⁴ Council of the European Union (2011) “Joint Declaration on a Mobility Partnership between the European Union and Armenia” Doc 14963/11 ADD1 (6 October 2011).

¹²⁵ European Commission (2014) Political Declaration “Déclaration conjointe pour le Partenariat de Mobilité entre la Tunisie, l’Union Européenne et ses Etats membres participants” (3 March 2014).

¹²⁶ Council of the European Union (2011) “Joint Declaration on a Mobility Partnership between the European Union and the Kingdom of Morocco” Doc 6139/13 ADD1 Rev 3 (3 June 2013).

¹²⁷ Signed by the Community, the Presidency of the EU, interested Member states and the respective third partner country.

¹²⁸ Parkes (2009) *Op. Cit.* p. 331.

¹²⁹ See TFEU Article 79(3); See for e.g. Parkes (2009) *Op. Cit.* p. 331. Hernández i Sagrera, R. & Carrera S. (2009) “The Externalisation of the EU’s Labour Immigration Policy. Towards Mobility or Insecurity Partnerships” CEPS Working Document No. 312 p. 106; 138.

elasticity would allow states of origin, for example to target labour mobility schemes to reduce or avoid environmentally induced displacement. Based on dialogue and cooperation with third states, the scheme is, however, biased towards the initiatives of the EU and Member states.¹³⁰ But an additional effort is made by outlining a list of projects (of general or more specific character) to operationalize the agreement, while at the same time guaranteeing the added value for third countries of voluntariness and open-ended character because, once signed, they remain accessible to the participation of other interested Member states. Progress is monitored through a scoreboard (which contains information regarding all initiatives, partners involved, contact points, funding source, applicable timeframe and evaluation indicators) and facilitated by local structures with the participation of EU institutions.¹³¹ They reflect a new form of governance (for our purpose, of preventative nature) that could be used for the benefit of EDPs.¹³²

4.4.4 Territorial Scope of Application

Under this framework, non-EU citizens should be granted better access to work opportunities within the EU. As previously mentioned, this externality has been influenced by the international agenda and the EU political landscape shift towards the migration-development nexus and mobility under the adage “more for more approach.”¹³³

While the externality element of MPs is visible, it is true that the EU has internal motivations when choosing countries to engage with, particularly when these may constitute illegal migration corridors into the EU.¹³⁴ It is not by coincidence that the negotiations are started at the European level by Directorate General Internal Affairs, in cooperation with the EU’s Presidency after receiving the green light from the Council’s High-level group of Asylum and Migration, which identifies partnering countries.¹³⁵ Plus, these long-term cooperation

¹³⁰ See for e.g. statements made in any of the Joint Mobility Partnerships *Op. Cit.* (emphasis added): “The EU intends to contribute to implementing the partnership through Community and Member States’ initiatives, *within the limits of their respective competences*, in conformity with the applicable procedures and with due regard for the *principle of Community preference*.”

¹³¹ See European Commission SWD (2009) 1240 final *Op. Cit.* p. 4. Referring to how the actual implementation and progress is facilitated by pre-existing local structures in Cape Verde through “Groupe Local de Suivi” and in Moldova through a cooperation platform created for the effect (both comprising of national authorities; representatives of Member state Diplomatic Missions and an EC Delegation).

¹³² See generally, Sgro, A. (2013) “Les Déplacés de L’Environnement à L’Épreuve de la Catégorisation en Droit de L’Union Européenne” Thèse pour le Doctorat en Droit Public Université de Nice Sophia Antipolis UFR Institut Du Droit de la Paix et du Développement p. 379; Balzacq, T. (2009) “The Frontiers of Governance: Understanding the External Dimension of EU Justice and Home Affairs” in T. Balzacq (ed.) “The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security” (Palgrave 2009) p. 1-32. For a discussion on governance within the EU’s external dimension of Justice and Home Affairs.

¹³³ See European Commission COM (2011) 743 *Op. Cit.* p. 11.

¹³⁴ For example, Cape Verde and Moldova are both crucial transit points and/or sources for irregular migrants coming primarily from West Africa and Eastern Europe.

¹³⁵ See Nellen-Stucky (2010) *Op. Cit.* p.20. See also Council of the European Union (2010) “The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens” 2010/C 115/01 para. 6.1.1 Already in 2010 under the Stockholm Programme, the Council of the European Union had pointed out that (emphasis added): “The principal focus should remain non cooperation with the most relevant countries in *Africa and Eastern and South-Eastern Europe*. Dialogue and cooperation should be further developed also with other countries and regions such as those in *Asia and Latin America* on the basis of the identification of *common interests and challenges*.”

agreements for migration management are grounded (and aim to add value to) in existing bilateral frameworks (with which the EU has already established ties).¹³⁶ Therefore, neighbouring countries to the EU have been identified as priority partners. The context of the Arab Spring gave leeway, for example, to open negotiations with countries such as Morocco, Tunisia, and Egypt, given the “significant movements of people.”¹³⁷ The launching of these partnerships can nevertheless be interesting for environmentally displaced persons coming from the south of the Mediterranean or that cross the territory since this area is considered an EDP hotspot.¹³⁸

4.4.5 Substantive Scope of Application

It is interesting to acknowledge that MPs do have a human rights foundation because they are aimed at being migrant-centred. This means that MPs, in the wording of the European Commission, are to be based on “the principle that the migrant is at the core of the analysis and all action, and must be empowered to gain access to safe mobility.”¹³⁹ This is pertinent for EDPs. All MPs that have been established aim at operationalising the GAMM, which underscored the human rights of migrants as a cross-cutting issue.¹⁴⁰ Looking at the joint declarations with the different partnering countries, there are continuous references throughout the documents to the rights and protection of migrants, which should be “concrete and effective.”¹⁴¹ Importantly, labour mobility in the form of temporary and circular migration is to be facilitated to third-country nationals.¹⁴² Among other things, migrants have the right to be informed on the opportunities for legal migration, employment conditions, on-the-job opportunities and the labour market situation.¹⁴³ For this purpose, visa facilitation measures should be put into place.¹⁴⁴ The right to education is particularly highlighted either

¹³⁶Council of the European Union *Op. Cit.* 2010/C 115/01 para. 6.1.1 of the the Stockholm Programme. Examples of cooperation included projects such as Seahorse Networks funded by AENEAS that included other African West African countries as well as Cape Verde or the EU Border Assistance Mission to Moldova and Ukraine (EUBAM).

¹³⁷ European Commission (2011) “Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions A dialogue for migration, mobility and security with the southern Mediterranean countries” COM (2011) 292 final (24 May 2011).

¹³⁸Sgro (2013) *Op. Cit.* p.382.

¹³⁹ European Commission COM (2011) 743 final *Op. Cit.* p.7.

¹⁴⁰ *Ibid.*

¹⁴¹ Council of the European Union (2011) Doc 14963/11 ADD1 *Op. Cit.* Joint Mobility Partnership with Armenia p.3 para.1.

¹⁴² *Ibid.* See also Council of the European Union (2009) Doc16396/09 *Op. Cit.* Joint Mobility Partnership with Georgia p.9; Council of the European Union (2008) Doc 9460/08 ADD1 *Op. Cit.* Joint Mobility Partnership with Moldova p.11 para.4;

¹⁴³ Council of the European Union (2011) Doc 14963/11 ADD1 *Op. Cit.* Joint Mobility Partnership with Armenia p.4 para.3; Council of the European Union (2008) Doc 9460/08 ADD2 *Op. Cit.* Joint Mobility Partnership with Cape Verde p.3 para.1.

¹⁴⁴ Council of the European Union (2011) Doc 14963/11 ADD1 *Op. Cit.* Joint Mobility Partnership with Armenia pp. 2, 4; Council of the European Union (2008) Doc 9460/08 ADD2 *Op. Cit.* Joint Mobility Partnership with Cape Verde p.3 para.5 p. 10; Council of the European Union (2009) Doc16396/09 *Op. Cit.* Joint Mobility Partnership with Georgia pp.2, 4; Council of the European Union (2008) (Doc 9460/08 ADD1 *Op. Cit.* Joint Mobility Partnership with Moldova pp.2,3; Council of the European Union (2013) Doc 6139/13 ADD1 Rev 3 *Op. Cit.* Joint Mobility Partnership with the Kingdom of Morocco p.5 paras.1,2,3.

in the form of access to formal education and/or vocational training in the host states.¹⁴⁵ Even though no reference is made to equal treatment between nationals of Member states and from the originating country, efforts must be made to safeguard social rights (e.g. social security) on a mutual basis for legal migrants and their families, including (upon return) the portability of social security rights.¹⁴⁶

To ensure integration of migrants in the host labour market, in some cases, pre-departure training is also foreseen (e.g. language education).¹⁴⁷ Unlike the Seasonal Workers Directive, reintegration measures for migrants in the country of origin upon return are particularly underscored (e.g., training and assistance in finding jobs; protection and assistance for vulnerable categories of returning migrants or to develop entrepreneurship actions).¹⁴⁸ Rather unfortunate, however, is the fact that the MPs declarations and the projects attached have a narrowed touch base. They are generally targeted at just the skilled and highly skilled migrants. This can reduce their potential impact for countries at risk of environmental degradation that could possibly benefit (like low-skilled workers) from temporary and circular migration schemes.

4.5 Seeking the Added Protection Value of Mobility Partnerships

The Positives

It is true that MPs do offer a particular status and framework for the mobility of non-EU nationals, and by extension to EDPs particularly when linked to a development approach. Amongst other advantages, the flexibility character of the arrangements does seem to allow states to be adjusted to tailor-made programmes according to their needs. The real challenge of MPs is when states' interests and motivations to take part are uncoordinated.

The Negatives

Contrary to its original purpose, MPs do not consist predominantly in the development of

¹⁴⁵Council of the European Union (2011) Doc 14963/11 ADD1 *Op. Cit.* Joint Mobility Partnership with Armenia p.11; Council of the European Union (2009) Doc16396/09 *Op. Cit.* Joint Mobility Partnership with Georgia p.3 para.4; Council of the European Union (2008) Doc 9460/08 ADD2 *Op. Cit.* Joint Mobility Partnership with Cape Verde p.9; Council of the European Union (2008) Doc 9460/08 ADD1 *Op. Cit.* Joint Mobility Partnership with Moldova p.14 para.8 i; Council of the European Union (2013) (Doc 6139/13 ADD1 Rev 3) *Op. Cit.* Joint Mobility Partnership with the Kingdom of Morocco p.5 , 9 para. 23.

¹⁴⁶Council of the European Union (2011) Doc 14963/11 ADD1 *Op. Cit.* Joint Mobility Partnership with Armenia p.4 para5, p. 10, 11. Council of the European Union (2009) Doc16396/09 *Op. Cit.* Joint Mobility Partnership with Georgia p.10; ; Council of the European Union (2008) Doc 9460/08 ADD1 *Op. Cit.* Joint Mobility Partnership with Moldova p.4 para. 6 p. 13 para. 7 p. 14; Council of the European Union (2013) (Doc 6139/13 ADD1 Rev 3) *Op. Cit.* Joint Mobility Partnership with the Kingdom of Morocco p.6 paras. 10, 11.

¹⁴⁷Council of the European Union (2009) Doc16396/09 *Op. Cit.* Joint Mobility Partnership with Georgia p.3 para.4; Council of the European Union (2011) Doc 14963/11 ADD1 *Op. Cit.* Joint Mobility Partnership with Armenia p. 3 para 4; Council of the European Union (2008) Doc 9460/08 ADD2 *Op. Cit.* Joint Mobility Partnership with Cape Verde p. 8 para.2.

¹⁴⁸Council of the European Union (2011) Doc 14963/11 ADD1 *Op. Cit.* Joint Mobility Partnership with Armenia p. 5 para. 8, pp. 11,12; Council of the European Union (2008) Doc 9460/08 ADD2 *Op. Cit.* Joint Mobility Partnership with Cape Verde p. 4 para.8; Council of the European Union (2009) Doc16396/09 *Op. Cit.* Joint Mobility Partnership with Georgia p. 4 para. 9 pp. 8,9,10; Council of the European Union (2008) Doc 9460/08 ADD1) *Op. Cit.* Joint Mobility Partnership with Moldova p. 4 para.6 pp.8,10,11,12; Council of the European Union (2013) Doc 6139/13 ADD1 Rev 3 *Op. Cit.* Joint Mobility Partnership with the Kingdom of Morocco p.8 paras. 18, 20 p. 9.

circular migration schemes. Rather, in the light of some critics, they consist of a restrictive and coercive approach imposed by the EU.¹⁴⁹ They are selective and based on conditionality. In other words, they are concluded with third countries, once certain conditions are met, such as cooperation on illegal migration and the existence of “effective mechanisms for readmission.”¹⁵⁰ In reality they serve more as capacity-building mechanisms in migration management rather than fostering labour mobility. It was this mismatch of interests that eventually stalled the negotiations between Senegal and the EU.¹⁵¹ Instead of a dialogue, the EU tends to engage in a paternalistic monologue of security and control towards fragile third states that have little power to influence the negotiations and the content of such undertakings.¹⁵²

Restlow explains that the imbalance between labour migration arrangements and actions against irregular migration is partly due to two factors: first, the economic crisis in Europe, and second the division of competences within the EU.¹⁵³ Member states still possess competence in determining labour migration policies and have been reluctant to open legal entry channels to labour migrants. Without a true commitment from Member states, the European Commission cannot offer attractive initiatives to open negotiations with third countries, but can only facilitate the visa process to certain categories of people. Readmissions and border control actions remain unattractive tradeoffs for third countries. This begs the question of the real potential outreach of MPs for EDPs.

An Archetypal Comprehensive Tool?

From our perspective, MPs do represent an archetypal comprehensive tool that has the potential to increase the leverage on both sides (the EU and third countries) if it targets local and regional needs by matching labour offer and demand through the appropriate migration schemes i.e., if they are migrant-centred. From the above analysis, MPs do aim to shift away from the hitherto restrictive approach followed by the European Union because they are focused on dialogue and on the positive potential that migration (if properly managed) may have on the development of both sending and receiving countries. Upon the evaluation of the

¹⁴⁹ See for e.g. Maroukis, T. & Triandafyllidou, A. (2013) “Mobility Partnerships: A Convincing toll for the EU’s Global Approach to Migration?” Policy Paper No.76 (Notre-Europe Jacques Delors Institute February 2013); Chou, M.H. (2009) “European Union Migration Strategy towards West-Africa: the Origin and Outlook of “Mobility Partnerships with Cape Verde and Senegal” Paper for EUSA Biennial International Conference “Information and Ideas on the European Union”, (Los Angeles, 23-25 April 2009). The author stresses that two distinct lines of reasoning (i.e. repressive and progressive) lay behind the strategy used in establishing MPs particularly towards African countries.

¹⁵⁰ European Commission *Op. Cit.* COM (2006) 735 Final.

¹⁵¹ See Chou, M-H. & Girbert, M. (2012) “The EU-Senegal mobility partnership from launch to suspension and negotiation failure.” 8 *Journal of Contemporary European Research*, 4 pp. 408-427. For a comprehensive account of the negotiation process of MPs between Senegal and the EU and the uncoordinated interests of the parties involved.

¹⁵² See Triandafyllidou, A. (2009) “Attempting the impossible? The Prospects and Limits of Mobility Partnerships and Circular Migration” ELIAMEP Thesis 1/2009 pp. 1-4 . For an account on the power relation imbalance between signatory countries.

¹⁵³ Council of the European Union (2014) “The Hague Programme: strengthening freedom, security and justice in the European Union” 16054/04 (13 December 2004) para 1.4. This was clearly outlined by the heads of state and government, who unanimously proclaimed that “the determination of volumes and of admission of labour migrants is a competence of the Member States.”

scheme in 2009 the European Commission recognized the need to take into account, more appropriately, the objectives of partnering third countries.¹⁵⁴ The somewhat inherent human rights dimension of MPs translated in effective and concrete mobility measures (for e.g. of circular migration both for high and low-skilled migrants, channeling remittances to investment plans, language courses or professional training) can reinforce their value and potential for EDPs. Importantly, MPs should respond to migrants' group vulnerabilities, employment aspirations, and family situations, and increase skills and provide equal treatment that respects, protects and fulfils their human rights. Circular migration can be used as a source of transcultural capital to create and promote mutual business for sending and receiving countries. Looking beyond the externalisation migration control agenda of the EU and into a rights-based approach one, targeted MPs, may be a form of sustainable adaptation that prevents displacement with limited costs and great benefits.

4.6 Benefits and Challenges of a Proactive Approach to Protection

The construction of a proactive system of protection for EDPs is built upon the idea of fostering labour mobility to promote migration as adaptation (i.e., by creating opportunities for migrants and in this way reducing environmentally induced displacement). Circular migration, for example, may be a way for a community to cope with changes in environmental conditions. For those who move, they can facilitate livelihoods, and for those who remain, they can facilitate economic value through remittances (at the household and at national level).¹⁵⁵ Moreover, migration as an adaptation strategy may ease the pressure on resources at home, thereby enabling part of the population to remain for longer, avoiding the loss of human capital or "brain drain" situations. The previous sections outline the legal EU framework (Seasonal Workers Directive and Mobility Partnerships), which could potentially provide the operational archetype of such preventative protection enterprise for EDPs. Drawing upon state practices, bilateral pilot circular migration schemes can be replicated for the benefit of EDPs.

Although not without its own limitations, the human rights orientation of both the Seasonal Workers Directive and the MPs offer useful insights into how practical and effective measures could be oriented for the protection of those potentially affected by environmental factors. As previously touched upon, the EU human rights legal order is inspired by the ECHR and other international human rights instruments. Member states' power to restrict immigration and asylum is not unlimited, but it is shaped by international obligations and individual humanitarian traditions. The EU is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. More importantly, the legitimacy of any action taken under EU law is based on the founding principle of the protection of human rights. Therefore, there needs to be a fundamental change at the international and regional levels on how we see migration - an opportunity - (rather than a

¹⁵⁴European Commission SEC (2009) 1240 *Op. Cit.* p. 3.

¹⁵⁵ Julka, A. (2011) "Multidimensional Re-creation of Vulnerabilities and Potential Resilience in International Migration" *49 International Migration* pp. 30,34, 41 pp. 30-49.

burden) to accommodate changes that result from environmental degradation.¹⁵⁶

If labour migration is to work as a preventative displacement protection measure under the Seasonal Workers Directive or the MPs, it cannot be a “managed” concept. In other words circular migration schemes under those legal instruments must seek the renewed interest and the context of destination countries. “Branded” measures to promote mobility for EDPs can be subsumed to ordinary migration schemes, but these must be targeted towards the interests of EDPs. One-size-fits-all labour migration schemes may risk being harmful for both sending and receiving countries. Finally, it is important to stress that migration is also not a silver bullet and can be maladaptive, thus resulting in a more unstable way of life.¹⁵⁷ Indeed, migration itself is “a complex process, involving not only the migrants themselves but also their relationship to their states and of destination.”¹⁵⁸

Yet, labour migration (supported by the different hard law and soft law mechanisms) can be seen as an extension of an *ex ante and* also complementary protection solution for EDPs.¹⁵⁹ This will not erode but rather reinforce the existing protection space under the EU Qualification or Temporary Directives for those who could potentially reach EU borders. The possibilities of *ex post* protection dynamics for EDPs will be explored in the next sections.

5. Consolidating a Reactive Approach to Protection for Environmental Displacement

In this section we explore the consolidation of a reactive approach to protection for EDPs. Given that international refugee law as it stands today is of limited application for people who have crossed national borders due to environmental stressors, as seen in Chapter 5, there is a need to explore regional protection paths that are complementary; i.e., that allow states to provide protection against return on human rights grounds. At the EU level, an example of complementary protection is subsidiary protection granted by what is commonly known as the Qualification Directive (QD).¹⁶⁰ Subsidiary protection is a right of individuals who qualify for it (particularly on *non-refoulement* grounds) but who are not refugees within the meaning of CRSR. The perusal of this type of protection may be relevant for those who are forced to move on a permanent or quasi-permanent basis where the prospects of return to their country of origin may be slim. This can include

¹⁵⁶Tacoli (2009) *Op. Cit.* p. 513.

¹⁵⁷See Mc Leman, R. (2009) “Climate Change and Adaptive Human migration: Lessons from rural North America” in N. Adger, I. Lorenzoni & K. O’Brien (eds.) “Adapating to Climate Change” (Oxford University Press) pp. 296-310. The author alerts us to the consciousness one must put on migration as an adapatation strategy.

¹⁵⁸ U.N. Secretary General (2006) “International Migration and Development: Report of the Secretary General” U.N. Doc. 60/871 (18 May 2006) para. 151.

¹⁵⁹ See generally, Long, K. (2009) “Extending Protection? Labour migration and durable solutions for refugees.” New issues in Refugee Research No. 176 UNHCR (October 2009).

