

A satellite image of a tropical cyclone, showing a distinct eye and spiral cloud bands over a dark blue ocean. The image is the background of the entire page.

REFUGEE LAW  
INITIATIVE

SCHOOL OF  
ADVANCED STUDY  
UNIVERSITY  
OF LONDON

# Environmental Displacement in 2018 – Current Protection Challenges

RLI Working Paper Series  
*Mini Volume* (Papers 23–26)

A mini volume of papers arising from  
the recent workshop, *Environmental  
Displacement in 2017*, at the University of  
Sheffield, School of Law



RLI Working Paper Series Mini-volume (Papers 23–26)

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(University of Sheffield)

# **Environmental Displacement in 2018 – Current Protection Challenges**

## **REFUGEE LAW INITIATIVE**

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REFUGEE LAW  
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*Editorial*

## Environmental displacement in 2018 – current protection challenges

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From 2008–2014, an estimated 184.4 million people were displaced from their homes by environmental factors.<sup>1</sup> The list of these factors is endless, and includes rising temperatures and changes in the frequency of high temperature regimes; changing rainfall regimes; changes in atmospheric and ocean chemistry; changes to coastal, marine and freshwater ecosystems; the melting of mountain glaciers; coastal flooding; land and soil erosion; and extreme weather events such as tropical storms, cyclones, floods, landslides, volcanic eruptions, earthquakes and tsunamis.<sup>2</sup>

The significance of these environmental changes is exemplified by the huge number of individuals that have been displaced. Unfortunately, this figure is set to rise. Low-elevation coastal areas that accommodate 10 per cent of the world's population; global drylands,<sup>3</sup> with a population of 2 billion; and more sparsely populated mountain regions are likely to become even more significantly affected by future global environmental changes and extreme weather events.<sup>4</sup> Although there is growing agreement that degrading environmental conditions, environmental changes, and other weather-related events influence mobility, there remains significant research to be done on how law and policy can react to these changes.<sup>5</sup>

It was in the spirit of fostering research on this important topic that the workshop entitled 'Environmental Displacement in 2017 – Current Displacement Challenges' was held at the University of Sheffield in June 2017.<sup>6</sup> Six junior researchers presented their research on two central issues: how to conceptualise the issue of human mobility in the context of environmental factors across disciplines, and how to approach the issue of human mobility in policy and legal responses. The presenters received feedback from three established scholars in the field – Professor Walter Kälin (University of Bern), Dr David James Cantor (Refugee Law Initiative, University of London), and Dr Ilan Kelman (University College London). The workshop was deliberately small in size, which helped foster feedback and discussion, the development of networks, and the identification of opportunities for future collaboration. Prof Kalin, Dr Cantor, and Dr Kelman closed the workshop with their thoughts on current challenges in environmental displacement and prospects for the future. This mini-volume of the Refugee Law Initiative Working Papers Series gathers together some of the papers presented at the event.

The papers in this mini-volume centre around the theme of human movement in the context of environmental factors. Such movement can be either internal or cross-border, and occupies a continuum ranging from voluntary migration to displacement. Migration is generally understood to involve elements of decision-making, whether regarding the location, timing or means of movement.<sup>7</sup> Displacement occurs where people lacking resilience and adaptive capacity, are forced to leave their place of residence in order to avoid any 'immediate and foreseeable' harm.<sup>8</sup>

To reduce vulnerability and increase resilience, is to reduce the impact of environmental changes and extreme weather events. Adaptation strategies are important in dealing with the effects of global environmental change and increased vulnerability, and migration is one such adaptation strategy.<sup>9</sup> In this mini-volume, Lauren Nishimura examines the three adaptation obligations – of actions, assistance, and cooperation – established by the United Nations Framework Convention on Climate Change (UNFCCC). She argues that the UNFCCC and climate change regime provides little guidance as to the meaning of these obligations, and argues that they should be interpreted through the lens of other international law obligations. By drawing on human rights law, environmental law, guidance on resettlement and relocation, and the work done by the Nansen Initiative, Nishimura develops and clarifies the adaptation obligations of both countries of origin and destination for those displaced by environmental factors.

The relevance of climate change law to human movement in the context of climate change is confirmed by the

1 Nansen, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Final Draft)* (The Nansen Initiative 06/10/2015), Executive Summary, I. Because human movement is multi-faceted, it cannot be solely attributed to environmental factors. Rather, environmental factors interact with economic, social, political and demographic drivers of human movement. See Foresight, *Migration and Global Environmental Change* (The Government Office for Science 2011), pp. 44–5; Nansen, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Final Draft)*, para 17.

2 Foresight, *Migration and Global Environmental Change*, pp. 51–2.

3 Uriel Safriel and others in Rashid M. Hassan, R. J. Scholes and Neville Ash (eds), *Ecosystems and Human Well-Being: Current State and Trends: Findings of the Condition and Trends Working Group of the Millennium Ecosystem Assessment* (Ecosystems and Human Well-Being: Current State and Trends: Findings of the Condition and Trends Working Group of the Millennium Ecosystem Assessment, Island Press 2005), p. 625: 'Drylands are limited by soil moisture, the result of low rainfall and high evaporation, and show a gradient of increasing primary productivity, ranging from hyper-arid, arid, and semiarid to dry subhumid areas. Deserts, grasslands, and woodlands are the natural expression of this gradient.'

4 Foresight, *Migration and Global Environmental Change*, pp. 39–40.

5 See for example: *ibid*; UNHCR, *The Environment and Climate Change* (October 2015); Neil Adger and others, *Human Security in: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014); Nansen, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Final Draft)*.

6 Funding from the University of Sheffield Migration Research Group and the Sheffield Centre for European and International Law is graciously acknowledged. Details of the event, including the programme, are available here: <https://mrg.group.shef.ac.uk/mrg-workshops-2/>.

7 Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press 2012), p. 5.

8 Nansen, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Final Draft)*, para 16.

9 See IOM, *Making Mobility Work for Adaptation to Environmental Changes: Results from the MECLIP Global Research* (2017); Jane McAdam, 'Refusing "refugee" in the Pacific: (de)constructing climate-induced displacement in international law' in Etienne Pigué, Antoine Pécoud and Paul De Guchteneire (eds), *Migration and Climate Change* (Migration and Climate Change, UNESCO Publishing, Cambridge University Press 2011), p. 88; and Foresight, *Migration and Global Environmental Change*, p. 173. See also for a visual representation IOM, *Migration and Environmental Change: Vulnerability and Resilience Scenarios* (2015).

Task Force established by the 21<sup>st</sup> Conference of Parties to the UNFCCC agreement. This Task Force will produce recommendations on how to 'avert, minimise and address displacement related to the adverse impacts of climate change.'<sup>10</sup> The UNFCCC's acknowledgement of the effects of climate change on human movement is complemented by other legal developments over the last 20 years. For example, the European Court of Human Rights' has found that a State's lack of resources to deal with a naturally occurring phenomenon can create such dire conditions so as to warrant complementary protection under Article 3 of the European Convention on Human Rights.<sup>11</sup> The international community has paid increased attention to the plight of Internally Displaced Persons, and the Guiding Principles on Internal Displacement have included 'natural or human made disasters' as a driver of internal displacement.<sup>12</sup> The completion of the Guiding Principles has been complemented by the entry into force of regional African treaties for the protection of IDPs, including the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). In this mini-volume, Alfredo dos Santos Soares aims to take stock of the progress made in the Kampala Convention's implementation and, in particular, assessing its effectiveness in protecting people displaced in the context of climate change. Dos Santos Soares argues that, despite the remarkable efforts made towards the implementation of the Kampala Convention, the concrete impact of its provisions on enhancing the protection of and assistance to environmental internally displaced persons is lacking. Much work remains to be done to translate this innovative instrument into practice, particularly to secure concrete improvements in the protection of those displaced within their states by environmental disasters.

A different approach with regards to protection in cases of displacement is to provide for temporary protection based on humanitarian grounds. This depends on the discretion of each state to either establish exceptional measures in *ad hoc* situations or apply existing provisions when necessary where these are included in domestic law.<sup>13</sup> At present, such practices exist at the domestic level and have not yet been incorporated into a binding regional or international framework. However, in this volume, Giovanni Sciacaluga explores whether this could be done at EU level. He argues that the Temporary Protection Directive – though it addresses individuals fleeing civil war, endemic violence, or systematic violations of human rights – could nonetheless be applicable to persons fleeing sudden-onset natural disasters. Sciacaluga argues that EU Member States would be more favourable to activating the Temporary Protection Directive if it were designed for displacement from rapid-onset natural disasters, since such disasters cause damages that are restorable in a relatively brief period. Hence, the paper calls for modification of the Temporary Protection Directive with a view to rendering it more specifically disaster-oriented.

The need for further research on the topic of human mobility and the environment is evident. Comprehensive responses are lacking with regards to protection in cases of displacement and facilitating adaptation strategies such as migration. Important legal questions include which terminology should be used; whether existing legal obligations such as international human rights law, European Law or International Climate Change Law can be interpreted so as to cover the legal gap; whether there is a need for negotiating new binding or soft law solutions; and finally whether the issue is best addressed at the international, regional, or domestic level. The publication of this mini volume by a new generation of early career scholars is a step forward in exploring these topical questions.

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10 Decision 1/CP.21:'Adoption of the Paris Agreement', Report of the Conference of the Parties on its twenty-first session, Paris (30 November – 13 December 2015), UN Doc FCCC/CP/2015/10/Add.1, Loss and Damage, Paragraph 49.

11 *Sufi and Elmi v. The United Kingdom* [2011] ECHR 4 para 282.

12 UNHCR, Guiding Principles on Internal Displacement (11 February 1998), UN Doc. E/CN.4/1998/53/Add), Introduction: Scope and Purpose.

13 For more see David Cantor, *Law, Policy and Practice Concerning the Humanitarian Protection Aliens on a Temporary Basis in the Context of Disasters* (The Nansen Initiative 2015).

# Assessing the protection of environmentally displaced persons under the Kampala Convention

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## Abstract

The geography of progressive climate change impacts places the African continent among the most vulnerable regions of the world. In line with the prediction of the Intergovernmental Panel on Climate Change in its first report (1990), the involuntary migration of population is already proving to be one of the most serious of such impacts across the region. The overwhelming majority of victims remain within their own countries. Thus, coupled with conflict, violence and development projects, slow-onset and rapid-onset disasters have currently made Africa home to the largest number of internally displaced people. Determined to tackle this plight, in 2009 the African Union adopted its *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Kampala Convention), articulating the need for a holistic response based on a combined framework of international human rights law and international humanitarian law. Five years since the convention entered into force (2012), this paper aims to take stock of the progress made in its implementation and, in particular, assessing its effectiveness in protecting people environmentally displaced in the context of climate change. To this end, it identifies the existing and ongoing normative, policy and institutional processes on domestication and implementation of the convention and explores the degree to which these processes provide for the protection due to people displaced by environmental disasters, with a particular focus on slow-onset environmental disasters. The paper finds that, despite the remarkable efforts towards the implementation of the said convention, the concrete impact of its provisions on enhancing the protection of and assistance to environmental internally displaced persons is still unperceivable. Much work remains to be done to translate this innovative instrument into practice, particularly to secure concrete improvements in the protection of those internally displaced by disasters in the context of climate change.

## *Keywords*

displacement; climate change; States obligations; Kampala Convention; Responsibility to Protect

## Introduction

In contrast to visible flows of refugees and cross-border migrants to Europe, in recent years the plight of internally displaced persons (IDPs) has been largely neglected by the international community.<sup>1</sup> Yet, it is clearly a growing crisis and 'a key challenge of our times'.<sup>2</sup> This is particularly severe in Africa, 'a continent disproportionately affected by internal displacement'<sup>3</sup> and home to the largest number of IDPs. In fact, as of the end of 2016, over 12.2 million people were living in displacement across the continent as a result of conflict and violence. That is more than 30 per cent of the global total (40.3 million).<sup>4</sup> Added to this figure should be countless more IDPs engendered by development projects, sudden-onset disasters, such as floods, and slow-onset disasters, such as desertification and more frequent droughts, which are linked to the adverse effects of climate change. Indeed, while precise data is not available since it has not been collected systematically, it is easy to assume that the continent is also strongly impacted by displacement due to this threefold cause.

Concerned about internal displacement as 'a source of suffering for millions of people, a driver of food insecurity and a barrier to the sustained development',<sup>5</sup> African States showed their willingness and determination to address this problem in a comprehensive and detailed manner by adopting, on 23 October 2009, the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, the Kampala Convention, which entered into force on 6 December 2012, being the fastest African Union treaty to do so. It is the world's first and so far only legally binding regional instrument to cater specifically to IDPs.

Premised on the consideration of drivers of migration in general as being influenced by multiple factors, the Kampala Convention applies, in a holistic fashion, to all situations of internal displacement regardless of its causes (Article 15). While this makes sense, it does not preclude me from evaluating the extent to which implementation of the convention is being effective with regard to IDPs due to environmental disasters. In other words, the aim of this paper is to assess the current effectiveness of the Kampala Convention in providing protection to people displaced by disasters in the context of climate change. Among other reasons, this purpose is largely justified by the growing affirmation of climate change, which is becoming the dominant force in inducing human displacement,<sup>6</sup> since it operates as an amplifying factor in conflicts and other elements of socio-economic vulnerability, in particular in the African continent.

To meet this aim, methodological relevance is given to conceptual analysis of three disasters (explicitly referred to in the convention as one of the major drivers of internal displacement), as well as to the identification and analysis of the existing or under construction policy, legal and institutional national frameworks on environmental IDPs. In this sense, I also lay methodological emphasis on the examination of measures taken or to be taken by States parties specifically to prevent and mitigate the effects of disasters, including by establishing early warning systems and implementing disaster risk reduction strategies, emergency and disaster preparedness and management measures in areas at risk. I try to find out how all this is used to prevent displacement and protect people displaced by disasters, including those that are induced by climate change.

The paper consists of three sections. The first reviews and delves into the international academic debate around the linkages between climate change and human mobility, as well as the evolution of the international response to the protection needs of people displaced as a result of severe impacts of climate change. The purpose is helping to clarify the necessary theoretical framework for the assessment of the Kampala Convention in protecting IDPs due to disasters and climate change. The second section undertakes an overview of the African context of forced displacement, with particular emphasis on the characterisation of internal displacement caused by environmental disasters in the context of climate change. Then it gives an outline of the convention's scope, drawing particular attention to its key provisions on displacement due to disasters. The third and final section discusses the domestication and implementation process of the Kampala Convention, seeking to find out its current and future incidence and effectiveness in protecting environmental IDPs. The case of Angola will be used as an example to illustrate the debate, as the only State party to the Convention that has its own legislation on internal displacement.

## I. Approaching climate change and environmental displacement

Climate change has been characterised by the former UN General Secretary Ban Ki-moon as 'the defining challenge of our era'.<sup>7</sup> As such, it affects directly or touches upon all areas of human life, being a subject of study in many scientific and academic disciplines. One of the key questions for many disciplines deals with the impact that climate change has or may have on human mobility.

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1 This is clearly reflected in the fact that IDPs 'ended up largely excluded from the outcomes of the UN's Summit for Refugees and Migrants' held in September 2016. Indeed, 'the single reference to IDPs in the New York Declaration pointed to links between internal displacement and large movements of migrants and refugees. However, addressing internal displacement was recognised mostly as a way of mitigating large cross-border movements of vulnerable people' (IDMC, *Global Report on Internal Displacement*, Geneva, May 2017 [hereinafter referred to as GRID 2017], p. 5).

2 Idem.

3 African Union, 'Explanatory Note on the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa', p. 2.

4 IDMC, GRID 2017, p. 26.

5 IDMC, *Africa report on internal displacement*, Geneva, December 2016, p. 4.

6 Fabrice Renaud, Janos J. Bogardi, Olivia Dun and Koko Warner, *Control, Adapt or Flee: How to Face Environmental Migration?* (Bonn: UNU-EHS, 2007), p. 16.

7 'Climate change poses 'defining challenge' of our time, Ban says', *UN News Centre*, 7 October 2008, [www.un.org/apps/news/story.asp?NewsID=28458](http://www.un.org/apps/news/story.asp?NewsID=28458) (accessed 25 Apr. 2018).

## 1.1. The links between climate change and displacement

In recent times, in particular since 2000, Mozambique has experienced an unusual increase in the frequency and intensity of floods, with tragic consequences, the last of which occurred in January 2013. Both national authorities and victims attribute this increase to climate change.<sup>8</sup> Similarly, floods that devastated Pakistan between July and August 2010 have been widely considered a sign of extreme weather events that the entire region may suffer in the future more frequently due to the climate change.<sup>9</sup> Aligned with this perception are the peasants of eastern Madagascar, who feel unable to cope with the increasingly persistent storms (and cyclones) devastating their crops and homes,<sup>10</sup> as well as those peasants of the Horn of Africa and Southern Africa, who are continuously affected by the scarcity of rainfall, desertification and soil degradation.<sup>11</sup> At the same time, the inhabitants of several small island states, especially atolls (Kiribati, Maldives, Marshall Islands, Tokelau and Tuvalu), do not hesitate to attribute to climate change the predictable sea level rise, which could lead to the disappearance of their countries and inexorably reduce them to statelessness.