¹⁶⁰ Directive of European Parliament and of the Council (2004) “On standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted” 2004/83/EC (29 April 2004) or Qualification Directive. This Directive has been recently recasted by Directive of the European Parliament and of the Council (2011) 2011/95/EU (13 December 2011).

people affected by slow-onset environmental change patterns, such as desertification, sea-level rise, or certain situations of natural disasters.¹⁶¹

For people who are forced to cross an international border due to fast-onset environmental change, temporary protection measures may be a path to explore. While temporary protection measures vary worldwide, a provisional type of protection is granted for situations of mass influx under the EU Temporary Protection Directive. This legal mechanism ensures emergency protection from *refoulement* and great manoeuvring to protect EDPs.

5.1 Subsidiary Protection under the European Qualification Directive

5.1.1 Rationale

The QD is described as the first supranational codification of a complementary protection regime.¹⁶² It provided for a legal obligation for Member States to grant subsidiary protection to persons who do not qualify for refugee status. Its development is rooted in the Tampere Summit in 1999¹⁶³ in the context of the European Union discussions to establish a Common European Asylum System.¹⁶⁴ This legal impetus was the result of the innovative evolution of the European asylum field built in the 1997 Amsterdam Treaty (Article 63 (2) (a)).¹⁶⁵ The QD aims at regulating the minimum eligibility standards of protection of third-country nationals or stateless persons, conferring upon them a status as refugees or as persons who otherwise need international protection; i.e., subsidiary protection.

Its intention was to stop ad hoc and discretionary national practices of complementary protection, creating a harmonized system.¹⁶⁶ While in some countries the concept of subsidiary protection had not been fully developed,¹⁶⁷ in others the concept was “geometrically variable.”¹⁶⁸ Thus, the establishment of a common ground of subsidiary

¹⁶¹European Commission, SWD (2013) 138 Final, *Op. Cit.* p. 18.

¹⁶² See McAdam, J. (2005) “The European Qualification Directive: The Creation of a Subsidiary Protection Regime.” 17 *International Journal of Refugee Law* 3 p. 462 pp.461-516.

¹⁶³ Council of the European Union (1999) “Tampere European Council 15 and 16 October 1999 Presidency Conclusions” available from: http://www.europarl.europa.eu/summits/tam_en.htm [accessed 13 May 2014].

¹⁶⁴ Directive 2011/95/EU *Op. Cit.* Article 1.

¹⁶⁵ Consolidated version of the Treaty Establishing the European Community, signed 2 October 1997 Amsterdam Treaty Article 63 (2) (a) reads: “The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (2) measures on refugees and displaced persons within the following areas: (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection.”

¹⁶⁶ See generally, McAdam (2005) *Op. Cit.* p.463. The initial development of the concept of subsidiary protection at the EU level was initially launched in March 1997 by a Danish proposal to the Migration and Asylum working parties. An additional proposal on the same subject was tabled a month later by the Dutch Presidency. But it was only under the Austrian Presidency in 1998 that the concept was generally defined: “protection for persons from third states who do not fall within the scope of the Geneva Convention but who still have the need of some international protection.”

¹⁶⁷ See Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum (2003) 5293/03 ASILE 3 (20 January 2003) p. 4.

¹⁶⁸ See generally, Bouteillet-Paquet, D. (2002) “Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A critical analysis of the legislation of the Member States of the European Union in D. Bouteillet-

protection was deemed necessary to avoid fragmentation of the Common European Asylum System and prevent further protection gaps. Originally, the key premise was that “harmonisation would be based on the valid international human rights instruments relevant to subsidiary protection.”¹⁶⁹ In this context, McAdam explains that the role of human rights law was seen as complementary: to enlarge the categories of persons to whom international protection is owed to beyond Article 1A(2) of the Refugee Convention.¹⁷⁰ The reality is that the inclusion and then exclusion of EDPs as a category of persons in need of protection somewhat fades the role of human rights law in the process up to QD, as we shall see in the next section.

5.1.2 *Travaux Préparatoires*: Inclusion and Exclusion of Environmentally Displaced Persons as Category of Persons in Need of Protection

The *travaux préparatoires* leading to the QD show that the first reminiscent liberal view to broadening the categories of subsidiary protection can be attributed to the European Commission in a note to the European Council¹⁷¹ Member states in particular were asked to elaborate their positions on whether environmental disasters constituted a ground for subsidiary protection.

Interestingly, when the European Commission tabled its first proposition of the Directive in October 2011, its personal scope reached

“an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm:

- (a) torture or inhuman or degrading treatment or punishment; or
- (b) violation of a human right, sufficiently severe to engage the Member State’s international obligations; or
- (c) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights.”¹⁷²

Having human rights as leitmotif, the legal terminology used in the provision was wide-ranging and inclusive, thus even enlarging the personal scope of protection to possibly

Paquet (ed.) “Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?” (Bruylant) p. 226 sq. For detailed legislation in Member states. Prior to the QD only 12 EU Member state countries had legislation governing complementary protection. Countries like Belgium, Ireland and the UK had no definition of subsidiary protection and used discretionary measures to complement the 1951 Refugee Convention.

¹⁶⁹Council of the European Union (1999) Note from the Presidency to Asylum Working Party “Discussion Paper on Subsidiary Protection” 13167/99 ASILE 41 (19 November 1999) p. 2. Particular mention was made to ECHR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.

¹⁷⁰McAdam (2005) *Op. Cit.* p. 465.

¹⁷¹Council of the European Union (1999) “Reflection documents on subsidiary protection.” Note of the Presidency to the ASILE group, Doc 13167/99 (19 November 1999) p. 6.

¹⁷²European Commission (2001) “Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection” COM (2001) 510 final 2001/0207(CNS).

include EDPs.¹⁷³ It contained room for overstretching the entitlement to subsidiary protection as a result of human rights violations even if conflict does not take place.¹⁷⁴ Kolmannskog and Myrstad have argued that point c) can be interpreted to include EDPs when the government is unable or unwilling to provide protection. They refer to Cyclone Nargis in 2008 as a case example, whereas France and other countries blamed the Burmese junta for human rights violations for rejecting international aid and for not being able to provide adequate disaster relief to their population.¹⁷⁵

However, the examination later portrayed by the Asylum Working Party¹⁷⁶ and the consequent reservations by the delegations in June and July 2002 show the reluctance of states in expanding the content of the beneficiaries of subsidiary protection (and by extension EDPs).¹⁷⁷ Despite this, a compromised proposal presented in September 2002 actually included an additional point d) to Article 15, foreseeing

“acts or treatment outside the scope of litra a-c in an applicant’s country of origin or in the case of stateless persons, his or her country of formal habitual residence, when such acts or treatment are sufficiently severe to entitle the applicant to protection against refoulement in accordance with the international obligations of Member States.”¹⁷⁸

The idea was to cater subsidiary protection for violations of human rights beyond the ones deriving from Article 3 of the ECHR and Article 1 of the 6th Protocol to the ECHR and in line with the international obligations of Member states. An expansive provision would have given states the possibility not to side-line people who are in need of international protection including EDPs. However, some governments were displeased with the vagueness of the

¹⁷³ *Ibid.* Chapter IV Even if the European Commission appeared non-committal on the precise legal foundation for the establishment of the Article 15 obligation: “No specific EU acquis directly related to subsidiary or complementary protection exists but the ECHR and the case law of the European Court on Human Rights provides for a legally binding framework, which informed the choice of categories of beneficiaries in this Proposal. The categories and definitions of persons listed in this Chapter do not create new classes of persons that Member States are obliged to protect but represent a clarification and codification of existing practice. The three categories(...) are drawn much from the disparate Member State practices and are believed to encompass the best ones.” The reference to ECHR and the ECtHR as legally binding frameworks which informed the elaboration of the proposal and the choice of categories is relevant to see how inclusive the initial proposal intended to be.

¹⁷⁴ Piotrowicz, R. & Van Eck, C. (2004) “Subsidiary Protection and Primary Rights” 53 *International and Comparative Law Quarterly* p. 114 pp.107-138.

¹⁷⁵ Kolmannskog, V. & Myrstad, F. (2009) “Environmental Displacement in European Asylum Law” 11 *European Journal of Migration and Law* p. 320 pp. 313-326

¹⁷⁶ The Committee of Permanent Representatives of the Governments of the Member States to the European Union (known as 'Coreper') prepares all of the Council of the EU's work, with the exception of some agricultural matters. It is supported by more than 150 highly specialised working parties and committees, known as the 'Council preparatory bodies'. These bodies examine legislative proposals, carry out studies and other preparatory work which prepares the ground for Council decisions. The Asylum Working Party deals with asylum issues under the Justice and Home Affairs banner available from: <http://www.consilium.europa.eu/council/committees-and-working-parties?tab=At-a-glance&lang=en> [accessed 15 May 2014].

¹⁷⁷ See Council of the European Union (2002) Doc 9038/02 and Council of the European Union (2002) Doc 10596/02 for the reservations made by Member States.

¹⁷⁸ European Commission COM (2001) 510 *Op. Cit.*

provision and its wide margin of interpretation manoeuvring.¹⁷⁹ This was later peremptorily clarified by the Council under the terminology “acts of treatment” (emphasis added): “it is ensured that *only man-made situations*, and not for instance situations arising natural disasters or situations of famine, will lead to the granting of subsidiary protection.”¹⁸⁰ The Council was peremptory in affirming that natural disasters were excluded from the scope of the Directive, but (perhaps naively) affirmed that man-made situations should be taken into account. Given that it has been overly stated by experts and academics that climate change is a man-made condition, people who are or will be affected by their adverse effects can, in principle, benefit from subsidiary protection.¹⁸¹ The nervousness around paragraph d) was so intense that in the end, the Council decided to eliminate it in October 2002.¹⁸² Further reassurance on this point, was made by adding recital 26 to the final version of the Directive, clarifying that “risks to which a population of a country or a section of the population is generally exposed to normally do not create in themselves an individual threat which would qualify as serious harm.”¹⁸³ It seems apparent that the final version of the QD clearly wanted to signal and delimit the protection regime discarding EDPs.

From the foregoing discussions, we can see that the shrinking of protection options for EDPs is a result of the EU’s politicised and harmonised approach of concepts and methods of subsidiary protection (based on best national practices). In reality, the EU QD does not create per se a new system of protection it is rather a “regionally-specific political manifestation of a broader legal concept”¹⁸⁴ undermining the very essence of the EU’s harmonisation objective.¹⁸⁵ The result is the creation and the implicit recognition of other persons not included under subsidiary protection but in need of international protection under international law and current Member state practice. During the discussions of the QD proposal at the European Parliament, Jean Lambert highlighted precisely this point in the report (emphasis added):

“While current definitions of asylum seekers deal only with those suffering persecution, or the fear of it, at the hands of human agents, *we are ignoring the growing number of people who are forced to leave their homes due to poverty and environmental degradation. These people equally need protection and there is an urgent need to devise the appropriate instruments and policies of prevention. Maybe that should provide step 2 of a Common European Asylum Policy.*”¹⁸⁶

¹⁷⁹ Council of the European Union Doc 11356/02.

¹⁸⁰ Council of the European Union (2002) Presidency note to the Strategic Committee on Immigration, Frontiers and Asylum Doc 12148/02. Interinstitutional File: 2001/02017 (20 September 2002) p. 7.

¹⁸¹ U.N.’s International Strategy for Disaster Risk Reduction (2008) *Op. Cit.* p. 1 (emphasis added) said that “[i]nformation on climate change is building a new perception of disasters as of our own making. The increase in storms, droughts and other hazards expected to arise from the accumulation of greenhouse gases in the atmosphere as a result of industrialisation and deforestation is clearly not natural.”

¹⁸² Council of the European Union (2002) Doc 12619/02.

¹⁸³ See Directive 2004/83/EC *Op. Cit.* para. 26 and recast Council Directive 2011/95/EU *Op. Cit.* para. 35.

¹⁸⁴ McAdam (2005) *Op. Cit.* p. 465.

¹⁸⁵ See Directive 2004/83/EC *Op. Cit.* para. 25 and recast Council Directive 2011/95/EU *Op. Cit.* para. 34. The Preamble of the recital reads: “It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection.”

¹⁸⁶ European Parliament (2003) “On the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise

The final version of the QD shows a rather strict scope of application as Member states were shy about broadening the categories of persons entitled to subsidiary protection.¹⁸⁷

Nevertheless, the lack of latitude of the QD is not an impediment to analysing its content and potential application to EDPs for two reasons. The first is that the eligibility criteria for granting subsidiary protection are mostly based on human rights instruments (on the basis of which subsidiary protection developed);¹⁸⁸ this is reflected in Article 19 (2) of the EU Charter of Fundamental Rights.¹⁸⁹ According to this provision, “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” This leaves the door open to expansive (albeit pragmatically limited) interpretation options to broaden the category of persons eligible for subsidiary protection including for EDPs.

Second, in line with the EU’s harmonization objective, the (potential) exclusion of EDPs protection under the current QD will show that a protection gap still needs to be bridged if the EU is to follow the standards established under Article 78 (1) TFEU, which refers to “offering an appropriate status to any third country national requiring international protection” and additionally follow Member states practices.

5.1.3 Personal Scope of Subsidiary Protection

As previously explained, the QD does not impose a new *rationae personae* protection obligation on Member states but rather clarifies and codifies existing international and community obligations and Member state practice. Under Article 2 of the QD, a third-country nationals and stateless persons are eligible for subsidiary protection if they would face a real risk of suffering serious harm as a result of that forced removal from EU territory. By outlining what serious harm is, the Directive limits the scope of application. Article 15 of the QD defines serious harm as:

- (a) the death penalty or execution,
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or
- (c) serious and individual threat to a civilian’s life of person by reason of indiscriminate violence in situations of international or internal armed conflict.”

Both paragraphs (a) and (b) are based on the obligations that transpire from general human rights provisions under Articles 2 and 3 of the ECHR, Article 7 of the ICCPR, and Article 3 of the CAT, whereas paragraph (c) is linked to common humanitarian principles¹⁹⁰ (that

need international protection” COM(2001) 510 - C5-0573/2001 - 2001/0207(CNS) Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs Rapporteur: Jean Lambert (11 December 2003) p. 25.

¹⁸⁷ See Directive 2004/83/EC *Op. Cit.* and recast Council Directive 2011/95/EU *Op. Cit.* Article 15.

¹⁸⁸ Article 3 ECHR; Article 3 CAT and Article 7 ICCPR. See Directive 2004/83/EC *Op. Cit.* para. 25 and recast Directive 2011/95/EU *Op. Cit.* para. 34 Preamble of recital reads: “Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.”

¹⁸⁹ European Union”Charter of Fundamental Rights of the European Union” 7 December 2000, Official Journal of the European Communities, OJ C364/01 (18 December 2000).

¹⁹⁰ International Committee of the Red Cross (ICRC), “Geneva Convention Relative to the Protection of Civilian Persons in Time of War” (Fourth Geneva Convention), 75 UNTS 287 (12 August 1949).

nonetheless are linked to international obligations of Member states regarding *non-refoulement*).¹⁹¹ Under these instruments states are prohibited from transferring an individual (national or non-national, including migrants and refugees within a state's jurisdiction or at the state's border) by force to a state where he or she would be persecuted or exposed to torture; cruel, inhumane or degrading treatment; or would face serious risk of violation of human rights (see Chapter 5, Section 4.4).

Within treaty law and customary law, non-return and non-rejection at the border "implies at least temporary admission to determine an individual's status."¹⁹² In human rights law, it contains an expanded prohibition of return such that "an individual is protected whenever there exists a real risk of violation of one of the individual's core fundamental rights in the country of destination."¹⁹³ It therefore constitutes the application of a preventative method to the protection of human rights. Notably, the value of the EU QD is that it specifically grants a status to non-returnable individuals, which may potentially include EDPs.

Despite criticisms, the rules on granting or revoking each form of status have not been amended under a recent recast of QD.¹⁹⁴ Nevertheless, the two last grounds are the most appropriate in the context of environmental displacement and will be discussed below. It must be recalled however, that Article 15 is only considered when an examination of a claim under the Refugee Convention has concluded that the applicant does not qualify for refugee status or if the applicant purposely applies for subsidiary protection.¹⁹⁵

5.1.4 Seeking the Added Protection Value of Article 15(b)

In order to determine the focus of protection of Article 15(b), one must remember the fact that freedom from torture and inhuman and degrading treatment under Article 3 of the ECHR enjoys absolute protection, unlike other human rights. It also has been the most effective basis for obtaining protection in individual cases, including cases of expulsion.¹⁹⁶ Article 15(b) also prohibits derogation (among others) from Article 2 (the right to life) of the ECHR.

¹⁹¹ See Directive 2004/83/EC *Op. Cit.* para. 25 and para. 36; Directive 2011/95/EU (recast) *Op. Cit.* para. 34. The Preamble of the recital reads: "Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States." Para. 48 of the recital reads: "the implementation of the Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of international obligations of Member States regarding *non-refoulement* (...)."

¹⁹² Goodwin-Gill, G. & McAdam, J. (2007) "The Refugee in International Law" (Oxford University Press) p.215.

¹⁹³ Vandova, V. (2010) "Protection of non-citizens against removal under international human rights law" in A. Edwards and C. Ferstman (eds.) "Human security and non citizens: law, policy and International affairs" (Cambridge University Press) p. 495.

¹⁹⁴ See generally, European Council on Refugees and Exiles (ECRE) (2010) "Comments from ECRE on the European Commission's Proposal to recast the Qualification Directive" (March 2010) *available online* <http://www.ecre.org/component/downloads/downloads/128.html> [accessed 15 May 2014] "Comments from UNHCR the European Commission's Proposal to recast the Qualification Directive" (July 2010) *available online*: <http://www.unhcr.org/4c5037f99.pdf> (accessed 15 May 2014).

¹⁹⁵ See generally, McAdam (2005) *Op. Cit.* P. 474; Council Directive 2004/83/EC *Op. Cit.* Article 2 (e) and recast Council Directive 2011/95/EU *Op. Cit.* Article 2 (f) reads (emphasis added) "Person eligible for subsidiary protection" means a third country national or stateless person *who does not qualify as a refugee* (...)."

¹⁹⁶ ECtHR, *Chahal v United Kingdom*, Application No.22414/93 (15 November 1996); ECtHR, *Ahmed v Austria* Application No. 25964/94 (17 December 1996).

In Chapter 4 we outlined the risk that EDPs face due to environmental change from loss of life, family, possessions, and livelihoods to the collateral effects of poverty, diseases, poor health, and starvation. This evidently impacts a number of codified rights at the same time.¹⁹⁷ The joint reading of Article 15(b) of the QD and Article 3 of the ECHR can be a source of protection for EDPs who feel they cannot return to their countries of origin since the conditions, they could encounter put them in a situation where survival would be either very risky or impossible.¹⁹⁸ Both the right to life (Article 2) and the right guaranteed under Article 3 ECHR are non-derogable even in time of war or other public emergencies.¹⁹⁹ As previously mentioned, protection under Article 3 is, therefore, more extensive than that secured under Articles 32 and 33 of the UN Refugee Convention, which allow exceptions to removal on the basis of national security and public order (see Chapter 5, Section 4.4).²⁰⁰

The significance of the ECHR has been highlighted by the CJEU; in an opinion in 1996, the court held that respect for human rights is a condition of the lawfulness of EU acts²⁰¹ (including the QD). The ECHR is widely regarded as a minimum standard for the protection of human rights within the EU. This is exemplified by the CJEU's willingness to follow the case law of the ECtHR,²⁰² as it makes regular reference to it.²⁰³ The main advantage of this is the development of a more coherent approach and legal certainty to the interpretation of the content of fundamental rights and ultimately the protection of the human person. Notably, the CJEU has on many occasions emphasised that "in interpreting a provision of community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which is part."²⁰⁴ Accordingly, a progressive interpretation of Article 15 to protect EDPs can arguably be justified.²⁰⁵

¹⁹⁷ See ECtHR, *Hilal v UK* Application No. 45276/99 (06 March 2001).

¹⁹⁸ See generally, McAdam, J. (2012) "Climate Change, Forced Migration and International Law" (Oxford University Press) p. 64, advocating that this can be a pertinent scenario.

¹⁹⁹ ECtHR, *Chahal v United Kingdom* Op. Cit. paras. 76, 79-81.

²⁰⁰ Arai-Takahashi, Y. (2002) "Uneven, but in the Direction of Effectiveness - Anticipatory Ill-Treatment under Article 3 ECHR" 20 Netherlands Quarterly of Human Rights p. 6 pp. 5-27. The author refers to the ECtHR *Chahal v United Kingdom* where the government's request for implied limitations on Article 3 was refused by the court.

²⁰¹ CJEU, Opinion 2/94 Pursuant to Article 228 of the EC Treaty- Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms" ECR I-1759 (28 March 1996) para. 34.