### 1.1.1. Discussion on the causal links between environmental events and climate change

It should be emphasised that any of the environmental events mentioned above usually involves population displacement. This leads me to take a brief overview of the ongoing debate on the causal links between the events and climate change. Before that, it is necessary to point out the existence of persistent scientific dissent, sometimes polarised, on anthropogenically based climate change. Immersed in heated discussions, advocates and detractors accuse each other of 'climate-scepticism' perceived as 'business lobbying' serving the fossil fuel industry (oil, coal and natural gas); and of 'science fiction' and 'ecoalarmism' of those who have allegedly turned climate change into a summary of all problems affecting humanity.<sup>12</sup>

Obviously, both sides agree on the apodictic recognition of change as something inherent to planet Earth, which, over its millions of years of existence, has undergone enormous and intense mutations. The difficulty arises when appealing to the suggestion that human beings are responsible for some of those changes. On the other hand, there are many scientists who consider that human activity has the capacity to directly affect the climate system, as evidenced by massive emissions of greenhouse gases resulting from the use of fossil fuels. They assert the existence of clear evidence linking this increasing emission of gases to the atmosphere over the 20th century with the consequent increase in average global temperature which, according to them, has been rising since the 1970s, and may have suffered an additional acceleration over the first decade of the 21st century.<sup>13</sup>

One cannot ignore the great uncertainties surrounding a reality of such dizzying complexity as the climate and the processes of its variability, nor the need to resort to prudence and rigorous and deep analysis, which can lead to greater scientific evidence, and shed more light on the subject, favouring its better understanding and adequate management. In any case, here I do share not only the perception that the climate is changing, but also and above all the scientific certainty that endeavours to demonstrate that the anthropogenic climate change is a reality in which we are already immersed, not a mere and picturesque speculation concerning a remote future.<sup>14</sup> This is, after all, the major conclusion reached by the IPCC in its fifth assessment report, asserting that climate change is unequivocal, as well as the human influence on and responsibility for it.<sup>15</sup>

Climate change is by many considered as one of the major threats facing humanity along with terrorism and nuclear proliferation,<sup>16</sup> and one of the four forces that are to determine the future of civilisation.<sup>17</sup> As such, it entails serious dangers and terrifying consequences that in many regions might be of cataclysmic dimensions, especially if global warming, instead of being limited to 2°C, increases to 4°C. Waves of heat, flooding in coastal cities, worsening water shortages, growing food production risks, increased tropical hurricane intensity and unprecedented loss of biodiversity make up the bleak picture that may likely emerge from this increase in temperature.<sup>18</sup>

8 K. Asante, R. Brito, G. Brundrit, P. Epstein, A. Fernandes, M. R. Marques, A. Mavume, M. Metzger, A. Patt, A. Queface, R. Sanchez del Valle, M. Tadross and R. Brito (eds.), *Main report: INGC Climate Change Report: Study on the impact of climate change on disaster risk in Mozambique* (Mozambique: INGC, 2009).

9 GMF, *Report: Climate-induced migration growing problem for nations of all kind*, Washington, 29 September 2010, [www.ehs.unu.edu/file/get/6336](http://www.ehs.unu.edu/file/get/6336) (accessed 25 Apr. 2018).

10 Walter Kälin, *Climate Change Displacement – A Challenge for International Law*, Kolkata, Mahanirban Calcutta Research Group, [www.mcrg.ac.in/DL3.pdf](http://www.mcrg.ac.in/DL3.pdf) (accessed 25 Apr. 2018).

11 Heinrich Böll Stiftung, *Climate Governance in Africa: Adaptation Strategies and Institutions* (Cape Town: Unity Press, 2010).

12 Juan José Sanz Donaire, 'Precisiones a las bases científicas del cambio climático', en Centro Superior De Estudios De La Defensa Nacional (Ed.), *Cambio climático y su repercusión en la economía, la seguridad y la defensa* (Madrid: Ministerio de Defensa, 2009), p. 11; Dinyar Godrej, *El cambio climático* (Barcelona: Intermón Oxfam, 2002), pp. 90–7.

13 Carlos M. Duarte (ed.), *Cambio global. Impacto de la actividad humana sobre el sistema Tierra* (Madrid: CSIC, 2006).

14 Jim Motavalli, 'Prólogo', in Jim Motavalli (ed.), *El cambio climático. Crónicas desde las zonas de riesgo del planeta* (Barcelona: Paidós, 2005), pp. 9–16.

15 Working Group I Contribution to the IPCC Fifth Assessment Report, *Climate Change 2013: The Physical Science Basis Summary for Policymakers*, Stockholm, Sweden, 27 September 2013.

16 William J. Burroughs, *Climate Change. A Multidisciplinary Approach* (2nd edn., Cambridge: Cambridge University Press, 2007).

17 Lauren C. Smith, *El mundo en 2050. Las cuatro fuerzas que determinarán el futuro de la civilización* (Barcelona: Debate, 2011).

18 Potsdam Institute for Climate Impact Research And Climate Analytics, *Turn Down the Heat: Why a 4°C Warmer World Must Be Avoided* (Washington D.C.: The World Bank, 2012).

### 1.1.2. Linkages between environmental events, climate change and displacement

It is unnecessary to resort to catastrophic projections to realise that the repercussions of climate destabilisation are already perceptible worldwide, as well as their translation into social and economic changes, which can force people to be displaced, either temporarily or permanently. As highlighted by the aforementioned IPCC in its first report in 1990, human migration movements could be the greatest individual impact of climate change, since millions may be displaced by it.<sup>19</sup>

It should be noted that the causal relationship between climate change and population displacement is an area of a controversial debate that has come to confront the positions between natural and social scientists, who have been labelling each other as 'maximalists' and 'minimalists'.<sup>20</sup> However, this debate tends to depolarise, since both sectors coincide in recognising that the relationship between climate change and (forced) migration is not linear but complex and 'multicausal'.<sup>21</sup> As such, it is broadly influenced by social, economic and political forces that determine the way societies interact with their own environments. In fact, as pointed out by Margareta Wahlström, 'it is not necessarily the temperature increase itself that poses the largest challenge in terms of human mobility, but the associated changes in, and combined effects of, precipitation patterns (drought and flooding), storms and sea level rise; loss of biodiversity, and ecosystem services; and resulting health risk, food and livelihood insecurity'.<sup>22</sup>

Certainly, the study of this reality still demands exhaustive and consistent empirical research, resulting from the use of more coherent and, where possible, unified methodologies.<sup>23</sup> It also should include the examination of such important issues as the plurality of factors that shape migration dynamics, the social determinants of people's vulnerability to climate change, and the diversity of migratory patterns associated with climate change.

Meanwhile, in its current evolutionary stage, the discussions about the causal nexus of climate-displacement are marked by two main and complementary arguments.<sup>24</sup> The first deals with the weight of environmental and climatic factors in migration and its connection with other agents of diverse nature. It is argued that understanding the role of the environment in migration dynamics may lead not only to the analysis of how and why people are vulnerable to climate change impacts, but also to examine different strategies they develop to cope with or adapt to environmental adversity. In this sense, migration is considered one of many possible adaptation strategies. The second argument focuses on the political context in which migration flows occur, as well as on the treatment people displaced in relation to environmental factors should receive. Stemming from here, it discusses the protection deserved by people in situations of vulnerability to climate change, as well as the responsibilities of States and the international community to ensure such protection. Without prejudice to the complementarity between both points of view, in coherence with its nuclear concern, this paper focuses more on the second argument.

In short, the need for further scientific and systematic research to deepen the understanding on this subject is undeniable.<sup>25</sup> However, this does not prevent me from realising that, although it is impossible at present to determine and precisely specify its magnitude, displacements motivated by the impacts of climate change are already a fact and will be exacerbated in the foreseeable future.<sup>26</sup> Most of these movements take place within countries, although the dimension of potential external displacements should not be underestimated.<sup>27</sup> This highlights the already mentioned trend of climate change to become the most important factor generating forced displacement.

In view of all the above, across the following part will review the conceptual framework that is being developed regarding the victims of these displacements. It is, in short, an effort to identify, define and/or categorise as clearly as possible their situation and/or special needs in order to outline their proper treatment in the international legal-political sphere.

## 1.2. In search of an appropriate conceptual framework

The debates outlined above on the complex links between climate change and human mobility are closely linked to the persistent lack of consensus on the concepts and terminology to be used to refer to people who migrate due to environmental factors. Expressions such as 'environmental migrants', 'climate refugees', 'environmental refugees',

19 IPCC, *First Assessment Report* (Cambridge: Cambridge University Press, 1990).

20 Franc Laczo and Christine Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva, 2009).

21 Carolina Fritz, *Climate Change and Migration: Sorting through Complex Issues without the Hype* (Washington: Migration Policy Institute, 2010), [www.migrationinformation.org/Feature/display.cfm?ID=773](http://www.migrationinformation.org/Feature/display.cfm?ID=773) (accessed 25 Apr. 2018).

22 Nansen Conference on Climate Change and Displacement in the 21st Century, Oslo, 6–7 June 2011, [www.unhcr.org/4ea969729.pdf](http://www.unhcr.org/4ea969729.pdf) (accessed 25 Apr. 2018).

23 Marc Stal and Koko Warner, *The Way Forward. Researching the Environment and Migration Nexus*, research brief based on the outcomes of the 2nd Expert Workshop on Climate Change, Environment, and Migration 23–24 July 2009, Munich, Germany (Bonn: UNU-EHS, 2009), p. 7.

24 Étienne Piguet, Antoine Pécod and Paul de Guchteneire (eds.), *Migration and Climate Change* (Paris/Cambridge: UNESCO/Cambridge University Press, 2011), pp. 1–26.

25 Renaud et al., *Control, Adapt or Flee*, p. 33.

26 IFRC, *Cambio climático y movilidad humana: punto de vista humanitario*, 22 April 2009, [www.ifrc.org/Global/Publications/disasters/climate%20change/climate\\_change\\_and\\_human\\_mobility-sp.pdf](http://www.ifrc.org/Global/Publications/disasters/climate%20change/climate_change_and_human_mobility-sp.pdf) (accessed 25 Apr. 2018).

27 Walter, Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change. Normative Gaps and Possible Approaches* (Geneva: UNHCR, Division of International Protection, 2012).

'ecological refugees', 'environmentally displaced persons', *inter alia*, make up the variety of concepts and terms in use, scattered in the existing literature, adding some confusion to the subject rather than clarifying it. It is evident that climate change is challenging language, legislation and long-established institutions in their approach to human displacement.<sup>28</sup>

Indeed, the environmental displacement taking place in the context of climate change is clearly a 'new reality' that demands an original approach and creative and imaginative responses in both the conceptual, normative and political-institutional realm.

In the process of constructing the conceptual and terminological framework that I am dealing with, numerous authors have already laid a greater or lesser emphasis on several related aspects, including: the (in)adequacy of the terms refugee, migrant or displaced; the specific causality of the displacement (whether economic, social or political); crossing or not of State borders; the sudden or progressive nature of the environmental degradation; its natural or human origin; and the voluntary or forced, temporary or permanent character of the displacement. Yet, attempts to conceptualise people displaced by environmental factors hitherto both include and exclude or contradict some or several of these aspects. In addition, directly or indirectly, authors try to position themselves in favour of or against the need to articulate mechanisms of international protection for displaced persons.<sup>29</sup> And, what is most important in this sense, they seem to agree that 'it makes a big difference whether people are perceived as refugees, other types of forced migrants or voluntary migrants.'<sup>30</sup> This denotes the strong political component – beyond the scientific and academic – entailing this debate.

### 1.2.1. 'Environmental refugees'

Despite the lack of its recognition in International Law, the term 'environmental refugee' has become the most popular of all the aforementioned. This is due in large part to its 'strength' in attracting the attention of the international community to issues related to the protection of human rights of people who may be displaced by environmental reasons.<sup>31</sup> Introduced in the 1970s by Lester Brown,<sup>32</sup> its use has been generalised by Essam El-Hinnawi who, in 1985, elaborated a policy document for the United Nations Environment Program entitled 'Environmental Refugees'. Therein he provided the first formal definition of 'environmental refugees', understood as people 'who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life.'<sup>33</sup>

The institutional affiliation of its author has given rise to the thought that this definition relies more on the humanitarian mission of his organisation than in the use of analytical criteria.<sup>34</sup> However, given its pioneering character, the recognition of the potential heterogeneity of environmental displacement as well as the different types of people displaced by environmental factors, this definition has become the obligatory starting point for work on this subject, which has already generated a vast amount of literature and long debates. Scholars such as Jacobson,<sup>35</sup> Myers, Kent<sup>36</sup> and Bates<sup>37</sup> are among those who have made a significant contribution to popularising the use of the term 'environmental refugees' and improving its conceptualisation. Their contributions have a common denominator: they do not distinguish whether displaced persons have crossed an internationally recognised State border or not.<sup>38</sup>

In the meantime, I must point out that, from the perspective of research, the juxtaposition of the terms 'environment' or 'climate' with 'migrants' or 'refugees' has been criticised for suggesting a 'monocausal' nexus between environmental factors and human mobility, thereby denying the multiplicity of causes leading to environmental displacements.<sup>39</sup> Obviously, this critical assessment conditions most of the terminology and concepts adopted so far.

28 Roberta Cohen and Megan Bradley, 'Disasters and displacement: gaps in protection', *International Humanitarian Legal Studies*, 1 (2010), p. 3.

29 Mostafa M. Naser, 'Climate change-induced displacement: definitional issues and concerns', *Chicago-Kent Journal of Environmental and Energy Law*, 2 (2011), pp. 1–52.

30 Stephen Castles, *Environmental change and forced migration: making sense of the debate*, New Issues in Refugee Research, Working Paper 70 (Geneva: UNHCR, 2002), p. 9.

31 Camillo Boano, Roger Zetter and Tim Morris, *Environmentally displaced people: Understanding the linkages between environmental change, livelihoods and forced migration*, Refugee Studies Centre's Forced Migration Policy Briefings (University of Oxford, 2008), p. 1.

32 James Morrissey, *Environmental Change and Forced Migration. A State of the Art Review*, Refugee Study Center's Background Paper (University of Oxford, 2009), p. 3.

33 Essam El-Hinnawi, *Environmental Refugees* (Nairobi, Kenya: United Nations Environment Programme, 1985), p. 4.

34 Diane C. Bates, 'Environmental refugees? classifying human migrations caused by environmental change', *Population and Environment*, 23 (2002), p. 466.

35 Jodi L. Jacobson, *Environmental Refugees: A yardstick of habitability* (Washington: Worldwatch Institute, 1988), pp. 37–8.

36 Norman Myers and Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995), defined 'environmental refugees' as persons: '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' (pp. 18–19).

37 Bates, 'Environmental Refugees?'

38 Renaud et al., *Control, Adapt or Flee*, p. 13.

39 Piguet, Pécoud and Guchteneire (eds.), *Migration and Climate Change*, pp. 17–20.

The use of the 'refugee' notion applied to those displaced by environmental factors motivated by climate change still raises a number of persistent objections and controversies. Stephen Castles,<sup>40</sup> for example, considers the term 'environmental refugee' to be simplistic, unilateral and misleading, since it involves an exclusive cause which is seldom given in practice. Thomas Homer-Dixon equally opposes to the use of this term as 'misleading'.<sup>41</sup> More bluntly, Richard Black denies the existence of 'environmental refugees' or 'climate refugees', as he considers them 'a myth'.<sup>42</sup> According to him, 'there remains a danger that academic and policy writing on "environmental refugees" has more to do with bureaucratic agendas of international organisations and academics than with any real theoretical or empirical insight'.<sup>43</sup>

From the political-legal point of view, the terms 'environmental refugees' or 'climate refugees' are rejected as they are considered an extrapolation of the term refugee, which is commonly used to designate a person fleeing violence and persecution. Its legal definition is outlined in the 1951 Convention<sup>44</sup> and its 1967 Protocol on the Status of Refugees,<sup>45</sup> and does not include environmental factors. It is further argued that the use of the term 'refugee' in the context of climate change could dilute the refugee definition, which would cease to be a specific legal category but become a broader and indefinite concept. The UNHCR<sup>46</sup> itself has sought to settle the debate by stating that these terms have no basis in international refugee law, and that most of those commonly described as 'climate refugees' or 'refugees from environmental disasters' have not crossed an international border. Furthermore, it states that the use of such terminology could undermine the international legal regime for the protection of refugees and create confusion by suggesting a link between the impact of climate change, environmental degradation, migration and persecution, the latter being the main reason for a refugee to flee their country of origin and seek international protection.

Based on the convenience and usefulness of the terminology, several analysts<sup>47</sup> still consider that even though it is not legally correct, the term 'environmental refugee' proves to be the most convincing as it puts a human face to the consequences of climate change, it evokes a sense of global responsibility towards them and also a sense of urgency to deal with imminent or ongoing disasters. Certainly, this reasoning makes an interesting point in the debate. However, the UNHCR's 'position of authority' makes the use of this terminology nonviable and determines the need to find alternatives.

### 1.2.2. Alternative terminology: environmentally displaced persons

In 2007, the International Organization for Migration (IOM) proposed the use of the term 'environmental migrants' to refer to 'persons or groups 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 choose to do so, either temporarily or permanently, and who move either within their country or abroad'.<sup>48</sup> Despite the effort of this organisation to demonstrate the opposite, for many this definition is equally unsatisfactory, since, according to them, it suffers from the same problem mentioned above: 'monocausality', to the detriment of the 'multi-causality' character of the conceptualised reality. The expression 'population movements induced by environmental factors', which has also been considered is, in addition to being vague and diffuse, is not attractive to the general public.<sup>49</sup>

Used in the context of one of the most rigorous and comprehensive studies on the nexus between climate change and population movements – the EACH-FOR Project<sup>50</sup> – the term 'displaced for environmental reasons' is perhaps the most comprehensive, covering 'environmental migrants', 'environmentally displaced persons' and 'people displaced for development reasons'. However, blurring the boundaries between these three subcategories prevents the term from being satisfactory.

It is clear, therefore, that the persistent terminological dissent and the lack of a valid and consistent definition determine the institutional and normative vacuum. There is no doubt that language is decisive, since it frames the problem and defines the associated response, rights and responsibilities. In this sense, a precise definition would be a crucial step towards the design and development of the desired institutional and legal framework and active policies for the protection and assistance to both externally and internally displaced persons, likely victims of environmental adversities either natural disasters or related to climate change. In any case, and as Walter Kälin warned<sup>51</sup> in 2008, 'we

40 Castles, *Environmental change and forced migration*, p. 5.

41 Thomas Homer-Dixon, *Environmental Scarcity and Global Security*, Headline Series, no. 300 (New York: Foreign Policy Association, 1993), pp. 40–1).

42 Richard, Black, *Environmental Refugees: Myth or Reality?* New Issues in Refugee Research Working Paper No. 34 (Geneva: UNHCR, 2001).

43 Ibid., p. 14.

44 Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951, entered into force on 22 April 1954. UNTS, vol.189, p. 137.

45 Protocol relating to the Status of Refugees, adopted in New York on 31 January 1967, entered into force on 4 October 1967. UNTS, vol. 606, p. 267.

46 ACNUR, *Cambio climático, desastres naturales y desplazamiento humano: la perspectiva del ACNUR*, 2009, pp. 8–9.

47 Maria Como Stavropoulou, 'Alterações climáticas: desastres naturais e deslocações forçadas', en: *Refugiados e deslocados ambientais: o lado humano das alterações climáticas*. Actas do IX Congresso Internacional do Conselho Português para os Refugiados (Lisbon: CPR), p. 38.