²⁰² Jacobs, F. (2007) "The Sovereignty of Law" (Cambridge) pp. 54-55 As stated by the former Advocate General, "The CJEU [...] has followed scrupulously the case-law of the European Court of Human Rights"; Callewaert, J. (2009) "The European Convention on Human Rights and European Union Law: a long way to harmony" 6 European Human Rights Review pp.768-783. On the evolving relationship between the ECtHR and the CJEU.

²⁰³ See for e.g., CJEU, Case 374/87 *Orkem v Commission* (18 October 1989) ECR 3283, para. 30; CJEU, Joined Cases 46/87 and 227/88 *Hoechst v Commission* ECR 2859, para. 13 (21 September 1989); CJEU, Case C-13/94 *P. v S. and Cornwall County Council* (30 April 1996) ECR I-2143, para. 16; CJEU, Case C-185/95 *P. Baustahlgewerbe v Commission* (17 December 1998) ECR I-8417, para. 29; CJEU, Case C-7/98 *Dieter Krombach v André Bamburski* (28 March 2000) ECR I-1935; CJEU, Case C-112/00 *Schmidberger v Austria* (12 June 2003) ECR I-5659, para. 79; CJEU, Joined Cases C-402/05 P and 415/05 *Kadi and Al Barakat International Foundation v Council and Commission* (03 September 2008) ECR I-6351, paras. 256, 344, 360, 363, 368.

²⁰⁴ See CJEU, Case 292/82 *Merck v Hauptzollamt Hamburg-Jonas* (17 November 1983) ECR 3781 para.12; CJEU, Case 337/82 *St. Nikolaus Brennerei und Likörfabrik, Gustav Kniepf-Melde GmbH v Hauptzollamt*

5.1.5 The Act of Ill-Treatment: The *Soering* Threshold and its Progress

Since the judgment of the *Soering* case,²⁰⁶ the ECtHR has recognized under Article 3 the “inherent obligation” of prohibition of removal of a person who is threatened or would face a real risk of torture, inhumane or degrading treatment. In this respect, the court has been eloquent in affirming that removal in the given situation would “plainly be contrary to the spirit and intendment of the Article” and would “hardly be compatible with the underlying values of the Convention.”²⁰⁷ While the judgement did not concern an asylum-seeker, the principle enunciated was later applied to the first case before the ECHR concerning the refusal of asylum *Cruz Varas and Others v Sweden*²⁰⁸ and has had a great impact on the rights of asylum seekers in Europe.

To reach the *degrading* threshold, the act “was such as to arouse in its victims feelings of fear anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance.”²⁰⁹ Recent scholarship has acknowledged that degrading treatment may *inter alia* include the denial of a lack of basic services, such as health, social security, education, housing, and child protection, which are essential for a dignified life when a degree of severity is encountered.²¹⁰ The court has candidly admitted in a judgement in 1979, that even though (emphasis added):

“the [European] Convention [on Human Rights] sets forths what are essentially civil and political rights, *many of them have implications of social and economic nature*. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights, should not be decisive factor against such an interpretation; *there is no water-tight division* separating that sphere from the field covered by the Convention.”²¹¹

Under *Soering*, the court made it clear that the assessment of the level of severity cannot be made in absolute terms, but all circumstances of the case need to be taken into account. Thus

Krefeld ECR 1051, para. 10 (21 February 1984); CJEU, Case C-223/98 *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.* ECR I-7081, para. 23 (14 October 1999); CJEU, Case C-17/03 *Vereniging voor Energie, Milieu en Water and Others v Directeur van de Dienst uitvoering en toezicht energie* ECR I-4983, para 41 (07 June 2005); CJEU, Case T-576/08 *Federal Republic of Germany v European Commission* ECR 2011, para 105 (13 April 2011).

²⁰⁵ Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952 ETS 9 (ECHR, as amended by Protocol 14) See Article 59 (2). The ECHR now allows for the EU to accede the Convention, where formally it was only open for states to become parties. Nevertheless, it is worth reinforcing once again that all Member states are party to the ECHR.

²⁰⁶ ECtHR, *Soering v United Kingdom*, Application No. 14038/88 (07 July 1989) hereinafter referred in the text as *Soering*. German national Jens Soering was imprisoned in the UK and facing extradition to the U.S. where he would be trialled for murder and would face the death penalty. The applicant alleged that, if sentenced to death he would be exposed to the so called “death row phenomenon,” which allegedly amounted to breaching Article 3 ECHR.

²⁰⁷ ECtHR, *Soering v United Kingdom Op. Cit.* paras .88, 89, 91.

²⁰⁸ ECtHR, *Cruz Varas and Others v Sweden*, Application No.15576/89 (20 March 1991).

²⁰⁹ ECtHR, *Soering v United Kingdom, Op. Cit.* para. 100; in the same line or argument, see ECtHR, *Pretty v UK*, Application No. 2346/02 (29 April 2002) para.52.

²¹⁰ Blake, N. & Husain, R. (2003) “Immigration, Asylum and hHuman Rights (Oxford University Press) p. 297; Schachter, O. (1983) “Human Dignity as a Normative Concept” 77 *American Society of International Law* 4 pp. 848,851 pp.848-854.

²¹¹ ECtHR, *Airey v Ireland*, Application No.6289/73 (9 October 1979) para. 26.

contingent, “it depends on all circumstances of each case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.”²¹² The provision curbs the expelling state by prohibiting removal where the individual fears ill-treatment by the receiving state. The provision also forbids removal if the person fears ill-treatment in the receiving state by a non-state actor; i.e. when the receiving state has failed²¹³ or is unable to obviate the risk by providing adequate protection.²¹⁴ This situation, however, seems to eliminate liability of the government where the person might be ill-treated.

In this context, the court notes not only the implied principle of *non-refoulement* regarding Articles 2 and 3, but also its expanding implications on other rights under the convention.²¹⁵ It states:

“The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action, which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”

5.1.5.1 The Assessment of ‘Speculative’ Ill-Treatment

In its decisions, the ECtHR has provided, as Arai-Takahashi rightly claims, “clear guidelines for the recognition of “speculative ill-treatment”.”²¹⁶ In other words, the court does not require certitude of the occurrence of ill-treatment and considers a “real risk” to be enough to fulfil the requirements under Article 3. This is of particular relevance because the court has acknowledged that the risk does not refer to a degree of uncertainty: risk needs not be of high probability or even probable for the applicant to be subjected to ill-treatment, thus precluding an unsafe return.²¹⁷

²¹² ECtHR, *Soering v United Kingdom*, *Op. Cit.* para. 100 . See also ECtHR, *Ireland v UK*, Application No. 5310/71 (18 January 1978) para. 162; and ECtHR, *N v United Kingdom*, Application no. 26565/05 (27 May 2008) para. 29.

²¹³ This has been generally accepted in the ECtHR, *Altun v Federal Republic of Germany* (1983) and by the UK’s supreme court (ex-House of Lords) under *Regina v Secretary of State for the Home Department*, ex parte Bagdanavicius (2005) para. 8 (Lord Brown).

²¹⁴ ECtHR, *H.L.R. v France*, Application No. 24573/94 (29 April 1997) para. 40 where the applicant was challenging a deportation to Colombia because of the threat of drug traffickers in that country.

²¹⁵ ECtHR, *Soering v United Kingdom*, *Op. Cit.* paras. 91 and 113; see also ECtHR, *Cruz Varas v Sweden*, *Op. Cit.* paras 69-70; ECtHR, *Vilvarajah v United Kingdom* Application Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87) (30 October 1991) para. 103.

²¹⁶ Arai-Takahashi (2002) *Op. Cit.* p. 8.

²¹⁷ ECtHR *Soering v United Kingdom Op. Cit.* para.88. In this context, the court notes (emphasis added): “The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that “no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The fact that a

The risk of sending a person back to their country of origin when the conditions in that state are of such a critical degree (drought, soil erosion, inexistent shelter or other basic services) that would put in peril an individual's life can potentially amount to ill or degrading treatment and be worthy of protection under Article 15(b) of the QD. These risks are real, of a probable nature, and likely to impact protected human rights.

In its analysis, however, the court does state that it requires “substantial grounds” for believing that the person concerned could be a victim of a breach of Article 3 (facing a “real risk” of ill treatment). The “substantial grounds” argument of this “real risk” can be justified based on the overall country conditions, individual circumstances of the applicant, and a description of the human rights at risk.²¹⁸

When determining the degree of risk, it seems that the court was motivated to some extent by the wording of Article 3 of the CAT, which says “substantial grounds for believing that he would be in danger of being subjected to torture.” In the Soering judgement, the court stressed the similarity between the obligations under Article 3 of CAT and Article 3 of the ECHR by affirming:

“[t]he fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention.”²¹⁹

The court adopted the phraseology “substantial grounds” rather than “danger” in its own risk assessment. This term was substituted with the expression *real risk*. According to Alleweldt,

specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in *the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).*”

²¹⁸ The ECtHR does generally have to take into account to establish “substantial grounds” the past experience of the applicant, its profile, its credibility, the wide-spread and mass human rights violations in the country of origin, and the continuity of the risk. *See Ibid.* para. 91 (emphasis added): “In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action, which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”

²¹⁹ ECtHR, *Soering v United Kingdom Op. Cit.* para. 88.

such a distinction was made because the court must have intended to accept not only “dangers” but also “very small risks” as long as they are not unreal. This is because, the author explains, there was a need to make Article 3 practical and effective. The real risk is interpreted in such a way to determine that even small risks of probabilities are not neglected, ensuring protection against return to all individuals from ill-treatment. In this regard, the effectiveness principle justifies a broad interpretation of the expression *real risk*.²²⁰

Accordingly, the reading of the right to be protected against removal in the case of threat of ill treatment is evolving. The progressive interpretation of what constitutes ill-treatment based on a human rights approach²²¹ is key to substantiating a protection claim under the QD for EDPs, and the ECtHR increasingly demonstrates this approach. The obligations of host states in potentially providing protection cannot be dismissed. Risks are hardly “unreal,” and every risk (even if small) is in fact, a “real” one.²²²

As the court admits:

“[c]ertainly, “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions”; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3).”²²³

For example, the restriction placed by Article 3 on states’ freedom of action was extended in *D. v United Kingdom*²²⁴ on the expulsion intention to St. Kitts of a drug courier dying of AIDS. The court considered that the removal of this individual would amount to “inhumane treatment” due to the unavailability of basic health services, social and family ties or work prospects in his country of origin. Despite the acknowledgement by the judiciary of the “exceptional circumstances” of the case, its progressive interpretation is reflected on the grounds that the court:

“must reserve itself a sufficient level of flexibility to address the application of that Article (art. 3) in other contexts which might arise. (...) To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection.”²²⁵

Yet, in a later case, *Bensaid v United Kingdom*²²⁶ the court decided in the opposite direction sustaining that that the deportation to Algeria of a patient suffering from schizophrenia exposing him to inadequate medical care did not breach Articles 3 (prohibition of removal of a person who is threatened or would face a real risk of torture, inhumane or degrading treatment), 8 (right private and family life), or 13 (right to an effective remedy) of the ECHR.

²²⁰ Alleweldt, R. (1993) “Protection Against Expulsion Under Article 3 of the European Convention on Human Rights,” 4 European Journal of International Law p. 366, pp.360-376.

²²¹ McAdam (2012) *Op. Cit.* p. 89.

²²² Alleweldt (1993) *Op. Cit.*

²²³ ECtHR, *Soering v United Kingdom Op. Cit.* para. 102.

²²⁴ ECtHR, *D. v United Kingdom* Application No. 30240/96 (2 May 1997)

²²⁵ *Ibid.* para. 49

²²⁶ ECtHR, *Bensaid v United Kingdom* Application No. 44599/98 (6 May 2001)

In a dissenting opinion, however, Judge Sir Nicolas Bratza joined by judges Costa and Greve, affirm that, given the evidence before the court, there existed:

“powerful and compelling humanitarian considerations in the present case which would justify and merit reconsideration by the national authorities of the decision to move the applicant to Algeria.”²²⁷

The joint reading of *D. v United Kingdom* and the dissenting opinions of *Bensaid v United Kingdom* in a way determine the progressive court’s view that the only legal protection that an individual has from removal against ill treatment is prevention.²²⁸ Further, the court takes a holistic view of what prevention entails: the (in)direct responsibility of protection from the expelling state (and not his dependence on services *per se*) “where even the indirect attribution of responsibility to a third state might not be necessary.”²²⁹ In other words, there is an increasing acceptance of responsibility of harm or risk by the host state to protect the individual against ill-treatment due to the circumstances in the state of origin.

In *N. v United Kingdom*²³⁰ the development of the jurisprudence on socio-economic deprivation leading to a breach of Article 3 continued, but as a retrograding chapter. In this case, the ECHR reasoned that forcible return of the applicant, who was HIV-positive, to Uganda, where she would not have access to the medical treatment she required, did not give rise to violations of Articles 3 and 8 of the ECHR. The court sustained that the delivery of medical treatment is not an obligation of states under the ECHR since this is categorised as falling within the scope of social economic rights and outside the sphere of Article 3. Scholars like Battjes have since criticised this approach because the court focused on the economic effects of state parties to provide medical treatment to the applicant - a balancing exercise typical to the qualified rights in the ECHR, which allow interference in accordance with the law - rather than applying the standard approach to Article 3.²³¹

²²⁷ *Ibid.* p. 18 (Separate Opinion of Judge Sir Nicolas Bratza joined by judges Costa and Greve); See Scott, M. (2014) “Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?” 26 (3) International Journal of Refugee Law p. 418 pp. 404-432. The author notes regarding the scope of protection under Article 8 of the ECHR that despite the fact that the court went on to conclude that Article 8 was not breached since the threshold had not been met “Bensaid is an important judgement for claimants resisting expulsion owing in part to the fear of adverse environmental conditions in the receiving state as it establishes that the impact of expulsion to the receiving state on the claimant’s physical and moral integrity is a relevant consideration for Article 8. Although the judgement concerns in particular the impact of the claimant’s mental health, the concept of physical and moral integrity is inherently loose and would extend at least to the physical and mental impacts related to natural disasters (such as increased disease incident in the aftermath) as well as to the psychological impacts of living in the aftermath of a natural disaster.”

²²⁸ Cassese, A. (1989) “International Law in a Divided World” (Clarendon Press) pp. 128-129.

²²⁹ See Arai-Takahashi (2002) *Op. Cit.* p.12. Of notice, the ECtHR in *Soering v United Kingdom Op. Cit.* para. 91 points out “In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action, which has a direct consequence the exposure of an individual to proscribed ill-treatment.” The ECtHR in *Narsi v France Application No. 19465/92* (13 July 1995) further emphasises this point.

²³⁰ ECtHR, *N. v United Kingdom Application No. 26565/05* (27 May 2008).

²³¹ See Battjes, H. (2009) “In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 Reassessed” 22 Leiden Journal of International Law, 3 pp. 583 - 621; Clayton, G. (2008) “Article 3 Jurisprudence – *N. v UK*: Not a Truly Exceptional Case? 14 Immigration Law Digest 3 pp. 6-14.

More recently however, the progressive understanding of risk of ill-treatment and its linkage with general living conditions was reinforced under *MSS v Belgium and Greece*.²³² In this case, the applicant travelled from Afghanistan to Belgium via Greece, where his fingerprints were taken. In accordance with the Dublin Regulation²³³ (which allocate state responsibility for the assessment of asylum applications according to a list of objective criteria and prevents applicants from “asylum shopping”), Belgium opted to return the applicant to Greece. It was this action and his subsequent treatment that formed the basis for the application.

The court categorically condemned Belgium for returning the applicant to Greece, exposing him to a situation of “extreme material poverty” (...) “unable to cater for his most basic needs: food, hygiene and a place to live” (...) “given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece”²³⁴ thereby violating Article 3 ECHR. The court, however, does accept the general point that:

“Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home (...) Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.”²³⁵

However, the situation in Greece was characterised by members of the court as “particularly serious,”²³⁶ and Belgium should have not returned an individual to a country unable to provide decent material and human conditions to asylum-seekers which entered into positive law with the Greek legislation when they transposed the Reception Directive.²³⁷ This Directive lays down the minimum standards for the reception of asylum-seekers in the EU and was, according to the court, also allegedly breached by Greece.²³⁸ The case is a reminder of the importance of human rights protection in the context of the EU supranational legal order.

²³² ECtHR, *MSS v Belgium and Greece* Application No. 30696/09 (21 January 2011).

²³³ Council of the European Union (2003) “Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining and asylum application lodged in one of the Member States by a third-country national” (18 February 2003).

²³⁴ *Ibid.* paras. 252, 254, 259.

²³⁵ *Ibid.* para.249

²³⁶ *Ibid.* para. 254

²³⁷ Council of the European Union (2003) “Council Directive laying down minimum standards for the reception of asylum seekers” 2003/9/EC (27 January 2003). See Recital of Directive (5) and (6) where it clearly mentions that the Directive respects fundamental rights in particular those recognised by the the EU Charter of Fundamental Rights, and with respect to the treatment of persons falling within the scope of this Directive, Member states are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

²³⁸ ECtHR *MSS v Belgium and Greece Op. Cit.* para. 263. “The Court considers that the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible, because of their *inaction*, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the *victim of humiliating treatment showing a lack of respect for his dignity* and that this situation has, *without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation*. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

In addition to this, it is relevant to highlight that the judiciary points out the vulnerability of the applicant's status. With regards to this element:

“[t]he Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. (...) It notes the existence of a broad consensus at the international and European level concerning this need for special protection (...).”²³⁹

Interestingly, the court expresses a holistic understanding of the vulnerability of asylum seekers, in line with the conception of vulnerability that we preconize for EDPs (see Chapter 2, Section 4.2.4).²⁴⁰

The combination of these reasons could arguably, also be relevant for individuals where the prospects of return to their country of origin may be slim due to desertification, sea-level rise, or certain situations of disasters exposing them to a situation of extreme material poverty and violating Article 3 of the ECHR. Nevertheless, there would need to be determination of the threshold/substantial grounds, finding a breach by reference to a “situation of serious deprivation or want incompatible with human dignity.”²⁴¹

Overall, the following elements can be gleaned from the judgement and are relevant to consider if there has been a breach of Article 3 of the ECHR²⁴² and a corresponding *non-refoulement* obligation for EDPs by the host state: 1) the state of origin is unable or unwilling to deal with the situation of desertification, sea-level rise, or the outcome of a disaster and the applicant is dependent on the state for the resolution of that situation; 2) the applicant is faced with a situation of serious deprivation or want (such as food, hygiene and shelter) that is incompatible with human dignity;²⁴³ or 3) the applicant has a condition of pre-existing

²³⁹ ECtHR *MSS v Belgium and Greece Op. Cit.* para.251

²⁴⁰ *Ibid.* See Partly Concurring and Partly Dissenting Opinion of Judge Sajó p. 104-105 In this partly concurring and partly dissenting opinion, Judge Sajó somewhat disagreed with the Court's assertion on vulnerability since, in his view, asylum-seekers: “are not a group historically subjected to prejudice with lasting consequences, resulting in their social exclusion. In fact, they are not socially classified and consequently treated, as a group. For the reasons identified by the Court, it is possible that some or many asylum seekers are vulnerable (i.e. if they will feel a degree of deprivation more humiliating than the man on the Clapham omnibus), but this does not amount to a rebuttable presumption with regard to the members of the “class.” Asylum seekers are far from being homogeneous, if such group exists at all.” However, later in his discourse he acknowledges: “[a]sylum-seekers are generally at least *somewhat* vulnerable because of their past experiences and the fact that they live in a new and different environment; more importantly, the uncertainty about their future can make them vulnerable.”

²⁴¹ ECtHR *MSS v Belgium and Greece Op. Cit.* para. 253

²⁴² See Clayton, G. (2011) “Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*” 11 Human Rights Law Review 4 p. 769, pp. 758-773.

²⁴³ Schachter (1983) *Op. Cit.* pp. 851-852. Not wanting to develop elaborated discourses on the concept of human dignity, it is important to highlight the definition and meaning of Schachter regarding the concept of human dignity. He states, “human dignity involves a complex notion of the individual. It includes recognition of a distinct personal identity, reflecting individual autonomy and responsibility. It also embraces a recognition that the individual self is a part of larger collectivities and that they, too, must be considered in the meaning of the inherent dignity of the person.” Further, he adds: “[w]e are led more deeply into the analysis of human dignity when we consider its relation to the material needs of human beings and to the ideal of distributive justice. Few will dispute that a person in abject condition, deprived of adequate means of subsistence (...) suffers a profound affront to his sense of dignity and intrinsic worth. Economic and social arrangements cannot therefore be

vulnerability. In other words, they come from an identified geographical vulnerable area of collective entities, and that condition of pre-existing vulnerability may also be a result of the characteristics of a person or group, the circumstances, or the context and their capacity to resist and/or recover from environmental hazards.