48 IOM, Discussion Note: Migration and the Environment, MC/INF/288, 1 November 2007), [www.iom.int/jahia/webdav/shared/shared/mainsite/about\\_iom/en/council/94/MC\\_INF\\_288.pdf](http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf) (accessed 25 Apr. 2018), p. 1–2.

49 Piguet, Pécout and Guchteneire (eds.), *Migration and Climate Change*, p. 181.

50 Renaud et al., *Control, Adapt or Flee*.

51 Walter Kälin, *The Climate Change – Displacement Nexus* (Washington, DC: Brookings, 2008), [www.brookings.edu/research/speeches/2008/07/16-climate-change-kalin](http://www.brookings.edu/research/speeches/2008/07/16-climate-change-kalin) (accessed 25 Apr. 2018).

should not be distracted by semantic discussions with little practical meaning about whether to call affected persons “climate change refugees”, “environmental migrants” or something else. Instead, what is needed is a thorough analysis of the different contexts and forms natural disaster induced displacement can take.

It is a question of the participants in the debate sharing the fundamentals, so that the variety of terms should not prevent the development of a coherent common approach on what is really at stake.<sup>52</sup>

With all those arguments in mind, and without the slightest pretence of adding to the confusion, here I opt for the term ‘environmentally displaced persons’ (hereinafter EDPs),<sup>53</sup> which is intended to designate all persons or groups of persons who have been forced or obliged to escape or flee their home or place of habitual residence for an indeterminate period of time as a result or to avoid the effects of natural or man-made disasters, including climate change, whether or not they have crossed an internationally recognised State border. This general definition aims to promote an overall view of the environmental displacement problem, giving due weight to environmental factors motivated by climate change, but without neglecting the complex linkages and interaction between those factors, other factors that are socio-political in nature, and human mobility. From this conceptual overview, I will try to approach the magnitude and geography of the EDPs.

### 1.3. Magnitude and amplitude of environmental displacement

Linked to the precocity and fluctuations of the above-mentioned epistemological status on human displacement in the context of climate change are the figures of EDPs that have been recently amended and vary greatly depending on the definition, environmental factors, ventilated hypotheses and methodologies used.<sup>54</sup> It is clear that the growing awareness of the nexus between climate change and human mobility still lacks comprehensive empirical research that may lead to conclusive results.<sup>55</sup>

As a consequence, the quantification of EDPs remains a territory of unlikely consensus among the different parties in the debate, specifically between sceptics and alarmists. Lonergan, for instance, suggests that existing estimates and projections rely almost exclusively on ‘anecdotal evidence and intuitive judgments’.<sup>56</sup> Nevertheless, he warns about the detriment of underestimating the role that environmental alterations and the scarcity of resources can have in the population displacements. In turn, the IPCC itself, based on a number of reasons, considers most projections as being ‘mere conjectures’. However, in its aforementioned fifth report in 2014, this institution provides overwhelming data on the physical and environmental consequences of climate change that would lead to the displacement of millions of people.

As aforementioned, the need for concrete investigations and objective assessments is therefore indisputable, allowing a better understanding of the problem and reaching credible forecasts and valid estimates, surpassing mere conjectures and ‘academic approximations’. Meanwhile, increasing numbers of experts do not hesitate to include climate change among the main causes of forced migration, noting the existence of millions of people already displaced and millions of others who may be displaced as climate change impacts become more acute.<sup>57</sup>

Norman Mayer predicted that by 2050, up to 200 million people could be displaced by environmental and climate reasons. It is worth to bear in mind that by then, out of a world population estimated at nine billion people, one in 45 might be displaced for these reasons. This makes population displacements ‘one of the most serious challenges’ and ‘one of the main political problems’ to be faced over the 21st century.<sup>58</sup>

Joining the ‘numbers game’, the United Nations Environment Program (UNEP) estimates that by 2060, in Africa alone there could be some 50 million EDPs.<sup>59</sup> This reinforces forecasts that the impact and consequences of environmental degradation related to climate change could be exceptionally severe in this region of the world. I will get back to this later on.

The most apocalyptic of the above-mentioned estimates so far belongs to Christian Aid. In 2007, this institution predicted that by 2050, around one billion people could be permanently displaced, including 250 million due to climate change-related phenomena such as droughts, floods and hurricanes, and 645 million as a result of dam construction and other large scale development projects.

52 Piguet, Pécoud and Guchteneire (eds.), *Migration and Climate Change*, p. 184.

53 The term ‘environmental IDP’ is used interchangeably.

54 Tamer Aff and Koko Warner, *The Impact of Environmental Degradation on Migration Flows across Countries*, UNU-EHS Working Paper 5 (2008), p. 4.

55 Dominic Kniveton, Kerstin Schmidt-Verkerk, Christopher Smith and Richard Black, *Climate Change and Migration: Improving Methodologies to Estimate Flows* (Geneva: IOM – Migration Research Series Paper no. 33, 2008), p. 5.

56 Steve Lonergan, ‘The role of environmental degradation in population displacement’, *Environmental Change and Security Project Report*, 4 (1998), pp. 5–15.

57 Achim Steiner, ‘Prólogo’, *RMF*, 31 (2008), p. 4.

58 Kälin, *The Climate Change – Displacement Nexus*; Andrew Morton, Philippe Boncour and Frank Laczko, ‘Seguridad humana y desafíos Políticos’, *RMF*, 31 (2008), pp. 5–7.

59 Brown, Oli, ‘El baile de las cifras’, *RMF*, 31 (2008), pp. 8–9.

It is therefore not surprising that from these figures, some circles have begun to talk about what they call the largest mass global migration in the history of mankind.<sup>60</sup> As a result, 'demographic catastrophes' and large-scale international migrations flows have been predicted to 'damage the nature of destination regions and countries and thereby exacerbate the risk of conflict.'<sup>61</sup> There is no need to demonstrate how dangerous this approach is because it promotes xenophobia and social tensions by diverting attention from the protection and assistance needs of refugees and IDPs.

In a meritorious effort to overcome the 'alarmisms', in 2009 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and IDMC unveiled a pioneering study assessing the worldwide existence of 36 million displaced persons, in 2008 alone, as a consequence of natural disasters. This figure rose to more than 42 million in 2010, fell to under 15 million in 2011, and reached 32.4 million at the end of 2012. Of these data it is estimated that those displaced by environmental reasons linked to climate change were around 20 million in 2008, over 38 million in 2010, almost 14 million in 2011 and 32.4 million (98 per cent of the given figure) for 2012.<sup>62</sup> In the same period, there were approximately 4.6 million (2008), 2.9 million (2010) and 3.5 million (2011) persons displaced by violence, respectively. This highlights the trend of environmental phenomena related to climate change to turn into the main factor in population displacement around the world.

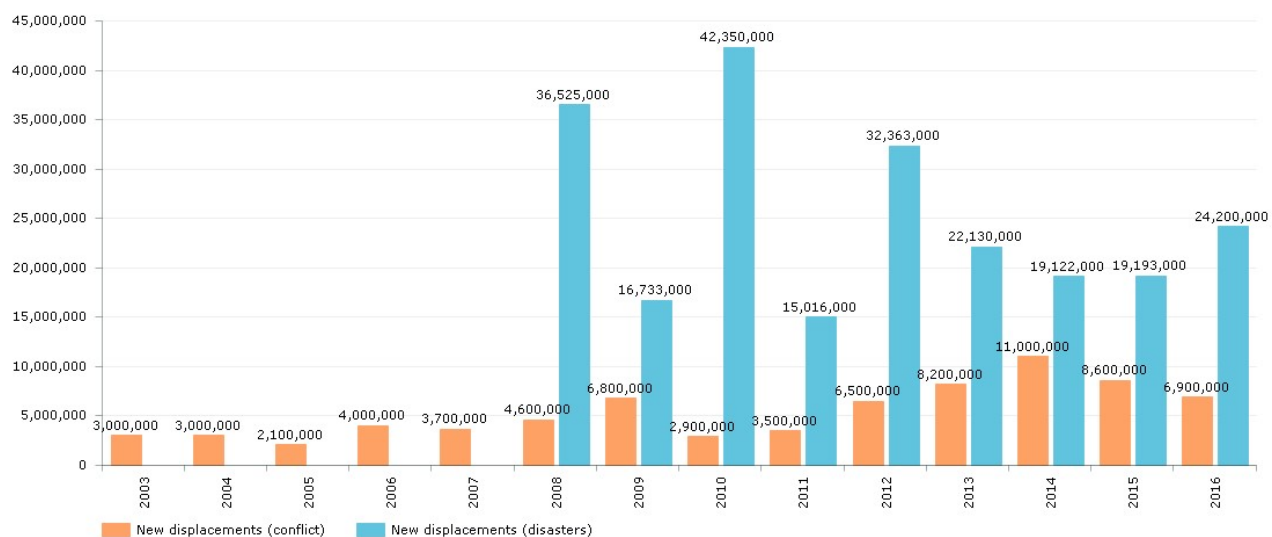
This demonstrates the progressive affirmation of climate change as becoming the dominant force inducing human displacement, since it acts as an amplifying factor to conflicts and other elements of socio-economic vulnerability. In providing the global scale of displacement caused by disasters, many of them related to climate change, the IDMC points out that these displace three times more people than conflicts. In fact, as illustrated below (figure 1):

Since 2008, an average of 26.4 million people per year have been displaced from their homes by disasters brought on by natural hazards. This is the equivalent to one person being displaced every second. The number and scale of huge disasters creates significant fluctuation from year to year in the total number of people displaced, while the trend over decades is on the rise.<sup>63</sup>

In its key findings, this same institution indicates that 'by the end of 2016 there were 40.3 million people internally displaced by conflict and violence across the world. An unknown number of people remain displaced as a result of disasters that occurred in and prior to 2016'.

It should be noted that, despite this unknown character of the magnitude of people displaced by disasters, the IDMC asserts that, adding to the already existing high number of IDPs by conflict and disaster, in 2016 alone a total of 31.1 million new displacements were recorded in 125 countries and territories. This is roughly the equivalent of one person forced to flee every second. Of this total number, 24.2 million new displaced people were due to disasters, while 6.9 million were motivated by conflict and violence.

Figure 1: Total annual new displacements since 2008



Source: IDMC, GRID 2017.

There is a broad consensus on the largely internal nature of displacement in the context of climate change, albeit it should be emphasised that the issue and size of EDPs crossing State borders should not be underestimated.

60 Scott Leckie, 'Implicaciones sobre los derechos humanos', *RMF*, 31 (2008), pp. 18–19.

61 RSH-OIM, *El cambio climático, la degradación del medio ambiente y la migración: qué hacer ante las circunstancias de vulnerabilidad de la población y cómo aprovechar las oportunidades de solventar el problema*. Informe de la Conferencia (Ginebra, 2008), p. 8.

62 IDMC, *Global estimates 2012. People displaced by disasters* (Geneva: IDMC, May 2013).

63 IDMC, *GRID 2017*.

From all the above, it is necessary to come to the conclusion that the environmental displacements occurring in the context of climate change, make up a 'new reality'. This overflows and poses enormous challenges to the legal order and international policies and relations, thereby demanding the adoption of new and imaginative answers. In this regard, and in order to analyse the extent to which international law is and should be an essential instrument for the management of environmental displacement as huge a social problem, the following two sections will review both the international recognition of environmental displacement and the evolution of States' obligations towards the victims.

#### *1.4. International recognition of environmentally displaced persons*

Both the United Nations Framework Convention on Climate Change (UNFCCC)<sup>64</sup> and the Kyoto Protocol<sup>65</sup> make no reference whatsoever to displacement induced by climate change.<sup>66</sup> Thanks to the decisive action of important sectors of the humanitarian community, international awareness on the issue has grown, as has the need for tighter integration of humanitarian and human rights approaches into international negotiations on climate change.

Inviting all States Parties to enhance their efforts on adaptation to implement *inter alia* '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', article 14 f) of the Cancun Agreements (Decision 1.CP/16) marks a turning point in the official recognition by States community, both of population displacement due to the impacts of climate change and the need to adequately address this reality at all levels, local, national, regional and international. In fact, it should be stated that this article represents the first inclusion of the environmental displacement issue in the international agenda.

However, it should be pointed out that this remarkable step was not followed up in successive climate change conferences. This is said without ignoring either the Decision on Loss and Damage adopted in Doha in 2012 (Decision 3.CP/18 paragraph 7 (a) (vi)), paragraph 50 of which refers to 'integrated approaches to avert, minimise and address displacement related to the adverse impacts of climate change', or the Warsaw International Mechanism for Loss and Damage, established by COP 19 to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change.<sup>67</sup>

Adopted by COP 21,<sup>68</sup> the Paris Agreement, the first ever universal, legally binding global climate deal, which sets out a global action plan to limit global warming to well below 2°C, is considered by many to represent an unprecedented breakthrough for action on migration and climate change or, *mutatis mutandis*, a stepping stone for the protection of EDPs. However, it can be conversely argued that the issue of human mobility taking place in the context of climate change is widely under-represented in the Paris Agreement. In fact, the only mention of migrants in the treaty can be found in its preamble, which reads as follows:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity. (emphasis added).

Therefore, even in the aftermath of the Paris Agreement, it fully makes sense to consider that negotiations under the UNFCCC should continue to factor in and make progress on the question of human mobility in relation to climate change.

At any rate, once the reality of environmental displacement has been recognised, the correct approach under international law should be to identify its forced or voluntary character; to classify those affected as migrants, IDPs, refugees or stateless persons; as well as to analyse the existence or not of an international normative and operational framework pursuant to which to respond adequately to this 'multicausal' and 'new reality'. It is worth, at this point, to recall the distinction proposed by Kälin<sup>69</sup> among five specific scenarios triggering human displacement and migration: i) the increase of hydro-meteorological disasters (flooding, hurricanes/typhoons /cyclones, mudslides etc); ii) designated areas as high-risk zones too dangerous for human habitation; iii) environmental degradation and slow onset disasters (e.g. reduction of water availability, desertification, recurrent flooding, salination of coastal zones etc.); iv) 'sinking' small island States caused by rising sea; v) decrease in essential resources (water, food production) due to climate change, which may well trigger armed conflict and violence. Needless to say that these diverse scenarios shape different subcategories of displaced persons or migrants, posing considerable challenges, at the very least from legal and humanitarian perspectives, at domestic, regional and international levels.

<sup>64</sup> Adopted in New York on 9th May 1992, it came into force on 21st March 1994 (UNTS, vol. 1771, p. 107).

<sup>65</sup> Adopted in Kyoto on 11th December 1997, it came into force on 16th February 2005 (UNTS, vol. 2303, p. 148).

<sup>66</sup> These two legal instruments, the UNFCCC and its Kyoto Protocol, are relevant to this debate since they set a significant precedent as a means of solving long-term international environmental problems, and constitute the first steps towards implementing an international response strategy to combat climate change.

<sup>67</sup> FCCC/CP/2013/10/Add.1. Decision 2/CP.19, paragraph 1.

<sup>68</sup> FCCC/CP/2015/L.9.

<sup>69</sup> Kälin, *The Climate Change Displacement Nexus*.

### *1.5. International obligations of States under the legal regime on climate change*

At its current evolutionary stage, international law imposes three kinds of general obligations for States in the context of climate change: mitigation, adaptation and protection.

Focusing on the causes of climate change, mitigation implies the commitment of States Parties to the UNFCCC and its Kyoto Protocol as well as to the Paris Agreement to reduce and limit global warming to well below 2°C, thereby to curb the ongoing climate change and its disastrous consequences. Considering that, due to the inertia of the climatic system, it is already impossible to avoid some of its effects,<sup>70</sup> States commit to undertake adaptation measures, thus reducing the risk of disasters and structural weaknesses whilst enhancing the resilience of people and communities, especially in developing countries. The third obligation seeks to address the impacts of climate change by protecting the human rights of the affected people, including the environmentally displaced.<sup>71</sup>

It should be noted that international negotiations under the UNFCCC on the fight against climate change still remain focused on mitigation and adaptation; the protection of people has not yet been taken into account to a sufficient degree. Even so, we must point out that, despite the recognition of climate change as a cause of human mobility which can increase risks and vulnerability, regrettably human mobility seems far from being accepted and boosted as an adaptation strategy to climate change, or as a mechanism that can increase resilience of people affected by the negative impacts of climate change. As pointed out by António Guterres,<sup>72</sup> 'although there is a growing awareness of the perils of climate change, its likely impact on human displacement and mobility has received too little attention'.

### *1.6. Protecting the environmentally displaced persons: a pending issue*

When it comes to assessing the protection of people in the context of the global and multi-level response to climate change, it is worth stressing that this task should be based on the foundations of humanity, dignity, human rights, solidarity and international cooperation. On the basis of these principles, States have the primary responsibility to protect their populations, giving particular attention to special needs of those most vulnerable and affected by environmental disasters, including displaced people, host communities and those at risk of displacement.<sup>73</sup> To this end, it is essential that States develop legislation, policies and institutions, as well as invest in adequate resources.

In the wake of the discussions and five scenarios of displacement proposed by Kälin as outlined above, it is worth noting that, on the ground, States may face difficulties on how to deal with the aforementioned different subcategories of EDPs and determine the type of protection to be granted. To begin with, there is a lack of both a mandatory definition on EDPs and specific rules that could help to frame and regulate the protection that they need and deserve. Hence, the existence of a legal and institutional vacuum in this regard. This is despite the fact that a thorough examination of the existing rules – particularly in refugee law, humanitarian law, human rights law, environmental law and even the Guiding Principles on Internal Displacement – leads to the conclusion that, for their protection and assistance, some of EDPs may be covered by the existing international legal and institutional framework.

It is worth remembering and insisting that the five scenarios mentioned above are considered useful for, among other things, categorising those who move as migrants, IDPs, refugees, stateless persons or several of these categories at the same time. Certainly, such categorisation is a risky and debatable task, which requires the development of specific analysis criteria. Notwithstanding, it seems to be opportune to look at the direction of displacement, which allows me to address two subcategories of EDPs, resulting from internal and external migratory movement.