In *Sufi and Elmi v United Kingdom*,²⁴⁴ the court applied the principles elaborated in *MSS* alerting to the context of “humanitarian crises,” alleging that, should the applicants be returned to Somalia to seek refuge (in particular asylum camps), they would be exposed to risky conditions (overcrowding shelters and limited water and sanitation facilities), contrary to Article 3.²⁴⁵ The court observes at paragraph 291:

“the Court considers that the conditions both in Afgooye Corridor and in Ddaab camps are sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention. IDPs in the Afgooye Corridor have very limited access to food and water, and shelter appears to be an emerging problem as landlords seek to exploit their predicament for profit. Although humanitarian assistance is available in the Dadaab camps, due to extreme overcrowding access to shelter, water and sanitation facilities is extremely limited. The inhabitants of both camps are vulnerable to violent crime, exploitation abuse and forcible recruitment. Moreover, the refugees living in- or, indeed, trying to get to the Dadaab camps - are also at risk of *refoulement* by the Kenyan authorities. Finally, the Court notes that the inhabitants of both camps have very little prospect of their situation improving within a reasonable timeframe.”

Furthermore, the court highlighted that, even though the crisis is primarily due to direct and indirect actions of the parties to the conflict, drought has contributed to the humanitarian crises.²⁴⁶ The judiciary takes a step further by acknowledging that environmental factors contribute overall (to the multi causality) to displacement and instability within a region. As a

excluded from a consideration of demands of dignity.” The author also highlights conduct and ideas antithetical or incompatible with respect for inherent dignity: 1) statements that demean and humiliate individuals or groups because of their origins, status or beliefs; 2) vilification or derision of beliefs that people hold in reverence, teaching that particular races, ethnic groups, or religions hold “ridiculous” or dangerous views, or otherwise belittling cherished beliefs; 3) denial of the capacity of a person to assert claims to basic rights; 4) punishment of detained persons by psychological or physical means that are meant to humiliate or ridicule their beliefs, origins or way of life; 5) dissemination of negative stereotypes of groups (ethnic, religious, social) and implications that members of such groups are inferior; 6) psychiatric treatment that involves coercive means to change beliefs or choices that are lawful; 7) restriction on opportunities and means to maintain family life by, for example, denying access to family members or requiring members of families to inform authorities of the acts of beliefs of others; 8) denial of educational or employment opportunities to persons on grounds of their membership in groups or their beliefs; 9) restrictions on equal participation in political processes because of beliefs, status or origin; 10) degrading living conditions and deprivation of basic needs; 11) abuse and insolence by officials, especially of persons suffering from infirmities or social opprobrium; and 12) medical treatment or hospital care insensitive to individual choice or requirements of the human personality.”

²⁴⁴ ECtHR *Sufi and Elmi v United Kingdom* Applications Nos. 8319/07 and 11449/07 (28 June 2011).

²⁴⁵ *Ibid.* para. 291.

²⁴⁶ *Ibid.* para. 194 (emphasis added): “On 3 February 2011 the Guardian reported that Somalia was once again facing a malnutrition crisis. An estimated 2.4 million people – about a third of Somalia’s population – required humanitarian aid after the failure of recent rains and *drought had overtaken insecurity as the leading cause of displacement*. In fact, it was reported that as a consequence of the drought, the exodus from conflict-racked Mogadishu in recent years had been reversed, with thousands of people now leaving the countryside for the capital in search of food and water.” Para. 195. “On 17 February 2011 the UN News Centre reported that *severe drought in Somalia was once again exacerbating the humanitarian crisis* with more people becoming internally displaced and others moving into refugee camps across the border in Kenya. Malnutrition rates among children, already above emergency levels in Somalia, had risen and an estimated 2.4 million people – 32 per cent of the country’s 7.2 million people – were in need of relief aid.”

point of example, the Darfur conflict is often cited as a result at least partly, of climate change. In the mid-1980s, drought and famine killed more than 1 million people and laid waste to livestock herds, leading to the fight over land between pastoralists and farmers. Subsequently, “a string of conflicts broke out as both sides armed themselves, and those conflicts created the template for today’s disaster.”²⁴⁷ The spread of the conflict in Darfur states as well as in the neighbouring states of Chad and the Central African Republic is an example of how environmental degradation is likely to increase conflict and where countries of origin and neighbouring countries are sometimes unable to adequately provide adequate protection for those environmentally displaced.²⁴⁸

Coming back to the the jurisprudential preview, it is true that neither *Sufi and Elmi* nor *MSS* is clear on “whether the claimant must be able to point to a risk of ill-treatment on return, or whether return to circumstances where she is unable to cater for her basis needs and there is no prospect of her situation improving within a reasonable timeframe would suffice.”²⁴⁹ However, a more progressive understanding of protection from *refoulement* under Article 3 merits that consideration should be given to all the three aforementioned elements in *MSS* if an individual is faced with a serious want and is unable to obtain food or shelter in situations of desertification, sea level rise, or disasters, which are incompatible with his human dignity. Without a doubt, there could be a resistance of host states to this interpretation, and they would require substantial evidence of the likely fate of the applicant, but as the effects of environmental change begin to be more visible, with some of them leading to conflict situations²⁵⁰ it is perhaps probable that removal in these circumstances could lead to a violation of Article 3.

On this point, it is important to concur with Harvey’s view:

“The ECtHR understands the nature of the responsibilities of states, it acknowledges that they enjoy the collective right in international law to regulate migration, but underlines in the case law that this must all be undertaken within the constraints of legality. On this point, it is for the court to determine, in dialogue with others, the interpretative horizons of human rights.”²⁵¹

5.1.6 Seeking the Added Protection Value of Article 15(c)

The possibility of protection of EDPs flowing from Article 15(c) of the QD is rather interesting because, in this case, the extension of protection is not particularly concerned with the cause of the armed conflict; therefore, it could be extensive to situations of

²⁴⁷ Borger, J. (2007) “Scorched” *The Guardian* (28 April 2007) available from:

<http://www.theguardian.com/environment/2007/apr/28/sudan.climatechange> [accessed 10 January 2013].

²⁴⁸ Moberg, K. (2009) “Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection” 94 *Iowa Law Review* p. 1134, pp.1107-1136.

²⁴⁹ Scott (2014) *Op. Cit.* p.416.

²⁵⁰ See generally, Nordås, R. & Gleditsch P. (2014) “Chapter 3 Climate Change and Conflict” in S. Hartard & W. Liebert (eds.) “Competition and Conflicts on Resource Use” 46 *Natural Resource Management and Policy* pp.21-38.

²⁵¹ Harvey, C. (2013) “Is Humanity Enough? Refugees, Asylum Seekers and the Rights Regime” in S. Juss & C. Harvey (eds.) “Contemporary Issues in Refugee Law” (Edward Elgar) p. 81.

environmental-related conflict²⁵² (where changes in the environment impact the lack of natural resources or means of subsistence, resulting in an armed conflict). This has led, however, to divergences resulting from the application of subsidiary protection against a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict” since Member states interpret various circumstances differently.²⁵³

Battjes has advanced the idea that Article 15(c) has a wider scope than Article 15(b). In contrast to Article 15(b), which requires substantial grounds for believing that a person would face a real risk of the relevant ill treatment (inhuman or degrading ill treatment or punishment), Article 15(c) only requires that the individual would face “a threat” of the relevant ill treatment.²⁵⁴ If one considers that the “threat” prerequisite is less rigorous in this case there is still another hurdle to overcome, as the “threat” referred in Article 15(c) must be one that amounts to a “serious and individual threat.” Because of this, there has been a tendency for Member states to narrow the scope of the provision, only accepting applicants who are personally targeted. in line with the restrictive approach of Recital 35 of the Recast QD.²⁵⁵ UNHCR has criticised this, as it renders protection offered by the QD as illusory (and contradictory to Article 15(c) as the provision provides protection from serious harm caused by “indiscriminate violence”). “However, that would appear to ignore that the proposition advanced by this recital [35] is qualified by the word “normally:” to say that widely shared risks do not “normally” create an individual threat must surely leave open the possibility that they “abnormally” create such a threat.”²⁵⁶

5.1.6.1 *Elgafagi* and the Importance of Context

In the first decision dealing with subsidiary protection, *Elgafagi v Staatssecretaris van Justitie*,²⁵⁷ the CJEU reasoned that Article 15(c) “covers a more general risk of harm” in

²⁵² Edwards, A. (2012) “Climate Change and Refugee Law” in R. Rayfuse & S. Scott (eds.) “International Law in the Era of Climate Change” (Edward Elgar Publishing) p. 72, pp. 58-83. The author notes that, with respect to the provision, even though it would not normally cover sporadic armed conflict events one should be aware that an overly strict link to humanitarian law of the meaning of “armed conflict” would defeat the protection purpose of the provision.

²⁵³ See European Council on Refugees and Exiles (2010) “Comments on the European Commission Proposal to recast the Qualification Directive” *Op. Cit.* p. 15. See also Garlic M. (2007) “UNHCR and the Implementation of the EC Qualification Directive” in “The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States K. Zwan (ed.) (Wolf Legal Publishers 2007) p. 62.

²⁵⁴ Battjes H. (2006) “European Asylum Law and International Law” (Martinus Nijhoff Publishers) p. 239, 240.

²⁵⁵ Directive 2004/83/EC *Op. Cit.* para. 26 and recast Directive 2011/95/EU *Op. Cit.* para. 35 reads: “Risks to which a population is generally exposed to do normally not create in themselves an individual threat which would qualify as serious harm.”

²⁵⁶ Storey, H. (2008) “EU Refugee Qualification Directive: a Brave New World?” 20 International Journal of Refugee Law 1 p. 34, pp.1-49.

²⁵⁷ CJEU, Case C-465/07 Grand Chamber *Elgafagi v Staatssecretaris van Justitie* (17 February 2009). Mr. and Mrs Elgafaji, both Iraqi nationals, submitted applications for temporary residence permits in the Netherlands, together with evidence seeking to prove the real risk to which they would be exposed if they were expelled to their country of origin. They stated, *inter alia*, that Mr Elgafaji, who is a Shiite Muslim, had worked for a British firm providing security for personnel transport between Baghdad Airport and the ‘green’ zone. They pointed out that Mr Elgafaji’s uncle, employed by the same firm, had been killed by militia. A short time later, threatening letter “death to collaborators” was fixed to the door of Mr. and Mrs. Elgafaji’s residence. However,

comparison to Article 15(b). In other words, the threat does not need to be particular to the victim because of his personal circumstances (e.g. membership of a particular group), but the term *individual* denotes the likelihood of the risk/threat.

Article 15(c) refers to threat to life or person rather than to a particular act of violence, covering a broader risk of harm than paragraph (b) of the provision. It relates to something, which has a particular context - that is, the situation of armed conflict or as a result of systematic or generalised violation of their human rights. Furthermore, the violence mentioned is an “indiscriminate one,” “a term which implies that it may extend to people irrespective of their personal circumstances.”²⁵⁸ Therefore, the court’s decision sustains a link between the level of indiscriminate violence typifying the armed conflict and the existence of (emphasis added) “substantial grounds for believing that a civilian’s return to his country would face *solely on the account of his presence* a real risk of being subject to the serious threat mentioned by Article 15(c),”²⁵⁹ although, the court did clarify that this would represent an “exceptional situation.”²⁶⁰

What is interesting from the decision, however (and relevant for EDPs), is the fact that the applicant needs not demonstrate that the threat to his life is a particularly targeted one due to factors specific to those circumstances. Rather, he needs only to show that the *overall context* in the country of origin is so exceptionally severe for him that he may qualify for subsidiary protection on the grounds of the general situation.²⁶¹ The court also held that “the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event he is returned to the relevant country, (...) may be taken into account.”²⁶² This interpretation should be commended because it rejects a level of individualisation and protects the applicant from serious risks that are situational, in full compliance with both international refugees and human rights law²⁶³ and the earlier understanding by the UNHCR that recommended deleting the term “individual” in Article 15(c) of the Directive.²⁶⁴

the Dutch authorities refused to grant temporary residence permits to the couple on the grounds that they had not proved the circumstances on which they were relying and, therefore, had not established the real risk of serious and individual threat to which they claimed to be exposed in their country of origin. Other cases concerning the QD include Joined Cases CJEU C-71/11 and C-99/11 *Germany v Y. and Z.* (5 September 2012); CJEU, Case C-277/11 *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (22 November 2012) and Case C-364/11 *Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kamel Ismail v Bevandorlasi es Allampolgarsagi Hivatal (BAH)* (19 December 2012).

²⁵⁸ CJEU, Case C-465/07 *Elgafagi v Staatssecretaris van Justitie Op. Cit.* para. 34.

²⁵⁹ *Ibid.* Para. 35. Later in para. 39 the CJEU affirmed that “the more the applicant is able to show that he is specifically affected by reason of factors particular to his own circumstances the lower level of individual violence required for him to be eligible for subsidiary protection.”

²⁶⁰ *Ibid.* para. 37

²⁶¹ *Ibid.* para.43

²⁶² *Ibid.* para. 40, first indent; Para. 35 refers to “relevant region.”

²⁶³ It is relevant to notice in this context that since the judgement in ECtHR, *Salah Sheek v The Netherlands*, Application No. 1948/04 (11 January 2007), the ECtHR no longer requires and individual to be particular targeted. See also ECtHR, *NA v United Kingdom*, Application No.25904/07 (17 July 2008); ECtHR, *Sufi and Elmi v United Kingdom*, Application Nos. 8319/07 and 1149/07 (28 June 2011).

²⁶⁴ The UNHCR had also recommended deleting the Recital 26 (now Recital 35 of the Recast QD).

It is important to note that, before the final grand chamber judgement in an opinion given by the Advocate General Poiares Maduro the previous year, he recalls the importance of ECHR in the community case law²⁶⁵ and the interpretation by the Strasbourg court a “dynamic interpretation which is always changing,”²⁶⁶ emphasising too, the relevance of the Charter of Fundamental Rights²⁶⁷ (Article 53 (3)) and the leeway for “extensive protection” under Union law.²⁶⁸

Borrowing the cumulative rationale of the judgement and the complementary interaction between both judicial orders (ECtHR and CJEU), emphasising a more dynamic interpretation of human rights towards the protection of the human person, it is reasonable to say that subsidiary protection should not be limited to situations of international or internal armed conflict, but could also cover situations of generalised violence and systematic human rights violations that do not equate to armed conflicts under international humanitarian law.²⁶⁹ This

²⁶⁵ CJEU, Case C-465/07 *Elgafagi v Staatssecretaris van Justitie* Opinion of AG Poiares Maduro (9 September 2008) ECR I-00921 para. 22 “In that regard, the ECHR is reproduced in Community case-law for two main reasons. First of all, because the commitment which each Member State has expressed to the Convention demonstrates the status of those rights as corresponding to values common to the Member States, which therefore necessarily wish to safeguard them and reproduce them in the context of the European Union. Next, the protection of fundamental rights in the Community legal order exists alongside other European systems of protection of fundamental rights. These include both systems developed within the national legal systems and those stemming from the ECHR. Each of those protection mechanisms certainly pursues objectives which are specific to it and the mechanisms are certainly constructed from legal instruments particular to them, but sometimes they apply none the less to the same facts. In such a context, it is important, for each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop those same fundamental rights in order not only to minimise the risk of conflicts, but also to begin a process of informal construction of a European area of protection of fundamental rights. The European area thus created will, largely, be the product of the various individual contributions from the different protection systems existing at the European level.”

²⁶⁶ *Ibid.* para. 20.

²⁶⁷ *Ibid.* para. 21. About the relevance of the Charter of Fundamental Rights the Advocate General states (emphasis added): “As I pointed out in a previous case, ‘although the charter in question cannot in itself constitute a sufficient legal basis for the creation of rights capable of being directly invoked by individuals, it is nevertheless not without effect as a criterion for the interpretation of the instruments protecting the rights mentioned in Article 6(2) EU. From that perspective, that charter may have a dual function. In the first place, it may create the presumption of the existence of a right which will then require confirmation of its existence either in the constitutional traditions common to the Member States or in the provisions of the ECHR. In the second place, where a right is identified as a fundamental right protected by the Community legal order, the Charter provides a particularly useful instrument for determining the content, scope and meaning to be given to that right.’”

²⁶⁸ *Ibid.* para. 23. “Accordingly, although the case-law of the Strasbourg court is not a binding source of interpretation of Community fundamental rights, it constitutes none the less a starting point for determining the content and scope of those rights within the European Union. Taking that case-law into account is, moreover, essential to ensure that the Union, founded on the principle of respect for human rights and fundamental freedoms, (6) will contribute to extending the protection of those rights in the European area. In that respect, it is perfectly natural that the Charter of Fundamental Rights, while acknowledging that it ‘contains rights which correspond to rights guaranteed by the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention’, (7) adds that ‘[t]his provision shall not prevent Union law providing more extensive protection’.”

²⁶⁹ This is corroborated in a comment by the European Council on Refugees and Exiles regarding the Qualification Directive. ECRE (2010) Comments on the Recast Qualification Directive *Op. Cit.* p. 17.

can include, for example, situations of sexual violence towards women and children in the aftermath of a disaster.²⁷⁰

Subsuming EDPs to the protection offered under Article 15(c) makes the states take into account human rights, the context and the geographical reach of the situation when deciding the application for subsidiary protection. Taking all these elements into account in a way echoes that protection cannot rely simply on the discretion of states to meet the protection needs of an individuals; protection goes beyond the threshold of mere solidarity into effective obligations of host states in granting subsidiary protection.

5.1.7 ‘Internal Flight Alternative’: Narrowing the Chances of Protection?

At a closer look, Article 8 of the QD seems to narrow protection, noting that subsidiary protection cannot be granted if a person is able to seek refuge in another part of their country (where there is no well-founded fear of being persecuted or no risk of suffering serious harm) and the person can reasonably be expected to stay in that region²⁷¹ (commonly known as “internal flight alternative”). Rather than offering legal protection, the Directive seems to act as a legal deterrence mechanism to keep an individual from seeking lawful protection in another country if needed, obscuring the very essence of international protection. Effectively, as long as EDPs could avail themselves of protection in their country of origin, an application for subsidiary protection of an EDP might be rejected. In practical terms, EDPs would only be protected unless their country would be entirely devastated by an environmental disaster or disappears over a period of time (in case for e.g. of small island states). It seems that people who are forced to leave from drought (despite the threat to their right to life) would not be protected, if they could seek refuge in another part of the country.

This view would favour protection to some and neglect others, even if they are at risk. The risk could be twofold: of an immediate nature – the inexistence of sufficient basic services such as shelter, food, education or health for everyone that flees and of a gradual nature - the predicted risk of climate or other environmental risks and degradation within that country or region, not to mention the humanitarian crises and even civil wars that this could potentially bring to an area competing over basic resources. In a situation like this, a threat against the right to life (a right from which no derogation is allowed) is evidently imminent. If these are

²⁷⁰ See Alston, M. (2015) “Women and Climate Change” (Routledge) pp. 155-156; Azad, A., Hossain, K. & Nasreen, M. (2013) “Flood-Induced Vulnerabilities and Problems Encountered by Women in Northern Bangladesh”⁴ *International Journal of Disaster Risk Science* 4 pp. 190–199; Sapir, D.G. (1993) “Natural and Man-made Disasters: the Vulnerability of women-headed households and children without families”⁴⁶ *World Health Statistics Quarterly Rapport Trimestriel de Statistiques Sanitaires Mondiales* 4 pp. 227-233.

²⁷¹ Article 8 of the Qualification Directive *Op. Cit* reads: “1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country. 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant. 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.”

the conditions to which a person would return, it seems that the person(s) would be unable to draw on protection from their country of origin.

It is important to highlight that Article 8 of the QD does mention, as part of the assessment of the application for international protection, Member states should determine whether the applicant can reasonably be expected to stay in that part of the country and furthermore, that all general circumstances prevailing in that part of the country and the personal circumstances of the applicant shall be taken into account at the time of taking the decision. This so called “reasonableness test” is a key tool that involves the assessment of the risk of future persecution and whether return would expose the individual to a real risk of suffering serious harm, and has been adopted by the vast majority of jurisdictions.²⁷² However, the concept of reasonableness is somewhat difficult to determine because of the conditions of both the country of origin and the host country of asylum. “These differences go to the core of global inequities resulting from instability and conflict, economic inequalities, the imperfect realization of human rights norms, and varying cultural expectations in different parts of the world.”²⁷³

The literature has highlighted that a “human rights approach to reasonableness”²⁷⁴ of return should evidently apply. This is “whether meaningful protection is otherwise available in that area” and if it is practically sustainable in economic and social terms. Accordingly, the suitable benchmark for such a determination should be “whether the claimant’s basic civil, political and socio-economic human rights, as expressed in the Refugee Convention and other major human rights instruments would be protected there.”²⁷⁵ The overruling by the Austrian Federal Constitutional Court of a decision from the asylum tribunal that a rejected asylum-seeker could be sent back to his native Pakistan reflects, to some extent, this line of thought. The court ruled that “the Tribunal had failed to examine under Article 3 ECHR whether the person concerned would have to go back to areas affected by the 2010 floods or would have been able to find a reasonable location alternative. Thus, while not determining the scope of Article 3 ECHR in cases of return to disaster-affected areas, the Constitutional court affirmed, albeit without further reasoning, the applicability, in principle, of the prohibition of inhumane treatment to such returns.”²⁷⁶ In other words, and as previously highlighted, human rights norms are an important yardstick in any assessment of reasonableness, leaving much scope to consolidate the current protection regime under scrutiny to apply to EDPs.

²⁷² Including within EU Member state countries.

²⁷³ Türk, V. & Nicholson, F. (2003) “Refugee Protection in International Law: an Overall perspective” in E. Feller, V. Türk & F. Nicholson (eds.) “Refugee protection in international law an overall perspective” (Cambridge University Press) p. 27.

²⁷⁴ Kelley, N. (2002) “Internal Flight/Relocation/Protection Alternative: Is it Reasonable?” 14 International Journal of Refugee Law 1 p.36 pp. 4-44.

²⁷⁵ *Ibid.*

²⁷⁶ Kälin, W. & Schrepfer, N. (2012), “Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches” (UNHCR, Division of International Protection) PPLA/2012/01, (February 2012) p. 36. The authors refer to the Bundesverfassungsgericht (Österreich) decision U84/11 (19 September 2011).

5.1.8 The Recast Qualification Directive: A Missed Opportunity for the Protection of Environmental Displacement

Despite inherent limitations, it seems that EDPs could benefit from subsidiary protection under the QD if one utilises human rights law as an important benchmark for the status determination procedure and a more dynamic interpretation methodology. Scholars have suggested that legal clarity would be achieved if an amendment were made to Article 15 of the Directive to include environmental disasters as a basis for the grant of subsidiary protection.²⁷⁷ Interestingly, countries like Cyprus, Finland, and Sweden already offer protection on the grounds of environmental disasters, which increasingly shows the urge to consolidate protection for EDPs. Others, like Denmark (even if not bound by the QD), have used their discretionary powers to grant humanitarian protection to people who could not return to their country of origin due to extreme weather events.²⁷⁸ See the table below.

Legal National Provisions Addressing Environmental Displacement

Cyprus

Article 29 (4) of the Refugee Law of 2000 states (emphasis added).²⁷⁹

“No refugee or a person with subsidiary protection status shall be deported to any country where his life or freedom will be endangered or he will be in danger of being subjected to torture or inhuman or degrading treatment or punishment or persecution for reasons of sex, race, religion, nationality membership of a particular group or political opinion or because of armed conflict or *environmental destruction*.”

Finland

Chapter 6 Section 88a (1) of the Aliens Act 301/2004 grants humanitarian protection if (emphasis added).²⁸⁰

²⁷⁷ Kraler, A. Cernei, T. & Noack, M. (2011) “Climate Refugees: Legal and Policy responses to environmentally induced migration” DG for Internal Policies Policy Department C: Citizen’s Rights and Constitutional Affairs Study (European Parliament) p. 74.

²⁷⁸ See Kolmannskog & Myrstad (2009) *Op. Cit.* p. 324. The authors state that, between 2001 and 2006 there was a presumption under the Danish Aliens Act of 24 August 2005 that families with young children should not be returned to Afghanistan because of extreme drought. This presumption was eventually extended to include landless people who came from geographical areas where the lack of food could put them in a vulnerable situation upon return. See Ahmed, K. (2009) “Environmental Refugees a New Wave” 76 *New Times*, (October 2009) p. 13. Citing Karsten Lauritzen, Member of the Danish Parliament Venstre, the Liberal Party that protection under the Danish aliens legislation on “survival grounds” has been only given in very exceptional cases. He says: “The present refugee convention shouldn’t change or be broader. It’s enough to protect the ones who are suffering. Instead of taking some of the refugees from areas affected by climate change, it’s a better idea to increase the aid of those areas for adaptation. Although environmental refugees are not recognized by the UN, Denmark has given refugee status to some people from affected areas on the grounds of the case for survival. But it’s a very small number of people and a very specific case.” See Jakuleviciene, L. (2010) “Is there a need for an extension of subsidiary protection in the European Union Qualification Directive?” 2 *Jurisprudence* 120 p. 224 pp.215-232. The author asserts that Member States should continue grant asylum purely on discretionary grounds for purely compassionate grounds (e.g. old age, integration into host country) because of the absence of internationally or regional defined standards on how to deal with these individuals. She gives the example of Norway who has been able to make a distinction under their Immigration Act (which entered into force in January 2010) between valid protection grounds and the more humanitarian reasons for granting residence.

²⁷⁹ See Cyprus (2000) “The Refugee Law of 2000: a Law to provide for the recognition of refugees and for the better Implementation of the Convention relating to the Status of Refugees” Article 29 (4). However, one should highlight that Article 3(1) clarifies that this protection is only available to persons who have already been granted refugee status or humanitarian protection.

“An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds under section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of formal habitual residence as a result of an *environmental catastrophe* or a bad security situation which may be due to an international or internal armed conflict or poor human rights situation.”

Sweden

Chapter 4 Section 2 (3) of the Aliens Act 2005 provides (emphasis added).²⁸¹

“In this Act “a person otherwise in need of protection” is an alien who in cases other than those referred to in Section 1 [Refugee based grounds] is outside the country of the alien’s nationality, as he or she is unable to return to the country of origin because of an *environmental disaster*.”

These bottom-up examples show that there is space to level up the protection for EDPs, in line with the EU’s consistency imperative between its policies, as well as the harmonisation objectives of the EU asylum policy in general and the QD in particular.

With the changes now under the EU Treaty (which gives competence to the EU to harmonise the asylum system (Article 78 TFEU)), the recast QD presented itself as a way to create a “uniform status” for beneficiaries of international protection “valid throughout the Union.”²⁸² “in the interest of clarity”²⁸³ and due to the continuing “disparities” between Member states “concerning the grant of protection and the forms that protection takes.”²⁸⁴ The purpose of the recast Directive, was not only to underline the principles of the previous Directive but concomitantly to achieve a “higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards.”²⁸⁵

Concerning the content of international protection status, it is true that there is an approximation of substantive rights of refugees and beneficiaries of subsidiary protection (including family unity,²⁸⁶ access to employment,²⁸⁷ access to accommodation,²⁸⁸ better standards for vulnerable persons,²⁸⁹ and healthcare²⁹⁰) and these are positive steps under the

²⁸⁰ Finish Aliens Act 301/2004 (amendments up to 458/2009 included) (30 April 2004).

²⁸¹ Swedish Aleins Act 2005/716 (amendments up to and including Swedish Code of Statutes 2006:220) (29 September 2005).

²⁸² Article 78 TFEU.

²⁸³ Qualification Directive *Op. Cit.* Recital 9.

²⁸⁴ *Ibid.* Recitals 1, 8.

²⁸⁵ *Ibid.* Recital 10.

²⁸⁶ *Ibid.* Article 23.

²⁸⁷ *Ibid.* Recitals 40, 42, Article 26.

²⁸⁸ *Ibid.* Article 32.

²⁸⁹ *Ibid.* Article 20(3) refers to vulnerable groups (such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence). Recitals 18, 19, 28, 38 and Article 20(5), and Article 31 all related to guaranteeing the “best interests of the child”. Recital 20, Article 4(3) (c), Article 9(2) (f) and Article 10(1) (d) are all gender-specific provisions.

²⁹⁰ *Ibid.* Recitals 40, 46, Article 30.

recast QD.²⁹¹ Important to highlight is that Article 7(2) states that protection must be “effective and of a non-temporary nature.” We can still question, however, if allowing Member states to continue differentiation between these two protection statuses (e.g., with regards to residence permit²⁹² and access to social welfare²⁹³ and integration facilities²⁹⁴) is in line with the principles of equality and non-discrimination guaranteed under the Charter of Fundamental Rights²⁹⁵ and the overall international human rights commitments of the Union and Member States.²⁹⁶

Under the recast QD the rules on granting and revoking each form of status have not been amended despite criticism of the continuous narrow interpretation that Member states have of Article 15.²⁹⁷ The recast QD was a missed opportunity to further enlarge the scope in consolidating and granting subsidiary protection, which could have included EDPs. This would have been in line with the opinion of the European Economic and Social Committee to the Recast QD, which suggested that “there is a need to agree on a way of expanding the range of people eligible for international protection: women suffering abuse, vulnerable people, environmental refugees, etc.”²⁹⁸ Importantly, it could have built on the European Parliaments’ earlier suggestion for a “step 2 of a Common European Asylum Policy.”²⁹⁹

Discretion continues to be left to Member states to grant subsidiary protection based on humanitarian grounds (for human rights violations other than the right to life or to physical

²⁹¹ See generally, Peers, S. (2012) “Legislative update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive.” 14 European Journal of Migration and Law p. 215 sq. pp. 199-221 for a detailed account and update of the content of international protection status under the recast QD.

²⁹² Qualification Directive *Op. Cit.* Article 24 (1) grants refugees a residence permit that is valid for at least three years and renewable. Article 24(2) grants beneficiaries of subsidiary protection and their family members a renewable residence permit that must be valid for at least one year and, in case of renewal, for at least two years. Of note is the fact that beneficiaries of subsidiary protection are now able to obtain long term residence permit status under Directive 2011/51 “amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection” (11 May 2011) and this status cannot be lost due to cessation of the underlying protection status. See generally, Peers S. (2012) “Transfer of Protection and EU Law” 24 International Journal of Refugee Law 3 pp. 527-560.

²⁹³ *Ibid.* Recital 45, Article 29.

²⁹⁴ *Ibid.* Recitals 40,41, 47, 48 and Article 34.

²⁹⁵ Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, (18 December 2000) OJ C364/1.

²⁹⁶ *Ibid.* Recital 39 does state however, that derogations must be justified (emphasis added): “While responding to the call of the Stockholm Programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with the *exception of derogations which are necessary and objectively justified*, beneficiaries of subsidiary protection status *should be granted the same rights and benefits* as those enjoyed by refugees under this Directive, and *should be subject to the same conditions of eligibility.*”

²⁹⁷ See generally, European Council on Refugees and Exiles (2010) “Comments from on the European Commission’s Proposal to recast the Qualification Directive” *Op. Cit.* and UNHCR (2010) “Comments on the European Commission’s Proposal to recast the Qualification Directive” *Op. Cit.* The European Commission had initially intended to propose amendments to Article 15 due to wide divergences in interpretation between Member states (see policy plan on asylum COM (2008) 360 17 June 2008) but ultimately decided not to declaring that the *Elgafagi* judgement provided the necessary interpretation (see Recast Proposal, Explanatory Memorandum).

²⁹⁸ European Economic and Social Committee Opinion (2009) “On the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) COM(2009) 554 final – 2009/0165 (COD) SOC 369 Rapporteur: Antonello Pezzini (28 April 2010)

²⁹⁹ European Parliament (2003) COM(2001) 510 - C5-0573/2001 - 2001/0207(CNS) Committee on Citizens' Freedoms and Rights, Justice and Home Affairs Rapporteur: Jean Lambert *Op. Cit.* p. 25.

integrity) with the same level of protection that the Directive recognises for selective categories.³⁰⁰ Discretion of Member States to introduce or retain more favourable human rights-based standards for a person eligible for subsidiary protection can also undermine the progression of harmonisation of the system of the European Asylum Policy and create wider protection gaps.

Concomitantly, it can reinforce the existence of other categories in need of international protection, alerting states to take action. The fact is that the eligibility criteria for subsidiary protection is important from the point of view of the beneficiaries because subsidiary protection is usually more permanent than the humanitarian protection status.³⁰¹

However, hope still remains for EDPs since the recast QD recognises that its implementation should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member states.³⁰²

5.1.9 Conclusion

One should not be carried away with clever legal argumentation because the reliance on human rights law as a means for protection of EDPs is far from consensus. There is an inherent limitation of the application of the QD for EDPs in particular under Articles 8 and 15 of the QD. Furthermore, at a more pragmatic level, a system of individual status determination may be unable to cope with potentially vast movements of persons as a result of environmental disaster situations. Despite these restraints, there is still wide interpretative space and harmonisation scope to consolidate protection towards EDPs if we rely on human rights instruments and legislative practices from Member states. Promoting a bottom-up consistency with existing legislative practices could open the door for a wider consolidation of protection for EDPs.

While the recast QD was a missed opportunity to recall the need for protection for people who are displaced by environmental factors, it is relevant to note that the EU legal political sphere has continuously highlighted the need to bridge the EDP protection gap. For example, the European Commission's staff working document on climate change, environmental degradation, and migration highlights that the QD does not include environmental degradation or climate change amongst the types of serious harm, which can afford granting such protection. However, the document admits that there are some EU Member states that

³⁰⁰ See European Council on Refugees and Exiles (2008) "Study on the Transposition of the Qualification Directive (October 2008) available from <http://www.ecre.org/component/downloads/downloads/131.html> [accessed 19 May 2013].

³⁰¹ Nykänen, E. (2012) "On the Lines of Demarcation and their Significance – the categories of complementary protection under the Finish Aliens Act" 30 Nordic Journal of Human Rights 2 p. 173, pp. 148-173. Under Finish legislation those receiving subsidiary protection receive a first residence permit, which is valid for four years. While the beneficiaries of humanitarian protection, when they receive their first residence permit, this one is only valid for a year.

³⁰² Qualification Directive *Op. Cit* Recital 48 and Article 38(2) stating that the European Commission shall report to the European Parliament and the Council on the application of this Directive at least every 5 years.

“have included in their legislation on refugee-type protection provisions concerning those who may be unable to return home owing to a natural disaster.”³⁰³

While states tend to limit their protection obligations to a minimum, jurisprudence is increasingly enlarging the understanding of the scope of protection. The cross-fertilisation between the two legal orders within European human rights law: - the ECHR and the European Union - opens doors to the solidification of protection for environmental displacement. In other words, there is no reason why Article 15(b) and(c) of the QD cannot be read purposively so as to ensure wider conformity with the case law and ensure EDPs protection. The development of the jurisprudence on socio-economic deprivation and the increasing judicial recognition of how environmental factors (such as drought or floods) contribute to the multicausality of displacement and instability in a region implies that a human rights approach to reasonableness of return to disaster-affected areas should evidently apply. The combined effects of the ECtHR and ECJ judgments may serve, therefore, as a “reference force” for the evolution and consolidation of EDP protection.

5.2 Temporary Protection under the European Union Temporary Protection Directive

5.2.1 Rationale

In Europe, another comparator response to protection to people displaced by sudden disasters or crises from a country or region is embodied in the Temporary Protection (TP) Directive.³⁰⁴ “Temporary Protection must be understood as a complementary system to the ‘European arrangements of asylum’ devised to make it work correctly in emergency situations that demanded a singular regulatory treatment; a suitable regulation which could grasp the phenomenon completely.”³⁰⁵ This exceptional emergency protection mechanism was especially designed for sudden mass-influx situations from third countries (e.g., armed conflict, endemic violence, or generalized human rights violations) in the aftermath of the former Yugoslavian wars of the 1990’s.³⁰⁶ TP is not meant to replace the institution of asylum but rather to offer immediate humanitarian protection to large groups of people who have been forced to flee their homes.

The TP Directive is the first piece of legislation in the area of asylum that was launched under the Amsterdam treaty.³⁰⁷ The Directive aims at providing protection to those people

³⁰³European Commission SWD (2013) 138 final *Op. Cit.* p. 18.

³⁰⁴Council of the European Union (2001) “Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof” 2001/55/EC (20 July 2001). Member States had until 31 December 2002 to transpose it into their national legislation (with the exception of Denmark and Ireland, which have opted out thus are not bounded by the Directive).

³⁰⁵Arenas, N. (2005) “The concept of ‘mass influx of displaced persons’” in the European Directive Establishing the Temporary Protection System” 7 *European Journal of Migration and Law* p. 438 pp. 435-450.

³⁰⁶*See generally*, Fitzpatrick, J. (2000) “Temporary Protection of Refugees: Elements of a Formalised regime” 94 *American Journal of International Law* pp. 279-306.

³⁰⁷Consolidated Version of the Treaty of the European Union (Treaty of Amsterdam) (2 October 1997) Article 63 “The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt measures on refugees and displaced persons within the following areas: 2. (a) minimum standards for giving temporary protection to displaced persons

who cannot return to their country of origin, while at the same time promoting balanced burden-sharing between member states. The concept of TP is based on four pillars: admission to safety, respect for human rights, protection against *refoulement* and safe return when conditions permit to the country of origin.³⁰⁸

5.2.2 *Travaux Préparatoires*: Inclusion and Exclusion of Environmentally Displaced Persons as a Category of Persons in Need of Protection

The aftermath of the Yugoslavia crisis created a sentiment of urgency in Europe to adopt legislation that could replace the flaws of the ad hoc protection policies formulated at the time and adopt a coordinated solution based on Member State solidarity.³⁰⁹ The preparatory work leading up to the TP Directive shows that temporary protection for people suffering the consequences of environmental disasters were not totally excluded from its initial scope. There is a need to summarise this process of inclusion and exclusion of EDPs to ultimately understand its overall relevance as a potential measure of consolidation of protection and *inter alia* host states obligations.

The process for adoption of a common regime and concerted action of TP started in 1997 with the European Commission's first proposal.³¹⁰ It envisaged a wide scope of protection that allowed the inclusion of mixed categories of people, which could have included, among others, people displaced by environmental factors.³¹¹ However, a year later in order to promote a balanced effort between Member states in receiving and bearing the consequences of receiving refugees and displaced persons (under the adages of "solidarity" and "burden sharing") the scope of application of TP was restricted in a second proposal.³¹² The precise outline of categories in need of TP in the document was justified by the European Commission to ensure the effectiveness of the TP.³¹³ The mechanism would however, remain flexible to include other people in need of TP. The usage of the wording *in particular* meant,

from third countries who cannot return to their country of origin and for persons who otherwise need international protection."

³⁰⁸ Executive Committee of the High Commissioner's Programme Conclusion (EXCOM) (1981) No. 22 (XXXII). See also (EXCOM) (1994) Conclusion No. 74 (XLV) paras. r, t.

³⁰⁹ See European Commission (1997) "Proposal to the Council for a Joint Action based on Article K3 (2) (b) of the Treaty on the European Union concerning temporary protection of displaced persons" COM (1997) 93 final 97/0081 (CNS) (4 April 1997) paras. 2,5,6,7. See Joly, D. (1998) "Temporary Protection Regime within the Framework of a New European Asylum Regime" 2 International Journal of Human Rights 3 pp.49-76 for the circumstances bringing about temporary protection in Europe.

³¹⁰ *Ibid.*

³¹¹ *Ibid.* Article 1 of the joint action. People in need of temporary protection included: "-persons who have fled from areas affected by armed conflict and persistent violence; persons who have been or are under a serious risk of exposure to systematic or widespread human rights abuses, including those belonging to groups compelled to leave their homes by campaigns of ethnic or religious persecution; and persons who for other reasons specific to their personal situation are presumed to be in need of international protection." The last paragraph is the most encompassing one, as it could have included protection for people who are displaced by environmental factors. The drafting of the joint action was perhaps inspired by the Executive Committee of the High Commissioner's Programme Conclusion (EXCOM) (1994) Conclusion No. 74 (XLV) *Op.Cit.* on the concept of temporary protection.

³¹² European Commission (1998) "Modified proposal of a joint action concerning temporary protection of displaced persons" COM (1998) 372 final 24 June 1998).

³¹³ *Ibid.* para 7

according to the European Commission, that the list of enunciated protected categories was non-exhaustive.³¹⁴

After years of discussion, the proposal of a Directive on TP was presented by the European Commission to the Council in 2000³¹⁵ an outcome, that had its juridical base in Article 63(2)(a) of the Treaty of Amsterdam.³¹⁶ With regards to EDPs, the discussions related to the proposal gained stimulus during the Council discussions in December 2000. The enlargement of the scope of temporary protection to include people displaced by environmental disasters was suggested by the Finnish delegation but barred by their Belgian and Spanish counterparts, who stated that there was no international refugee instrument that clearly cited these types of situations.³¹⁷

Member states had possibly overlooked on the one hand the historical developments of TP in Africa and the Americas, which were often generous³¹⁸ and on the other hand clearly wanted to avoid clear commitments in these situations. Fitzpatrick had previously admitted that, even though she considered that “persons fleeing severe natural disasters that deprive them of access to physical safety within their state of origin” could be part of a formalised policy on temporary protection, this inclusion may prove to be controversial because it distances TP from the refugee law paradigm.³¹⁹ Nevertheless, guiding tenants on TP for persons displaced by natural disasters were further suggested by the European Economic and Social Committee³²⁰ and advocated by civil society organisations.³²¹ At the same time, the Council of Europe in the discussions leading up to a recommendation on TP³²² proposed the inclusion of persons fleeing from natural or ecological disasters as a possible category to be subsumed

³¹⁴ *Ibid.*

³¹⁵ European Commission (2000) “Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof” COM (2000) 303 2000/0127 (CNS) (24 May 2000). *See generally*, Sgro (2013) *Op. Cit.* pp.302, 303.