#### *1.6.1. Internal environmentally displaced persons*

It is worth emphasising again both the predominantly internal nature of the environmental displacement crisis and the primary responsibility of States for the protection of victims. It should not be forgotten that, most of the time, the displaced are citizens of countries whose governments are unable or unwilling to provide them with assistance and protection. This situation itself should trigger international protection. In addition, acceptance of climate change as a root cause of displacement implies, therefore, the international community's assumption of common and shared responsibility to protect and assist victims. However, the inclusion of this protection within the emerging principle of R2P has proven to be a highly controversial issue that has so far been able to bring together more detractors than supporters.<sup>74</sup>

70 Xavier Labandeira and Pedro Linares, 'El Acuerdo de París sobre cambio climático', *ICADE*, 97 (2016), p. 12.

71 Considering that 'climate change threatens the full enjoyment of a wide range of rights, including the rights to life, health, water, food, housing, development and self-determination', existing human rights obligations defined under legally binding treaties must consequently inform States' climate action (policies and measures builds on the principles of non-discrimination and meaningful public participation principles), in order to effectively protect the rights of those most affected by climate impacts. See CIEL & GI-ESCR, States' Human Rights Obligations in the Context of Climate Change, Geneva 2018, [www.ciel.org/wp-content/uploads/2018/01/HRTBs-synthesis-report.pdf](http://www.ciel.org/wp-content/uploads/2018/01/HRTBs-synthesis-report.pdf) (accessed 21 Apr. 2018), pp. 1–2.

72 Guterres, António, 'Millions uprooted: saving refugees and displaceds', *Foreign Affairs*, 2008, [www.foreignaffairs.org/20080901faessay87506/antonio-guterres/millions-uprooted.html](http://www.foreignaffairs.org/20080901faessay87506/antonio-guterres/millions-uprooted.html) (accessed 27 Apr. 2018).

73 The Nansen Principle II, available at [www.unhcr.org/4ea969729.pdf](http://www.unhcr.org/4ea969729.pdf) (accessed 27 Apr. 2018).

74 Sara E. Davies, 'A responsibility to protect persons in the event of natural disasters?', in Sara E. Davies and Luke Glanville (eds.), *Protecting the*

It is widely believed that existing human rights norms and the Guiding Principles on Internal Displacement make up the normative framework of reference to ensure international protection for the vast majority of EDPs, who make up the majority of IDPs. While the Guiding Principles do not explicitly include climate change among the causes of internal displacement, they do so implicitly in providing a non-exhaustive list of causes and factors for such displacement.<sup>75</sup> In particular, the Guiding Principles expressly recognise natural and man-made disasters as potential root causes of displacement, regardless of their linkages to climate change patterns.<sup>76</sup>

However, the Guiding Principles have certain shortcomings that give rise to the lack of protection of IDPs. It should be recalled that, in addition to their non-binding nature, these Principles have definition problems, more descriptive than legal; they do not adequately cover environmental alterations in their complexity and breadth; they seem to focus more on displacements resulting from sudden environmental phenomena, leaving aside those that occur as a result of slow and progressive environmental disasters. Moreover, their transformation from soft law principles into national normative standards and policies of protection has proven insufficient and far from exhaustive. All of this is compounded by the enormous challenges of their implementation, shortcomings in institutional arrangements, and the unlikely emergence of any realistic alternative framework on the ground. It is therefore necessary to conclude that the protection of the human rights of the internal EDPs is far from being sufficiently assured.

On the other hand, those people who, presumably, make the decision (without being forced) to leave their homes and places of habitual residence due to the effects of climate change, such as environmental degradation that adversely affects food production, are often included in the category of voluntary internal migration. This is usually taken for granted without considering or promoting at all migration as a mechanism or a strategy of adaptation to climate change, that may allow people and communities 'to minimize harm for themselves and/or improve their overall lives'.<sup>77</sup>

#### 1.6.2. External environmentally displaced persons

Regarding the transboundary movement of people in the context of climate change, the lack of a specific and comprehensive legal framework for protection is even more blatant. For external EDPs who do not fit into any legally established status for 'economic' or 'forced' migrants across State borders, the human rights protection system, while still relevant in general terms, is nothing but a nominalist system.<sup>78</sup>

It should be also recalled that, with very few exceptions – such as the fifth scenario of displacement, in which climate change can trigger disturbances, violence and armed conflicts; or scenarios one and two<sup>79</sup> – external EDPs do not fall within the scope of the international legal regime for refugees. This is so even in those regional areas – such as the Africa and Latin America – where significant extensions have been made to the Geneva definition of the term refugee. In fact, both the OAU Convention regulating specific aspects of refugee problems in Africa (Article 1.2) and the Cartagena Declaration on Refugees<sup>80</sup> (in its conclusion no. 3), include among the constitutive assumptions of refugee status events which may seriously disturb public order. In that sense, both instruments could cover EDPs, since the impact of disasters can become severe enough to violate public order. However, although it seems possible, this interpretation still finds no support in either the *praxis* or the *opinio iuris* of States in either region.

In any case, it can be admitted and hoped that certain aspects of refugee law can be of great help in developing responses to population movements in the context of climate change. Following Jane McAdam,<sup>81</sup> I am looking in particular at the criterion of proof ('well-founded fear'), envisaged durable solutions, rights-based protection framework and the status it creates, as well as institutional oversight guaranteed by UNHCR. It should also be noted that, if well understood and informed by principles of dignity, human rights and international cooperation, the institute of *non-refoulement* can provide the necessary foundation for the development of an adequate framework for the protection of those EDPs who manage to cross States' borders. However, until now all this has been nothing more than good intentions or a mere aspiration of a still minority sector inside a somewhat enclosed debate.

The lack of a legal, political and institutional framework to provide protection for EDPs still prevails in the international arena. Yet, the relevance of regional organisations in the fight against climate change has been recognised in the correlative international negotiations process, as clearly reflected in the aforementioned paragraph 14 (f) of the Cancun Agreements. This gives us the opportunity to return to the Kampala Convention with the aim to evaluate how effective is and should be its implementation in providing protection to environmental IDPs in the African Union regional context.

*Displaced. Deeping the Responsibility to Protect* (Leiden: Martinus Nijhoff, 2010), pp. 164–84.

<sup>75</sup> Guiding Principle 6.

<sup>76</sup> Guiding Principles on Internal Displacement. Introduction: Scope and Purpose, paragraph 2.

<sup>77</sup> Diana Ionesco and Mariam Traore Chazalnoe, 'Migration as an adaptation strategy to climate change', IOM 2015, <http://weblog.iom.int/migration-adaptation-strategy-climate-change> (accessed 27 Apr. 2018). See also Robert A. McLeman and Lori M. Hunter, *Migration and Adaptation to Climate Change Working Paper Population Program*, December 2009.

<sup>78</sup> Kälén and Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change*, pp. 32–3.

<sup>79</sup> Referring to the event that national authorities 'politicised' the assistance and, in a discriminatory attitude, refused to provide any kind of protection and assistance to certain people due to their race, religion, nationality, membership of a particular social group or political opinion.

<sup>80</sup> Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19–22 November 1984.

<sup>81</sup> Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford/New York, University Press, 2012), p. 51.

## II. The African Union context of internal displacement

As Adepoju pointed out,<sup>82</sup> Africa, aptly described as a moving continent, is experiencing all the migratory configurations. Although fragmented, fluid, and often inaccurate, available migration data reveal the African migration reality as essentially internal, intra-regional, and south-south movement. The common denominator of the three most visible migratory configurations (labour migration, refugee flow and internal displacement) is that they are, in the majority, confined to the continent, including refugees and migrants who move to neighbouring countries and people forcibly uprooted within their respective countries.

At the end of 2016, the African continent was home to the greatest number of people (over 13 million)<sup>83</sup> displaced by conflict, violence and sudden-onset disasters, thus facing an internal displacement crisis far greater than any other region in the world.

According to the Internal Displacement Monitoring Centre (IDMC),<sup>84</sup> among disasters triggered by rapid-onset natural hazards, flooding is by far the most significant cause of flight in the continent, accounting for more than 90 per cent of displacement associated with disasters every year since 2009. In the meantime, this same institution reveals the limited character of these estimates, since a complete picture of the African internal displacement cannot be achieved without taking into account its other two important drivers, which have so far been largely ignored or less contemplated. I am referring to development projects (including the growing phenomena of land grabbing) and to slow-onset disasters, mostly droughts and the resulting food insecurity. The lack of accurate, systematically collected quantitative data on displacement as a result of both drivers makes it difficult to determine the real dimension of the plight in the region.

### II.1. Approaching the dimension of African environmental displacement

As will be discussed later in this paper, pending better and more comprehensive scientific evidence that may lead to a greater understanding of climate change in its complexity and also to a clear need for a strong will to mitigate the impact of human activity on the planet, responses to questions about the magnitude and amplitude of global and regional environmental displacement are nothing but mere approximations. Even so, some of such responses are already extremely worrying.

In line with the Intergovernmental Panel on Climate Change (IPCC),<sup>85</sup> which clearly states that anthropogenic climate change is accelerating and already has serious impacts on the environment and people's lives, the humanitarian community notes that this is verifiable in frequency, intensity and severity of disasters. In this sense, it is estimated that disasters have doubled over the last four decades, rising from about 200 to more than 400 a year, most of them related to climate change. As a result, the total number of people directly affected by disasters during the 1990s tripled to an average of 211 million people each year. In 2016 alone, 445 million people were reported,<sup>86</sup> with economic losses amounting to 83 billion dollars a year.<sup>87</sup> Needless to say, many of those affected are or turn into displaced persons. Therefore, these figures seem to indicate that, due to growing climate change impacts, along with increasingly intense and frequent disasters, environmental displacement can shape the 'new normality' of our world, especially in the African continent.