³¹⁶ Council of Europe Committee of Ministers (2000) “Recommendation (2000) 9 on Temporary Protection (and Explanatory Memorandum)” (3 May 2000).

³¹⁷ Council of the European Union (2000) “Outcomes of Proceedings of Working Party on Asylum (ASILE)” Doc 13958/00 (7 December 2000)

³¹⁸ Fitzpatrick (2000) *Op. Cit.* p. 283, 298.

³¹⁹ *Ibid.* p. 294

³²⁰ European Economic and Social Committee (2001) “Opinion on the Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (COM (2000) 303 final - 2000/0127 CNS)” SOC/046 (28 March 2001) para. 2.3 (emphasis added): “Although the Committee notes and understands that the proposal only applies to people fleeing from political situations, it thinks there might also be a case for a *directive providing temporary reception and protection mechanisms for persons displaced by natural disasters.*”

³²¹ Justice (2000) “Comments on Proposal for a Council Directive on minimum standards for temporary protection” (November 2000) p. 2. The NGO Noted that the European Commission’s Proposal for a Directive on TP was too restrictive unless the scope of protection mentioned within the document was merely indicative where situations of environmental disasters could be included.

³²² Standing Committee Report (1997) “Temporary protection of persons forced to flee their countries” Rapporteur: Mrs Elisabeth Arnold, Denmark, Liberal, Democratic and Reformers' Group, Doc 7889 (18 July 1997).

to TP status.³²³ As we shall see this climate of inclusion of EDPs under the European TP regime was ultimately not entirely abandoned, but (perhaps) postponed into the final version of a flexible TP Directive.

5.2.3 Personal Scope of Temporary Protection

Unselective Character of the Influx

An interesting change from the QD is that the TP Directive allows more flexibility in granting temporary protection. This is particularly noticeable in the wording of the TP Directive. Article 2(c) of the TP Directive sets out the personal scope of TP's "displaced persons:"

"means third country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by an international organisation, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection in particular:

- (i) persons who have fled areas of armed conflict or endemic violence
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights."

The combined reading of Article 2(c) and Article 7 (1)³²⁴ enables us to assert that the TP regime was designed to prioritise TP to "certain persons displaced in mass" but at the same time not to disregard "additional categories of protected persons." Article 2(c) clearly states that, in cases where the situation of the applicant does not fall under the Refugee Convention, the applicant may be protected under "other international or national instruments giving protection."³²⁵ The TP Directive uses the wording *in particular* to reinforce this point thus not totally excluding from its scope people displaced by environmental factors even if that was not the intention of some Member states in the *travaux préparatoires*. As Arenas points out, in a way, "temporary protection becomes the route to *expand* the categories of protected persons; therefore, it incorporates a new qualified immigration status 'the status of the temporary protection person,' which is one of the most important consequences of the system." Plus, "the Directive does not expose a formula of *assessed causes*. This means that *it is not exhaustive*; therefore, according to the evolution of consensus in the EU, the Council would be able to include other cases (...)."³²⁶

³²³ See Council of Europe Committee of Ministers (2000), "Recommendation (2000) 9 on Temporary Protection (and Explanatory Memorandum)" *Op. Cit.*

³²⁴ Council of the European Union Directive 2001/55/EC *Op. Cit.* Article 7 (1) reads: "Member States may extend temporary protection as provided for in this Directive to additional categories of displaced persons over and above those to whom the Council Decision provided for in Article 5 applies, where they are displaced for the same reasons and from the same country or region of origin. They shall notify the Council and the Commission immediately."

³²⁵ In particular the international obligations that derive from Article 3 of ECHR, Article 7 of the ICCPR, and Article 3 of the CAT.

³²⁶ Arenas (2005) *Op.Cit.* pp. 445, 446.

5.2.4 Seeking the Added Protection Value of the Temporary Protection Directive

(In)flexibility of TP for EDPs

The definition of *mass influx* is the chief concept that will differentiate between the application of the regular asylum system and the application of the temporary protection of the Directive. Under the TP Directive, “mass influx” is generally defined as the arrival in the Community of a large number of displaced persons (spontaneously or aided), who come from a specific country or geographical area who cannot return to their country of origin (Article 2(d)). It is a rather vague legal concept, but this does not diminish its originality and relevance. The UNHCR’s Executive Committee has previously stated that the phenomenon has not been defined, but that it can entail “some or all or the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment in large numbers.”³²⁷ According to the European Council of Refugees and Exiles (ECRE), the definition of an emergency requiring the activation of TP should relate both to the large scale of the outflow and to the consequences of a sudden large-scale arrival in a receiving region of persons who cannot return adding that it is “not only a question of absolute numbers, but is relative to past experience of arrivals and the capacity of a local area to provide assistance and secure protection.”³²⁸

Under the TP Directive, the concept of mass influx gains even more weight, as the procedure is only initiated when there is institutional cooperation in determining the existence of mass influx itself (Article 5(1)). The term excludes situations where an individual may also be in need of protection if he does not arrive in such conditions. Therefore, the system of TP does not create a new right to temporary asylum (because it is not initiated by the individual applicant), but rather the protection system is dependent on a qualified decision of the Council upon an initial proposal of the European Commission. This discretionary power of the Council and the undetermined nature of the legal terms can put at stake the effectiveness of TP under the Directive,³²⁹ and particularly side line protection for EDPs.

There is still merit, however, in using elliptical language, as TP expands protection to non-Convention refugees, enabling them to take advantage of an immediate provisional form of status. In applying a *prima facie* determination to EDPs we can eschew complex causation issues and mask identity differences. States can save administrative costs, while meeting short-protection needs. Importantly, the EU TP mechanism provides for a maximum stay of three years (Article 4(1)(2) and 6 (1)(a)),³³⁰ and this might balance, as Gibney explains, the

³²⁷ Executive Committee UNHCR EXCOM (2004) “Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations” para. a) Conclusions No. 100 (LV) – 2004 (8 October 2004).

³²⁸ European Council on Refugees and Exiles (1997) “Position of the European Council on Refugees and Exiles on Temporary Protection” (March 1997) para. 12, 13.

³²⁹ *Ibid.* p. 438.

³³⁰ The first European Council Decision grants temporary protection for one year (Article 4(1) para.(1) (1st sentence)) If not terminated by a Council Decision (Article 6 para.1 b) it is automatically extended for six months for a maximum of a further year (Article 4 para. 1 (2nd sentence)). After the second year it may be

interests of state control and humanitarian objectives.³³¹ Some have pointed out that, in reality, protection will only be “temporary” when all international efforts have been deployed to ensure the resolution of the crisis, allowing people to return to their country of origin in a short period of time.³³² Decisions in ending TP have to be taken by the Council based on the factual situation in the country of origin, ensuring that any returns will be safe and durable with due respect for human rights and fundamental freedoms and Member states’ obligations regarding *non-refoulement* (Article 6 (2)). Any compelling humanitarian motives that make return impossible or unreasonable shall be considered. This may include, for example, considerations regarding the degrading state of environmentally vulnerable areas of the country of origin or health factors that will make travel and return difficult (Articles 22(2) and 23(1)). It seems that the TP Directive takes advantage of the reasonings of the ECtHR in *D v United Kingdom* (from an “exceptional circumstance” to a codified, mainstreamed one).³³³

A challenge will be for States to mobilise and agree on such a TP format for people displaced by environmental factors. TP may offer an important protection response for cases of sudden environmental disasters that need cross-border movement. It may however, be limited to cases where the movement of people may not be so evident, arising from gradual land degradation or resource curtailment (because the impact on host states would not be so obvious). It may be a short-term solution for situations that lead to statelessness or other permanent situations, calling for a combination of alternative long-term solutions.

5.2.5 The Temporary Protection Directive: A Contemporary Missed Opportunity for the Protection of EDPs?

One of the current missed opportunities of the TP Directive is that the mechanism has never been triggered, so its practical potential for EDPs may be overshadowed. If applied, interesting good practices could have been scanned and perhaps replicated to other urgent mass influx situations.

The latest efforts to activate the provision by Malta and Italy to ensure equal distribution of asylum-seekers among Member states as a result of mass influx from Libya and Tunisia have failed. Instead, the European Commission provided financial and operational support through the Directorate General ECHO in response to the humanitarian needs triggered by the “Arab Spring” crisis.³³⁴ Recent calls by civil society organisations to put TP into action regarding

extended by a Council Decision by a qualified majority on a proposal from the European Commission for another year (Article 4 para.2)

³³¹ Gibney, M. (2000) “Between control and humanitarianism: Temporary Protection in contemporary Europe” 14 *Georgetown Immigration Law Journal* pp. 689-707.

³³² Koser, K. Walsh, M. & Black, R. (1998) “Temporay Protection and the Assisted Return of Refugees from the European Union” 10 *International Journal of Refugee Law* 3 p.444; pp.444-461.

³³³ See Section 3.1.2.1.

³³⁴ Abass, A. Kingah, S. & Nita, S. (2011) “Regional Responses to the Libyan Crisis” United Nations University Institute on Comparative Regional Integration Studies UNU-CRIS Policy Brief No. 1 p. 5, 6 (September 2011).

the Syrian crisis were also unsuccessful.³³⁵ Authors like Guild have affirmed that the TP Directive is openly politicised because it introduced a selective mechanism giving the Council the ability to choose the groups to be protected. There is a risk of being frustrated by the political inertia. This is why, she adds, the mechanism has also not been operationalised for the Afghanistan and Iraqi crisis, which proves that the EU tends to favour financial aid rather than protecting people within its territory.³³⁶ In addition, the inter-institutional approach based on cooperation to activate the TP procedure, while laudable, is complex, implicating that three institutions work rapidly in a transparent way.³³⁷ Despite the critiques, it remains a procedure with great potential and adaptability to exceptional situations of mass influx urgency for EDPs.

As Arenas explains, the EU TP regime achieves important success for two reasons. For the first time, a legal framework establishes a “binding legal obligation of temporary asylum” through an exceptional scheme initiated by the EU institutions based on solidarity. Second, “it confirms the general obligation of any State to allow entry or, at least, the temporary protection, provided that the principle of *non-refoulement* is applicable in cases of large-scale displacement.”³³⁸

It is a balancing mechanism that emphasises financial (Article 24 measures of temporary protection benefit from the previous European Refugee Fund and current Asylum, Migration and Integration Fund³³⁹) and physical (Articles 25 and 26, based on the principle of “double voluntariness “on the host state and the person seeking protection) burden-sharing between Member states. This is further reinforced by the principles of solidarity and fair sharing of

³³⁵ Human Rights Watch (2013) “EU Provide Protection to Syrian Refugees” *available from:* <http://www.hrw.org/news/2012/12/23/eu-provide-protection-syrian-refugees> [accessed 23 May 2014] “As the number of Syrians seeking protection in the EU grows, EU member states should consider invoking an EU-wide temporary protection regime, similar to the approach already taken by Syria’s neighbors, Human Rights Watch said. If the EU were to invoke the Temporary Protection Directive in relation to Syria, all Syrians would be granted a residence permit for the entire duration of the protection period, giving them work authorization, access to accommodation, and medical treatment. The mechanism would also encourage EU member states to resettle beneficiaries from other member states where reception capacity is overwhelmed.”

³³⁶ Guild, E. (2004) “Seeking Asylum: Storm clouds between International Commitments and EU Legislative measures” 29 *European Law Review* 2 p.198-218.

³³⁷ *See generally*, Roots, L. (2009) “The impact of the Lisbon Treaty on the Development of EU Immigration Legislation” 5 *Croatian Yearbook of Legal Studies* p.261-281.

³³⁸ Arenas (2005) *Op. Cit.* p. 437.

³³⁹ The European Refugee Fund (ERF): The ERF (€ 630 million over the period 2008-2013) supported EU countries’ efforts in receiving refugees and displaced persons and in guaranteeing access to consistent, fair and effective asylum procedures. The Fund also supported resettlement programmes and actions related to the integration of persons whose stay is of a lasting and stable nature. It also provided for emergency measures to address sudden arrivals of large numbers of persons in need of international protection, *available from:* http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund/index_en.htm [accessed 25 April 2014]. For the period 2014-2020 the Asylum, Migration and Integration Fund (AMIF) was set up with a total of € 3.137 billion for the seven years. It aims at promoting the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration. This Fund also aims at contributing to the achievement of four specific objectives: asylum; legal migration and integration; return and solidarity, *available from:* http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund/index_en.htm [accessed 30 November 2014].

responsibility, which act as guiding tenants under the Common European Asylum System (Article 80 TFEU).

In addition, the TP Directive lays down the “minimum” protection obligations of Member states³⁴⁰ towards persons enjoying temporary protection. The treatment granted to persons benefiting from TP may not be less favourable than set out in Articles 9 to 16 even though a large margin of appreciation was left to states with regards to certain human rights. A special right of freedom of movement within the EU was suggested by the European Parliament and UNHCR, but it was not introduced.³⁴¹ In this context, the ECRE had also highlighted limitations of system of a TP, for example, with regards to urgent healthcare or to access to employment which prioritises EU nationals.³⁴² The question of access to EU territory was also underlined as being imprecise and requiring further clarification.³⁴³ Originally, the European Commission proposal contained a non-discrimination obligation, but it was dropped in the course of the debates. This does not mean the Member states are not bound to implement their obligations of non-discrimination that flow from the Charter of Fundamental Rights, the ECHR, or other international instruments, so that any restriction on the rights of persons benefiting from TP have to be reasoned (Recital 16).

Despite inherent limitations, the flexibility token of TP, coupled with the general harmonisation banner with regards to the asylum system under the EU Treaty, might be favourable to expand and consolidate current protection options of EDPs. The TFEU does not use, however, the term *uniform status*, the term that it employs regarding asylum and subsidiary protection. Rather, it highlights a reach of a “common system of temporary protection.”³⁴⁴ This wording may seem to suggest that temporary protection occupies a secondary place in relation to asylum and subsidiary protection, in particular because the terminology *common system* may be read as downgrading protection as opposed to the creation of a uniform system. In reality, it may reinforce the importance of the TP Directive since it is a complementary system of shared competence (which coexists with national

³⁴⁰ Council of the European Union Directive 2001/55/EC *Op. Cit.* Recital 8; Article 1.

³⁴¹ See European Parliament (2001) C 343/86 “on the proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof” (13 Mar. 2001); See UNHCR (2000) “UNHCR Summary Observations on the Commission Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx (COM(2000) 303, 24 May 2000)” (15 September 2000).

³⁴² European Council on Refugees and Exiles (2001) “Information Note on the Council Directive 2001/55/EC of 20 July 2001” (1 September 2001).

³⁴³ Directive 2001/55/EC *Op. Cit.* Article 8(3) reads (emphasis added): “The Member States shall, *if necessary*, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.” See Sgro (2013) *Op. Cit.* p.312 and Boutruche, S. (2010) “La protection temporaire des personnes déplacées en droit de l'Union européenne : un nouveau modèle en cas d'afflux massifs ?” Thèse de doctorat Université Aix-Marseille for discussions on the content of Article 8(3).

³⁴⁴ Article 78(2)(c) of the TFEU states (emphasis added): “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: c) a *common system of temporary protection* for displaced persons in the event of a massive inflow.”

temporary protection regimes). Consequently, all measures that need to be adopted at the EU level cannot be detached from the general EU harmonisation objectives of “offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*” under article 78 (1) TFEU. This reading cannot be detached from the general EU’s mission to work for a high degree of cooperation, which defines common policies and actions in all areas of international affairs in order to assist populations, countries, and regions confronting natural or man-made disasters, while at the same time consolidating human rights (Article 21 TFEU).³⁴⁵

The TP Directive leaves wide room for manoeuvring to include EDPs within its scope. The lack of activation of the TP Directive has not as yet prevented states from developing legislation offering temporary protection to people in the event of environmental disasters. Article 3(5) and Recital 12 of the TP Directive allows Member states “to introduce or maintain more favourable conditions for persons enjoying temporary protection in the event of a mass influx of displaced persons.” National actions on temporary protection at the EU level and at large (in the U.S. and other ad hoc measures) can be explored to bridge the EU temporary protection gap to include EDPs within the wider scope of the Directive. They may also offer insightful learning for Member states to activate - when necessary - TP at the EU level.

5.2.6 Legal National Provisions Addressing Environmental Displacement

5.2.6.1 European Union Member States

A number of non-harmonised protection mechanisms and terminologies continue to arise around the world, including *complementary forms of protection*, *categorical protection* or simply *humanitarian statuses*. This evolution is clearly an outcome of the cross fertilisation between national and European courts based both on national human rights law and on the obligations under the ECHR that gradually try to fill the protection gaps as the world becomes more complex and with it people’s protection needs.³⁴⁶ A 2010 report by the European Migration Network identified a minimum of 60 varied non-harmonized protection statuses within EU Member states alone.³⁴⁷

Within Member states TP seems to be granted on humanitarian grounds and as a result of sudden environmental disasters. This leaves a narrow scope for protection for victims of slow-on-set environmental degradation conditions but their protection inclusion cannot be overlooked.³⁴⁸ Only Finland provides a formalised model of TP status for a maximum of

³⁴⁵ Sgro (2013) *Op. Cit.* p. 323 adds to this discussion that the emergency clause under Article 78(3) of TFEU could also justify the activation of TP for environmentally displaced persons within or outside the EU. It allows the Council to take provisional measures when one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries. It does not really concern the protection of third country nationals per se but the protection of Member States within the asylum regime.

³⁴⁶ See Kraler, A. (2011) “Fixing, Adjusting, Regulating, Protecting Human Rights – The Shifting Uses of Regularisations in the European Union” 13 *European Journal of Migration and Law* 3 pp. 297-316.

³⁴⁷ European Migration Network (2010) “The different national practices concerning granting non-EU harmonised protection statuses” p. 105.

³⁴⁸ Vuorio, J. (2008) “Warming climate could bring many refugees to Finland” *Helsingin Sanomat* (5 May

three years that may include EDPs.³⁴⁹ Others, like Italy, provide for exceptional temporary protection measures that shall be adopted in case of natural disaster situations.

Legal National Provisions Addressing Environmental Displacement

Finland

Chapter 6 Section 109 (1) of the Aliens Act 301/2004 (emphasis added)³⁵⁰

“*Temporary protection* may be given to aliens who need international protection and who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country of its neighbouring areas as a result of an armed conflict, some other violent situation or an *environmental disaster*.”

Italy

Article 20 (1) Legislative Decree nr 286 of 25 July 1998 (emphasis added):³⁵¹

By decree of the Prime Ministers (...) the *temporary protection measures* should be adopted, as an exception to the provisions of this single text, in case of major humanitarian needs, on the occasion of conflicts, *natural disasters* or other particularly serious events *in countries outside the EU*.”

Until now, people who have been displaced by environmental factors have not benefited from any of these TP national regimes. These TP measures serve more as a theoretical rather than a practical good practice model that could be potentially replicated elsewhere. There is also interpretation potential to include EDPs in other EU member states national legislation.³⁵² But even here, whilst there is room to make the “environmental argument” on humanitarian grounds, there are no specifics about protection and its content. Interpretative efforts of Swiss law on temporary stay and subsidiary protection may also cater to the needs of EDPs displaced by sudden onset disasters rather than of those whose lives are put at risk by slow-onset changes.³⁵³

The mechanism put in place by the British government after the volcano eruptions in the island of Montserrat in 1995 has been referred to as an example of a practical model in the EU for displacement management in the context of environmental displacement studies.³⁵⁴ The ad hoc “Voluntary Evacuation Scheme” included financial relocation assistance for those affected by the disasters (“Assistance Passages Programme”) and a two-year residence permit

2008) The former director-general of the Finnish Immigration Service Jorma Vuorio has elaborated on this point: “Currently those fleeing natural disasters can be granted temporary protection. However, deserts rarely go green again. Naturally, if an entire country is seen to be uninhabitable, we could grant permanent residence permits” *available from*:

<https://www.hs.fi/english/print/1135236075380> (accessed 25 May 2013).

³⁴⁹ See generally, Sgro (2013) *Op. Cit.* pp. 326-329.

³⁵⁰ Finish Aliens Act 301/2004 (amendments up to 458/2009 included) (30 April 2004).

³⁵¹ Italian Legislative Decree No. 286 “Consolidated Act of Provisions concerning immigration and the condition of third country nationals” (25 July 1998).

³⁵² Kraler, Cernei & Noack (2011) *Op. Cit.* pp. 57-60. The authors give an overview of temporary protection mechanisms, mostly based on humanitarian grounds offered in Belgium, Ireland, Lithuania, Latvia, Malta and Slovakia which may be interpreted to cover environmental displacement.

³⁵³ Kälin, W. (2010) “Conceptualising Climate Induced-Displacement” in J. McAdam (ed.) “Climate Change and Displacement: Multidisciplinary Perspectives” (Hart Publishing) p. 100, pp. 81-104.

³⁵⁴ Kolmannskog & Myrstad (2009) *Op. Cit.* p. 318 briefly mention the case. Sgro (2013) *Op.Cit.* p. 336 has further brought this example more into light in the context of EDPs.

to live in the UK.³⁵⁵ This is a rather particular case because, in reality, Montserrat is a British Overseas Territory, which are territories under the jurisdiction and sovereignty of the UK even if they do not form part of it. They have not acquired independence and have voted to remain British territories, so there was an explicit obligation from the British government in operationalizing TP measures.³⁵⁶ The outcome of the scheme, however, has highlighted some important aspects that governments must take into account when structuring and putting into action these schemes for EDPs. First, states must ensure that evacuation measures are in place for sudden disasters and ensure inter-departmental cooperation.³⁵⁷ Second, while environmental scenarios may be predictable, a certain level of risk has to be accepted and managed by government authorities.³⁵⁸ Third, states need to ensure that any TP scheme is part of a wider sustainable protection solution upon return, resettlement, and reintegration.³⁵⁹

5.2.7 Other International Temporary Protection Efforts

5.2.7.1 Temporary Protection Status in the United States

In the United States, prior to the Refugee Act of 1980, the Immigration and Nationality Act (INA), “section 203(a)(7) provided a quota for persons fleeing persecution in certain countries or from natural calamities (...) [i]n the process of revising US refugee law, however, Congress did away with INA sections.”³⁶⁰ Today, the INA³⁶¹ only awards a Temporary Protection Status (TPS) to individuals who are already in the U.S. and temporarily unable to return to their country of origin because of instability due to an on-going armed conflict (e.g., civil war), environmental disaster (e.g., earthquake or hurricane), epidemic, or any other unusual temporary condition.³⁶²

³⁵⁵ See for e.g., Foreign and Commonwealth Office (1998) “Memorandum from the Parliamentary Under-Secretary of State Baroness Symons (9 February 1998); Clay, E. *et al.* (1999) “An evaluation of the HMG’s Response to Montserrat Volcanic Emergency” Report EV635 (Overseas Development Institute Department for International Development Evaluation December 1999).

³⁵⁶ It should be noted however, that these people are British nationals but not British citizens. For an account of the different types of British nationality *available from* <https://www.gov.uk/types-of-british-nationality> [accessed 31 May 2014].

³⁵⁷ See generally, Patullo, P. (2000) “Fire from the Mountain: the tragedy of Montserrat and the betrayal of its people” (Constable). The author gives a full overview of the challenges of the Montserrat case in particular regarding the lack of preparation of the UK government regarding disasters situations.

³⁵⁸ See generally, Aspinall, W. *et al.* (2002) “The Montserrat Volcano Observatory: its evolution, organisation, role and activities,” in T. Druit & B. Kokelaar (eds.) “The eruption of Soufrière Hills Volcano, Montserrat, from 1995 to 1999” 21 Geological Society pp. 71-91. See also Haynes, K. (2000) “Volcanic Island in crisis: investigating environmental uncertainty and the complexities it brings” 21 Australian Journal of Emergency Management 4 pp.21-28.

³⁵⁹ *Ibid.* See also Clay, E. *et al.* (1999) *Op. Cit.* p. 53 sq. Sgro (2013) *Op. Cit.* p. 336. Today there are approximately 4500 inhabitants in Montserrat whereas before the eruption the island had 10400 inhabitants. More than 8000 people left the island after the volcano eruption.

³⁶⁰ Parker, J. (1982) “Victims of Natural Disasters in U.S. Refugee Law and Policy: Transnational Legal Problems of Refugees” Michigan Year Book of International Legal Studies. pp. 137-139.

³⁶¹ The U.S. Immigration and Nationality Act (INA), was created in 1952 and has been amended many times over the years, but is still the basic body of immigration law. The Act is also contained in the United States Code (U.S.C.), which is a collection of all the federal laws of the United States.

³⁶² INA, Section 244/1 b) 1) (emphasis added): “(A) the Attorney General finds that there is an *ongoing armed conflict* within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety; (B) the *Attorney General finds that-* (i) there has been an *earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected*, (ii) the

Protection under this framework is discretionary and not automatic. The Attorney General must “designate” a country of concern.³⁶³ In our specific context, this is carried out by evaluating the incapacity of return of the individual as a result of serious environmental destruction, as well as the capacity of the country affected to deal with incoming flows of nationals. Plus, there is a need for a formal request from the country affected to the U.S. government.³⁶⁴ As a result, it makes temporary protection dependent on a number of conditionalisms, and in reality it only protects those individuals who are already in the U.S.. Primarily, it is a form of relief that takes into account the needs of the country of origin (objective/outwards conditions) in general, rather than focusing on the needs of the individual of that country, in particular (subjective/inwards conditions). It generally grants the applicant a period between 6 and 18 months the possibility to reside and work by shielding him/her from deportation.³⁶⁵ The status is renewable upon the unchangeable conditions of the country of origin. The verbosity *temporary* denotes the weakness of the provision and the legal limbo that a person may face, as it may be years before an individuals can return safely to their country of origin.

There are currently 11 countries designated under the U.S. TPS procedures: El Salvador, Guinea, Haiti, Honduras, Liberia, Nicaragua, Sierra Leone, Somalia, Sudan, South Sudan and Syria. Some are designated areas as a result of natural disasters (e.g. El Salvador, Haiti, Honduras and Nicaragua) others are of conflict situations (e.g. Sudan, South Sudan and Syria)³⁶⁶ or both. In recent years, as a result of natural disasters, some called for the administration to grant TPS to countries such as Peru, Pakistan, Sri Lanka, India, Indonesia, Thailand, Myanmar, Malaysia, the Maldives, Tanzania, the Seychelles, Bangladesh, and Kenya. This resulted in a proposition to put into action a “Tsunamis Temporary Protection Act to offer temporary protection to people originally from tsunami-affected areas.”³⁶⁷ However, there has been blind support from the government to enact those measures.³⁶⁸ The

foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and (iii) the foreign state officially has requested designation under this subparagraph; or (C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States. A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless notice of the designation (including a statement of the findings under this paragraph and the effective date of the designation) is published in the Federal Register. In such notice, the Attorney General shall also state an estimate of the number of nationals of the foreign state designated who are (or within the effective period of the designation are likely to become) eligible for temporary protected status under this section and their immigration status in the United States.”

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ INA Section 244 para.(b)(2)(B)

³⁶⁶ See US TPS available from: <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS> [accessed 20 May 2015]

³⁶⁷ House of Representatives (2005) “Tsunamis Temporary Protection Status Act of 2005,” House of Representatives, 60, 109th Congress (1st Session), (4 January 2005). This proposal was made by Jackson-Lee Sheila.

³⁶⁸ Wasem, R. & Ester, R. (2010) “Temporary Protection Status: Current Immigration Policy and Issues” (RS20844) (Washington, DC: Congressional Research Service) p. 6 available from:

case of the Phillipines is yet another illustrative example in this respect. As the country became devastated by Typhoon Haiyan (Yolanda), claiming the lives of 6,000 people and displacing more than 3.43 million, the Filipino government formally requested that the U.S. government designate TPS for Filipinos in the United States. In spite of this, the U.S. Congress decided not to take action on a proposed bill that would have provided temporary protection for Filipinos in that country.³⁶⁹

At the same time, for those countries that have been granted TPS as a result of a disaster situation (e.g., Nicaragua or El Salvador as a result of the 1998 Hurricane Mitch and/or because of a series of earthquakes in 2001), the U.S. government has decided to prolong the TPS, as those affected areas remain “unable, temporarily, to handle adequately the return of its nationals.”³⁷⁰

While there is nothing that prevents EDPs from acquiring TPS in the U.S., it can be affirmed that it is mostly a politically vested form of protection in line with the discretionary power of the U.S. government. Furthermore, despite its limited benefits generally for EDPs, it is a useless mechanism for people from disappearing Small Island States,³⁷¹ as individuals would not have a place to go back to.

5.2.7.2 Other International Ad Hoc Schemes

In the absence of specific legislation, states have set up ad hoc schemes based on humanitarian principles: humanity, cooperation and solidarity to protect individuals in the event of disasters. These schemes are normally put into action in exceptional situations and on a case-by-case basis. The reliance on exceptional protection measures like these, also allows states to avoid the consolidation of a particular status from the time when they fear the arrival of migratory flows. Rather than an *ex ante* defined mechanism, they constitute an *ex post* instrument of protection typically for emergency situations. Sometimes, they emerge as an outcome of geopolitical considerations.

For example, African states offered protection to Haiti after the 2010 earthquake as a “sense of duty and memory and solidarity.”³⁷² Senegal, for example, not only offered assistance to

http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1562&context=key_workplace [accessed 20 March 2015].

³⁶⁹ See Seghetti, L., Wasem, R. & Ester, R. (2015) “Temporary Protection Status: Current Immigration Policy and Issues” (RS20844) (Washington, DC: Congressional Research Service) pp.4, 7 *available from*: <http://fas.org/sgp/crs/homesecc/RS20844.pdf> [accessed 20 March 2015].

³⁷⁰ *Ibid.* p. 7.

³⁷¹ Mortom, A. (2009) “Climate Refugees Start Move to New Island” *The Age National*, (29 July 2009) *available from*: <http://www.theage.com.au/national/first-climate-refugees-start-move-to-new-island-home-20090728-e06x.html> [accessed 20 March 2015]. As previously mentioned, in 2009 more than 2700 residents of the Carteret Islands in the South Pacific have been evacuated to Papa New Guinea.

³⁷² See Baldauf, S. (2010) “Haitians to Africa? Senegal resettlement plans gain steam” *Christian Monitor* (2 February 2010) *available from* <http://www.csmonitor.com/World/Africa/2010/0202/Haitians-to-Africa-Senegal-resettlement-plans-gain-steam> [accessed 25 May 2014]; Aljazeera (2010) “Africa mulls resettling Haitians” (31 January 2010) *available from*: <http://www.aljazeera.com/news/americas/2010/01/2010131155417123157.html> [accessed 25 May 2014]. The African Union agreed to consider a proposal from the Senegalese President to resettle thousands of Haitians affected by the earthquake in 2010. Among the proposals were the naturalization of Haitians who sought new nationality after the disaster and an adoption programme for children across Africa

victims of the earthquake, but also proposed assistance in the relocation of Haitians by offering them available land.³⁷³ The same approach was taken by Liberia, who supported the idea of voluntary relocation of Haitians in Africa.³⁷⁴ On a more formalised basis, the February 2014 free-movement agreement between the governments of Kenya, Uganda, and Rwanda can potentially be used in the admission of displaced persons by disasters or other environmental factors under a temporary protection regime.³⁷⁵

Canada³⁷⁶ and Australia³⁷⁷ adapted their immigration regimes to enable the issuance of temporary visas and permanent residency permits to the 2004 tsunami victims, based on family reunification (i.e., where a member of the family already resided on a permanent basis in the country). The UNHCR's appeal to postpone the return to areas ravaged by the tsunami was also considered by many other governments.³⁷⁸ Countries like Switzerland postponed the expulsion of rejected asylum-seekers from Sri Lanka, India, and Somalia and the UK also suspended the involuntary return of individuals back to affected areas.³⁷⁹ Botswana and Tanzania opened their borders to people displaced by natural disasters from neighbouring regions on temporary, ad hoc or humanitarian grounds.³⁸⁰ Latin American countries, such as Brazil, faced with an increasing number of Haitians due to the 2010 earthquake, and conscious of the limitations of their national laws to deal with this type of reality is currently developing a draft legislation to offer an extended form of protection for those persons facing crisis, calamities, or serious and generalised human rights violations.³⁸¹

5.2.8 Conclusion

The TP Directive offers an insightful regime for the protection of EDPs and the obligations of the Member states towards persons enjoying TP in mass influx situations. The flexibility of the language coupled with the solidarity of the mechanism outlined in the Directive render a

for children who had been made orphans including, creating a new country within Africa for Haitians. In the words of the African Union President at the time (emphasis added): “[i]t is out of a *sense of duty and memory and solidarity* that we can further the proposal to create in Africa the conditions for the return of Haitians who wish to return after the effect of the disaster that ravaged Haiti.”

³⁷³ BBC News (2010) “Senegal offers land to Haitians” (17 January 2010) *available from*: <http://news.bbc.co.uk/2/hi/africa/8463921.stm> (accessed 25 May 2014).

³⁷⁴ Africa Resource (2010) “World Response to Haitian Earthquake” (3 March 2010) *available from*: <http://www.africaresource.com/arts-a-culture/newsworthy/711-world-response-to-haitian-earthquake> [accessed 25 May 2014].

³⁷⁵ Tamara, W. (2015) “Developing Temporary Protection in Africa” 49 *Forced Migration Review* p. 25; p.23-25

³⁷⁶ Laczko F. & Collett E. (2005) “Assessing the Tsunami’s Effects on Migration” *The Online Journal of the Migration Policy Institute* (1 April 2005) *available from* <http://www.migrationpolicy.org/article/assessing-tsunamis-effects-migration> [accessed 25 May 2014]

³⁷⁷ Stephen, S. (2005) “Responding to the tsunami refugee crisis” *Green Left Weekly* (19 January 2005) *available from*: <https://www.greenleft.org.au/node/33360> [accessed 25 May 2014].

³⁷⁸ Executive Committee of the High Commissioner’s Program (2006) “Providing International Protection Including through Complementary Forms of Protection” 25 *Refugee Survey Quarterly* 1 para. 22 p. 148 pp. 143-152.

³⁷⁹ Laczko, F. & Collett, E. (2005) “Assessing the Tsunami’s Effects on Migration” *available from*: <http://www.migrationpolicy.org/article/assessing-tsunamis-effects-migration> [Accessed 20 March 2014].

³⁸⁰ Kälin & Schrepfer (2012) *Op. Cit.* p. 37.

³⁸¹ Piacentini de Andrade, I. (2015) “Brazil’s Draft Migration Law” 49 *Forced Migration Review* (May 2015) pp. 36-37.

potential TP status *prima facie* for people displaced by environmental changing conditions. TP closes “protection gaps” and can represent a pragmatic solution between the binding principle of *non-refoulement* and - to some extent - the discretionary character of the asylum regime within the EU.

Because it does not include cases involving individual applications, TP can only be seen as an exceptional response that must overcome high political thresholds to activate the Directive. The mechanism has never been used in practice, and this may render the mechanism less effective in dealing with EDPs.

Nevertheless, other outlined forms of TP demonstrate the willingness of countries to make some adjustments to their immigration policies in the wake of environmental disasters (see Sections 5.2.7 and 5.2.8). However, this is mostly a reactive humanitarian measure to offer assistance to victims of disasters rather than a formalized one. A facilitated immigration procedure or temporary visa is only the first step, however. From the analysis, we can conclude that there is a space for a mainstreamed system of TP for EDPs. TP may provide a potential blueprint for events to come and can be used on the basis of the implementation already made. A more harmonised system of TP could be achieved, drawing from EU National Provisions Addressing Environmental Displacement. Ensuring bottom-up consistency with EU national legislative practices, together with the panoply of TP measures that have been applied in the wake of environmental disasters (even if framed differently) around the world can only reinforce the solidifying or evolving inclusion of EDPs, not only within the scope of the Directive but also towards an emerging formalised regime of TP for people displaced by environmental factors, without prejudice to the obligations of states under international law.³⁸²

6. (Re)Conceptualising Protection of EDPs: Towards a New Protection Paradigm?

6.1 Protection as a Dynamic Guiding Concept

After engaging in the previous analysis of testing effective and pragmatic solutions that could arguably consolidate protection for EDPs within the EU and beyond its borders, one question turns to our mind: are we moving towards a new protection paradigm in the environmental displacement context?

The answer is positive, to the extent that there is a need to rethink protection as a legal dynamic guiding concept of both *proactive* and *reactive* protection measures. In other words, states need to consider protection as a holistic enterprise underpinned by the human rights paradigm and their concomitant obligations deriving from international law both to prevent and deal with displacement (see Chapters 4 and 5). In particular, protection must be seen as a dynamic guiding concept to which people are entitled when their state of origin is unable or

³⁸² This path is particularly grounded in the UNHCR Guidelines on Temporary Protection or Stay Arrangements (February 2014) available from: <http://www.refworld.org/docid/52fba2404.html> [accessed 11 July 2015] that aim to assist governments in responding to humanitarian crises as well as complex or mixed population movements in cases where current responses are inappropriate or lacking. The Guidelines encourage states' predictability in responses to particular crisis or situations when they arise (to circumvent discretionary and *ad hoc* nature protection practices) through “standing arrangements” on temporary protection seen as “a pragmatical tool” to be concluded on a multilateral or regional basis.

unwilling to offer human rights protection to its own citizens, or “the widest possible exercise of fundamental rights and freedoms [which all] human beings [should] enjoy without discrimination.”³⁸³ Importantly, the notion of protection must necessarily evolve over time in order to meet the human rights and needs of people facing complex realities (in the “pre-in-post” displacement phases), such as the changing environment. From this perspective, the normative force of this expansive protection paradigm for environmental-induced displacement can be “understood as a dynamic of creation, of orientation and of application of the law exerted from the outer limits of the legal thought up to the most daily application of the legal standard (...) [thus] it is important to understand the different present forces [proactive and reactive] which gives the paradigm life and consistency.”³⁸⁴

The answer is also negative to the extent that we do not advocate an abandonment of the current legal protection paradigm. On the contrary, it is important to look, in the short term, at existing regional normative protection frameworks, - such as the one within the EU, - since it complements and enlarges the scope of protection in general and constitutes the stepping-stone to consolidating protection for EDPs in particular. There is much scope not to prevent migration *per se* but rather to consider labour migration as a preventative and complementary protection measure to adapt and avoid displacement, matching the interests of both the receiving state and those affected by environmental change (e.g., see Sections 4.1 and 4.4). Any cooperation to develop protection capacities of third countries should be based on responsibility sharing.

There is also much scope to furthering the current EU classic complementary protection regime if specific serious human rights deprivations occur. At a minimum, host states have an international obligation to provide sanctuary on either a temporary or longer-term basis when someone’s life is seriously threatened and there is a failure or absence of state protection (see Chapter 5 and Chapter 6 Sections 5.1 and 5.2).³⁸⁵ In matter of fact, it was asserted that the obligations of states towards environmental-induced displacement derive contextually not only as simply means of some *ex post* relief to victims when disasters occur. In other words, the active protection of human rights for environmental-induced displacement starts moving beyond mere ad hoc response measures to construct a whole system of protection targeted both before and after displacement occurs. European states are increasingly recognising protection on the grounds of environmental disasters in their national legal orders, an approach that should be envisaged at a collective level.

The EU regional protection framework offers existing legal statuses that, while not directly aimed at environmental displacement, can be potentially used, adapted, and reinforced within the EU and arguably replicated elsewhere. The identified “normative gap” with regards to the

³⁸³ Convention Relating to the Status of Refugees, adopted on 28 July 1951, 189 UNTS 137, Preamble.

³⁸⁴ Gaillard-Sebileau, E.(2009) “La Force Normative du Paradigme Juridique” in C. Thibierge *et al.* (ed.) ”La Force Normative – Naissance d’un Concept” (Lextenso Éditions 2009) p. 171 pp. 171-182 (authors own free translation).

³⁸⁵ Edwards (2012) *Op. Cit.* p. 82. The author advances the notion that Hathaway’s formula for determining ”persecution” under the 1951 Convention may gain renewed relevance under this analysis: ‘persecution = harm + failure of state protection.’ It could be adapted to apply to climate displaced (and others) as: ‘need for IP [International Protection] = serious threat to life or freedom + failure of state protection.’

protection of EDPs can be narrowed and solidified by existing regional protection solutions. Departing from a theory of inclusion (evolutionary and contextual interpretation of the existing EU regional legal framework, in accordance with international human rights and principles established in the contemporary, ever-evolving global and regional legal orders) before exclusion is just one explored path, but it is particularly important at a time when powerful states have little appetite for the development of new treaties.³⁸⁶

Above all, as Harvey neatly says:

“The defence of ‘humanity’ that emerges is often a reminder of what is now embedded in legality, through the advance of human rights law. In each of these instances, and in others like them, the invitation is to “see the person” within the layers of bureaucracy and administration and to give this moral aspiration a definite legal meaning. The work of that human rights will do is test, probe and nudge the strategies of states, as well as sharpen the progressive development of refugee law. Even the eventual adoption of new categorizations will not terminate this interplay because states will generally not open themselves unconditionally to suffering others. What makes these moderns debates so intriguing is that states have bound themselves to the standards within which the contest takes place. Even if view in sceptical terms, this will continue to offer normative footholds for imagining alternative configurations and, significantly, give practical hope to suffering others in need.”³⁸⁷

In reality, there are no insufficient sources of protection for people who are or will be displaced by environmental factors. What this research path teaches us is that the EDPs protection paradigm is a driving force for states to do a balancing exercise out of existing patchwork and inter connected protection standards and perhaps, in the long term, build a comprehensive framework (*ex ante* and *ex post*) for protecting EDPs. The international legal system contains the necessary elements for the construction of a protection framework, which is able -in part- to respond to the necessities of this new problematic. A new or renewed model of protection must take advantage of the existing rules and principles of the different branches of law. Even if we have endorsed a rather compartmentalised outlook the regimes of protection of environmental displacement and *inter alia* states obligations for presentation reasons (in Chapters 4 and 5 and 6), these must be seen as conflating rather than conflicting as they reflect the *cumulative effects* of normative and operational frameworks and (quasi) judicial decisions towards the protection of the human person. These complementary effects are conducive to the construction of more effective multidisciplinary and holistic protection regime for a new-concerned legal category.

As Cançado Trindade explains:

“The approximations or convergence between complementary regimes of protection (...), dictated by the *necessities* themselves of protection and manifested at normative, hermeneutic and operative levels, contribute to the search for effective solutions to current problems in this domain, and to the improvement and

³⁸⁶ The reluctance of some states to develop a new international climate change agreement is such an example, even though the initiative of European Union and other vulnerable nations taken at the Durban climate conference in December 2011 paved the way for the U.N. negotiations to develop a new international climate agreement that will be adopted in 2015 at the Paris climate conference and due to be implemented in 2020. It will take the form of a protocol, another legal instrument or “an agreed outcome with legal force,” and will be applicable to all Parties.

³⁸⁷ Harvey (2013) *Op. Cit.* p. 87.

strengthening of the human person in any situations or circumstances. It is necessary to keep on advancing decidedly in this direction.”³⁸⁸

Within EU law, states have an obligation to set clear common objectives for the protection of environmental-induced displacement by connecting internal and external policy objectives, now a Treaty obligation.³⁸⁹ The division of competences within the EU, in particular Member states’ power to restrict immigration and asylum is not unlimited but it is shaped by international obligations and individual humanitarian traditions. The legitimacy of any action taken under EU law (even within the context of environmentally-induced displacement) is based on the founding principle of the protection of human rights. The Union’s legal and political position, multilevel framework, double judicial check (ECtHR and CJEU), and *sui generis* status at the intersection of European Union and international law is an interesting and useful example to consider.³⁹⁰ It is against this background that the protection of EDPs should be (re)conceptualised.³⁹¹

³⁸⁸ Cançado Trindade, A. (2010) “International Law of Humankind, Towards a new *Jus Gentium*” (Martinus Nijhoff Publishers) p. 525.

³⁸⁹ As previously said, Article 208(1) TEU stipulates that the EU and Member states policies shall “complement and reinforce each other”; in addition “the Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries” (Article 208 (2)). To attain this objective the TEU lays down duties of consultation and cooperation (Article 201 (1) TEU).

³⁹⁰ Carozza, P. (2003) “Subsidiarity as a Structural Principle of International Human Rights Law” 97 *American Journal of International Law* 1 p. 57 pp. 38-79. The author points out the value of the EU’s legal and political position and the challenges of international human rights law: “As a result of that *sui generis* status, the European Union has developed unparalleled relationships between national and supranational norms, actors, and institutions, and is constantly pulled taut between the commonality of integration and the particularity of separate national units. The same tension also characterizes many of the most persistent challenges of international human rights law (...). Thus, the very singularity of the Union, (...) gives it the possibility of contributing to the larger question before us.”

³⁹¹ Within the EU apparatus, the issue of environmental displacement is currently being led from a development perspective at the European Commission. Under the auspices of the Directorate General for Development and Cooperation – EuropeAid the EC has looked upon the integration of migration into development strategies and into the post-2015 development agenda by focusing on selected priority areas, namely employment and decent work, inclusive growth, environment and climate change, and access to basic social services (notably health and education). The potential of migration to positively contribute to adaptation in vulnerable countries to the effects of climate change is increasingly recognized. However, the understanding of protection as a holistic and formalized matter for environmental displacement through a “lens of combined forces” is still lacking and being sidelined by other Directorate Generals, in particular, the DG for Migration and Home Affairs.

Part IV – Towards a New Human Rights-Based Protection Paradigm for Environmental Displacement

Chapter 7. Thesis Conclusion

1. Introduction

In this final chapter, we briefly reflect on the findings of the foregoing chapters and discuss the main conclusion of this research.

2. Research Objective

This study has explored the increasing concern over the extent to which those suffering from forced (or potential) cross-border displacement as a result of environmental change are protected under international law, in particular human rights law. Centred around a holistic understanding of protection -from-during- after displacement (but concentrating only on the first and last phases of environmental displacement) the study sought to provide adequate answers to two basic questions: 1) whether and to what extent existing international law protects cross-border environmental displacement? and 2) whether and how existing formalised regional complementary protection standards can interpretively solidify and (re)conceptualise protection for cross-border environmental displacement?

In dealing with these queries, the research underscored the plight of such individuals, the obligations of states within the international legal human rights protection regime, and related instruments informed by the interpretative dynamic of (quasi) judicial decisions. In this context, we then sought to suggest pragmatically how the identified international “legal protection gap” might be remediated by means of consolidating existing (proactive and reactive) regional complementary protection standards, both to prevent and deal with environmental displacement.

3. Main Findings

The Increasing Legal Recognition of Environmentally Displaced Persons

The first part, which sought to conceptualise and examine who are Environmentally Displaced Persons was not just another futile attempt to impose rigid labelling, but rather a necessary exercise to understand the complex reality of those in need of international protection. By exploring the meaning of environmental change, as well as its human impact, we investigated the factors that influence displacement and exposed a number of different environmental displacement scenarios. While the study recognised the multicausality of human mobility (stemming from economic, social, political, demographic, and environmental factors), it asserted that it was important to consider the environment as an autonomous factor that leads to displacement for two reasons: first, because the environmental stressors over a

period of time will be more exacerbated for the environmental driver, and second, those people will be forcibly displaced across the border (where moving is not an option; to stay or to go is a “no choice option”). Since the concept of vulnerability is intimately related to protection in human rights law, we proposed using the concept of “vulnerability layers” in order to expose those vulnerable areas (geographical “hot spots”) affected by environmental change where people’s human rights are at risk and in need of legal protection contemplation.

Contextualising the study also helped understand the - *Protection Paradox* - between the “guesstimates” and realities of people displaced by environmental factors. It was important to assert that some of the dangers of environmental change, while intangible, and its impacts on cross border-displacement, are to some extent currently (in)visible. There is a need to act (to use academic research channels and rely on existing protection standards as remedies) and not to wait for the problem of forced displacement of populations to become more visible and acute. The amount of people being displaced by environmental factors is becoming a reality, and so is their recognition academically, institutionally, and within the overarching international protection agenda. Article 14(f) of the Cancun Agreement on long-term cooperative action under the UNFCCC has recognised the need for protection of cross-border displacement through a triangulation of efforts at the international, regional, and national levels, and the introduction of planned relocation as part of assistance and protection measures. Both the Council of Europe and the European Union have elevated the protection debate of environmental displacement. The gradual consensus-building taking place under the Nansen Initiative is developing a more coherent and consistent view at the international level for cross-border environmental displacement and helping to develop a more effective normative and institutional approach in this regard.

By scrutinising and (de)constructing the meaning of who EDPs are within this study, it was interesting to conclude that, while the debate on environmental displacement has gained terrain, the same cannot be said as regards its conceptualisation. It is true, however, that whatever the agreed-upon definitions may be, terminology must be solidified over time in order to measure the severity of forced displacement, avoiding governments halting and diverging the protection debate, and granting protection to those most in need.

Protection Obligations from Cross-Border Environmental Displacement Arise from Legal Cumulative Effects

The theoretical legal analysis carried out in the second part of this study - *Protection in Context* – generally concluded that environmental change violates human rights, and national governments, both individually, and as members of the international community, incur specific obligations under international and regional human rights treaties. Under these treaties, international human rights courts and intertwined interpretative guidance offered by quasi-judicial organs have proclaimed that states have the obligation to take preventative action to respect, avoid the violation of and to take positive steps to fulfil human rights, - including those of EDPs. The obligations to respect, protect, and fulfil warrants states adopting laws at the national and regional levels to prevent displacement and take coordinate action regarding slow and fast-onset environmental changing conditions. The obligations to

respect, protect, and fulfil conflate with the needs and rights of EDPs: the obligation to protect the right to life, health, and property; provide adequate food and housing; supply water; and respect vulnerable groups (older people, disabled people, children, minorities, and indigenous people). Furthermore, states have the obligation to ensure procedural rights (right to information, right to public participation and consultation, right to access to justice) in particular to collect information about environmental-induced displacement and disseminate it to all relevant stakeholders that should be consulted on a regular basis to ensure that adequate solutions to the challenges of EDPs are sought. The international community has a duty to cooperate and ensure that that financial, technical, and logistical assistance is in place for countries that are affected by environmental factors, thereby fulfilling their human rights obligations towards EDPs.

The human rights paradigm ensures that the legitimate rights of people affected by environmental factors are duly respected. Importantly, it identifies the “minimum standards of treatment” that should be afforded to EDPs; i.e., identifying the rights violated or at risk, noting how states need to deal with environmental risks (including displacement risks), and taking measures to deal with it. The study underlined that the minimum scope of protection warranted by states towards all individuals, regardless of nationality or statelessness, is not totally dependent on financial resources. In the *Örnerlydiz* decision, the ECtHR emphasised the fact that the protective function of the state can often be reflected in existing laws and constitutional provisions to ensure and to promote the effective protection of individuals whose lives might be endangered by immediate and known risks – and these may include those from a changing environment – and not necessarily taken to account in existing financial resources. A specific example derives from the right to information, which is established in the case law of the convention institutions regarding classical environmental matters.

Following from this, the study concluded that there is an increasing manifestation of a preventative dimension in the domain of the protection of the human person, which is gaining ground amidst international and (quasi) judicial decisions, but also that it is further evident in a number of interconnected normative (hard and soft law) and operational frameworks that – explicitly or implicitly – place obligations on states to prevent environmental displacement and the violation of peoples’ human rights.

An explicit recognition of the duty of states to protect from displacement in cases of natural and human-made disasters has been progressively recognised at international, regional and sub-regional levels. A good example at the international level is found in Principles 5,6 and 9 of the GPID and the Peninsula Principles on climate displacement. At the regional level, this is exemplified in Article 4 of the Kampala Convention. At sub-regional level the IDP Protocol to the Great Lakes Pact makes recognition of this by extension, as it imposes obligations on state parties to adopt and implement the GPID. The majority of the instruments analysed are particular to the internal displacement context, yet they have an exponential influence, also outlining the general obligations of states to avoid environmental cross border displacement. States must not only refrain from carrying out arbitrary

displacement, but at the same time must prevent and, where possible, mitigate, displacement caused by natural or human made risks or other third parties. While the innovative impact of these instruments, such as GPID, may be limited (because they do not formally bind states) they gain a certain degree of recognition because they have been progressively incorporated into states' national legislation and policies. The Kampala Convention, for example, despite its regional outreach, is the most powerful mechanism due to its binding character. Firstly, it solidifies a general preventative approach to protection found in international instruments. Secondly, it elevates the recognition of a vulnerable population group in need of protection due to natural and human made disasters. It offers conceptual clarity and the legal definition of what constitutes displacement, both within and across international borders. Therefore, at regional level it fills a previous international legal protection gap and may serve as model for other regions when developing a holistic approach to protection.

At the same time, the extensive elaboration on preventing disasters and/or adapting to environmental change in operational frameworks on disaster risk reduction and adaptation to climate change at international and regional levels - while not dealing with displacement *per se* - highlight the obligations of states to take preventative action to reduce vulnerabilities and protect the human rights of those (potentially) affected. The Hyogo Framework on Disaster Risk Reduction, as a non-binding international instrument, is complemented by binding human rights obligations which include the duty of states to reduce natural and man-made environmental risks by introducing legislation, programmes and policies to protect vulnerable populations. These obligations have been made explicit on constitutional provisions or through the adoption of specific national provisions in different countries.

The discussion outlines that the protection of the human person is not only an *ex post facto* obligation of states, but must be increasingly seen as an *ex ante* one. It requires a transformational change in government practices towards working in a proactive rather a reactive matter. Here labour migration - as a new status of protection - has a legitimate role to play for vulnerable communities in particular, when adapting to environmental change. As the fields of human rights and environment expand and intertwine, so do the *legal cumulative effects* of these frameworks, which highlight the prevention of, or protection from, cross-border environmental displacement as an important protection dimension of emerging customary nature. This path is increasingly confirmed by the work carried out by the ILC Draft Articles on the Protection of Persons in the Event of Disasters giving precision to prevention as a principle of international law. The development of a normatively grounded preventative dimension to protection for EDPs does not imply however, the curtailment of the right to seek asylum abroad.

Protection Obligations after Cross-Border Environmental Displacement Arise Contextually

In Chapter 5 we sought to explore the extent to which host states duties, which materialised under the Refugee Convention, are transferrable to protecting EDPs. The study showed the need to re-think a legal regime that has traditionally been geared towards the narrow class of

those people fleeing political persecution. This present legal structure, while relevant as a point of comparison, and although it offers protection and status to those who cross the border due to environmental factors in certain circumstances (where environmental impacts may amount to persecution based on qualified grounds), is still largely inadequate. The Refugee Convention was created for a different purpose and, therefore, has limited application to engage host states in particular obligations. Whereas the discussion highlighted the legal academic discourses that wish to enhance the meaning of refugeehood to include EDPs, this path is currently barred by institutional scepticism towards reopening negotiations concerning the Refugee treaty. The worry is that it could lower the current protection standards for refugees under the existing definition, as well as, the general dislike and stigmatisation of the term *refugee*. States such as New Zealand have recently made useful contributions towards our jurisdictional understanding of how the terms of the Refugee Convention are too strict to apply in this embryonic area. In two emblematic cases *Teitiota v The Chief Executive of the Ministry of Business and Employment* and *AD (Tuvalu) v New Zealand Immigration and Protection Tribunal* the applicants were considered not to be in need of international protection due to environmental factors.

These exposed barriers have not been an impediment to the evolution of the law of protection of the human person for cross-border displacement at the regional level that came into existence in order to fill existing regional gaps in the international protection regime. The enhanced interpretative human rights dimension of regional protection standards revealed that states have *contextually developed the protection of environmental displacement*. Both the African Refugee Convention and Cartagena Declaration on Refugees may provide some sort of protection for EDPs if they find themselves in analogous situations of conventional refugees and the Arab States Convention clearly offers protection to those people affected by environmental disasters.

State practice, primarily in the African context, has demonstrated that countries have allowed people that cross the border due to environmental factors to remain temporarily. It is true however, that environmental displacement could remain excluded from the legal framework of these regions due to a lack of ratification (like the Arab States Convention), or the non-binding character (like the Cartagena Declaration on Refugees) of some of these regional instruments, which narrow their authoritative character. This is coupled with the general state practice to grant protection status solely in situations of mass influx or on an *ad hoc* basis. It is therefore doubtful that the issue will be dealt with in a systematic and coherent matter. Nonetheless, extended protection obligations may be derived from a common ground of protection - the principle of *non-refoulement* - echoed in the case law of various treaty bodies (judiciary or quasi-judiciary. In particular, Article 3 of ECHR which gains relevance through the judgements of the ECtHR) and embodied in complementary protection standards at the European Union level.

Towards a New Human Rights-Based Protection Paradigm for Environmental Displacement

Finally, the third part of this thesis highlighted the protection of environmental displacement as a way of both reflecting states' human rights obligations and narrowing the identified legal protection gaps. The analysis of the European Union's regionally orientated protection regime can help states to consolidate an evolving Protection Paradigm of proactive and reactive measures being erected at the international level for environmental cross-border displacement. In other words, it helps states to (re)conceptualise protection as a holistic and dynamic enterprise. The positioning of the EU in the international sphere, underpinned by the paradigm for the protection of human rights, can remedy the current protection gap that exists within the international legal system. It offers effective and pragmatic solutions that can be consolidated within the European Union and beyond its borders, even if it did not have environmental displacees in mind.

Fostering labour migration through the EU Seasonal Workers Directive and/or Mobility Partnerships is suggested as an *ex ante* displacement protection measures that may enable populations to adapt to environmental change. Building on the experience gained within a number of relevant labour migration schemes implemented at European level and beyond, it could promote amongst states the use of migration as form of adaptation. The Seasonal Workers Directive offers a fast track procedure of common entry, residence conditions and a set of rights for migrant seasonal workers, and could be used as a preventative strategy to reduce displacement by targeting communities of origin who are most vulnerable to environmental change and to increase their resilience to environmental disruptions. The multi-seasonal permit in a single act reduces bureaucracy, offers a legal status, opens mobility opportunities and facilitates re-entry, but to function, states cannot be reluctant to open legal entry channels to labour migrants. The same can be said with regards to Mobility Partnerships. This cooperation agreement, which reflects a new form of governance on mutual commitments and shared responsibility between third states and EU Member states, can make a contribution into all aspects of migration (migration and development, legal migration and illegal migration), but can only work if it has the potential to increase the leverage on both sides.

Other existing complementary standards may allow states to provide *ex post* protection against return on human rights grounds to those who have crossed a border due to environmental factors. For example, it was argued that subsidiary protection under the EU Qualification Directive may be extended to those who are forced to move on a permanent or quasi-permanent basis where the prospects of return may be slim. This can include people affected by slow-onset environmental change patterns such as desertification, sea-level rise, or certain situations of natural disasters. Despite inherent limitations of the QD, the scope of protection may be confirmed by an enhanced interpretative and contextual dynamic of the Directive, together with Article 2 (right to life) and Article 3 of the ECHR (freedom from torture and inhuman and degrading treatment) and the jurisprudential glow of two legal orders with European human rights law (ECHR and EU) which provide protection in individual cases, including expulsion. The development of the jurisprudence on socio-economic

deprivation (in *D. v United Kingdom*, for example) and the increasing judicial recognition of how environmental factors (such as drought or floods) contribute to the multicausality of displacement and instability in a region (as highlighted in *Sufi and Elmi v United Kingdom* and further elaborated in *MSS v Belgium and Greece*) and/or the exceptionally severe context in the country of origin (found in *Elgafagi v Staatssecretaris van Justitie*), implies that a human rights approach to reasonableness of return to disaster-affected areas should evidently apply. In cases of forced movement due to fast onset disasters, it was argued that the EU Temporary Protection Directive may provide temporary protection status *prima facie* for situations of mass influx even if it would have to overcome a number of political thresholds. Existing national legislative practices, both on subsidiary and temporary protection within (and beyond) the EU addressing environmental displacement, may confirm an emerging *ex post* formalised regime of normative consistency that shows the consolidation of protection for people displaced by environmental factors.

As previously highlighted, the analysis showed us that the legal sources of protection for people who are, or will be, displaced by environmental factors are not insufficient. Policy makers must however, have their attention drawn to the issue. The possibilities of existing law should be made clear to them and they must be encouraged to embrace its expansive interpretative dimension, underpinned by the human rights legal order to (re)conceptualise and remedy protection for environmental displacement. The increased recognition of environmental displacement reveals the existence of a unanimous sentiment to put into action effective protection. Scholarship, civil society at large, and international organisations as a whole, have a role to play in this regard. While international law has developed considerably in the past twenty years in addressing displacement and the protection of the human person “the time for complacency has certainly yet to arrive.”¹ Perhaps the question at this point, should no longer be how much law exists and how much it protects, but what the transformative capacity is of human rights law in the wake of new challenges i.e. to enhance the protection regime for a new-concerned legal category based on their needs.

“This means that, despite the new challenges and some worrisome steps backwards in our days (e.g. forced migrations and uprootedness, restrictive and abusive migration policies, the closing of the frontiers and xenophobia), human conscience keeps on moving Law ahead, as its ultimate material source. Thus, despite the incongruities of the practice of States in our times, the *opinio juris communis* keeps on enlightening the path to follow, which cannot be other than that of the prevalence of the fundamental rights of the human person in all and any circumstances and of the consolidation of the obligations *erga omnes* of protection. This implies, ultimately, the primacy of the *raison d’humanité* over the old *raison d’État*.”²

The new protection paradigm for environmental displacement currently being erected by the interplay of international and regional normative forces and legal and policy developments is not clearly dictated, but rather, progressively being constructed. The end of this study, however, is just the beginning of a theme around which more discussion is still needed in order to protect the human person in the wake of new challenges.

¹ Leckie, S. (1995) “When push comes to shove: Forced evictions and human rights” (Habitat International Coalition) p. 98.

² Cançado Trindade, A. (2010) “International Law of Humankind, Towards a new *Jus Gentium*” (Martinus Nijhoff Publishers) *Op. Cit.* p.528.

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