In fact, the generality of quantitative data available and handled coincides in placing the African region among the most vulnerable, despite emitting far less carbon dioxide than other continents. As illustrated below (figure 2), Africa's carbon dioxide (CO<sub>2</sub>) emissions per year represent only a small fraction, 3 per cent, of global emissions, yet Africa hosts 15 per cent of the population of the world. Besides, this continent accounts for only 3 per cent of world energy consumption, which translates to the average energy consumption of an African inhabitant being six times less than the average for individual inhabitants across the populations of the world.<sup>88</sup>

82 Aderanti Adepoju, 'Migration dynamics, refugees and internally displaced persons', UNAI, 20 September 2016, <https://academicimpact.un.org/content/migration-dynamics-refugees-and-internally-displaced-persons-africa> (accessed 27 Apr. 2018).

83 Excluding the North, the rest of the continent accounted for 12.2 million IDPs by conflict and violence, and 1.0 million by disasters by the end of 2016, says IDMC, GRID 2017, pp. 26 and 37.

84 IDMC, *Africa report on internal displacement*, Geneva, December 2016, p. 5.

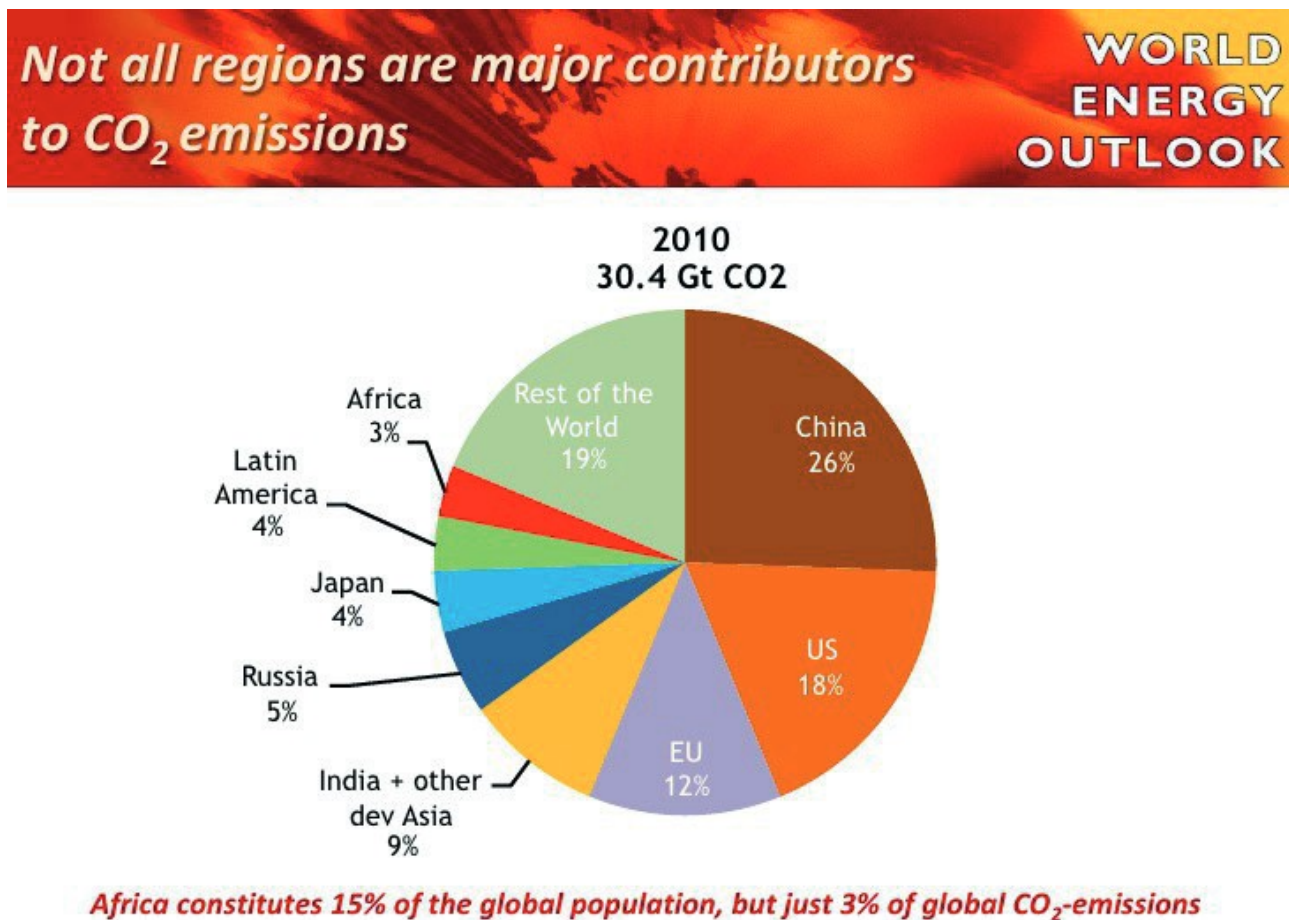
85 R.K. Pachauri and L.A. Meyer (eds.), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: IPCC, 2014).

86 This figure was made public during the *Global Platform for Disaster Risk Reduction*, held in Cancun, Mexico, 22–26 May 2017, under the slogan 'From Sendai to Cancun, From Commitment to Action'.

87 As indicated in the Letter from the IASC Principals to Yvo de Boer, Executive Secretary of the United Nations Framework Convention on Climate Change, 30 April 2009, [www.humanitarianinfo.org/iasc](http://www.humanitarianinfo.org/iasc) (accessed 27 Apr. 2018).

88 Oliver C. Ruppel, 'Climate change law and policy positions in the African Union and related developments in selected African countries', in Oliver C. Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds.), *Climate Change: International Law and Global Governance Volume II: Policy, Diplomacy and Governance in a Changing Environment* (Baden-Baden: Nomos, 2013), pp. 411–12.

Figure 2: Africa's carbon dioxide emissions



Source: Fatih Birol<sup>89</sup>

In the same way, in reporting on the effects of climate change that trigger displacement, in 2007 the IPCC<sup>90</sup> pointed to the African continent as being among the regions that could be most affected by water stress – both its scarcity (desertification) and its excess (floods, sea level rise, tropical cyclones) – and food insecurity and hunger as a consequence of the decrease in crop yields. Recently, the IDMC pointed out that although no African countries were among the 10 to experience the largest-scale or relatively large-scale displacement in 2016, ‘significant sudden-onset disasters did occur, however, and the displacements they triggered compounded the impacts of other natural and man-made hazards, including drought, coastal erosion, land degradation and conflict.’<sup>91</sup> Then, this same institution concluded, clearly stating that if displacement associated with slow-onset disasters were included in their estimates, particularly those related to drought conditions and food insecurity, the displacement figures for Africa would be significantly higher than they are right now.<sup>92</sup>

Outside IDMC and in an attempt to quantify this pressing reality, some estimations<sup>93</sup> indicate that in the coming decades, disasters related to climate change may put around 80 to 120 million people in the African continent at risk. Certain sub-regions, in particular the Sahara and semi-arid areas in southern Africa, may suffer from a temperature increase of 1.6 degrees by 2050. In the Horn of Africa region rainfall may decline to about 10 per cent of current levels. It should also be noted that around 50 per cent of the population lives in dry regions susceptible to drought. As Jean Ping points out,<sup>94</sup> the phenomenon of desertification in Africa is extremely disturbing, affecting 43 per cent of productive land, equivalent to 70 per cent of activity and 40 per cent of the continent’s population. Besides, sea level could increase up to around 25 centimetres, jeopardising lowlands of the western part of the continent and coastal fishing banks.

<sup>89</sup> Fatih Birol, ‘Global energy outlook and the implications for Africa’, presentation in Paris, 25 April 2012, <https://es.slideshare.net/internationalenergyagency/birol-18th-meeting-of-the-africa-partnership-forum> (accessed 29 Apr. 2018).

<sup>90</sup> R. K. Pachauri and A. Reisinger (eds.), *Cambio climático 2007: Informe de síntesis. Contribución de los Grupos de trabajo I, II y III al Cuarto Informe de evaluación del Grupo Intergubernamental de Expertos sobre el Cambio Climático* (Ginebra: IPCC, 2007).

<sup>91</sup> IDMC, GRID 2017, p. 38.

<sup>92</sup> Ibid.

<sup>93</sup> Oriol Solà Pardell, *Desplazados medioambientales: una nueva realidad* (Bilbao: Universidad de Deusto, 2012), pp. 27–8.

<sup>94</sup> Quoted in ‘Desertificação afecta a economia’, *Jornal de Angola*, 26 Oct. 2011.

Being highly exposed to all these impacts of climate change, which interact with relevant sociopolitical factors, the economies of a large part of the African populations have seen their vulnerabilities accentuated.<sup>95</sup> Taking all this into account, the Food and Agriculture Organization of the United Nations (FAO) predicted that, 'by 2080, due to climate change, it is likely that 75 per cent of the African population will be at risk of hunger'.<sup>96</sup>

All the above leads to the consideration that, if ongoing trends are not reversed, forced displacement caused by disasters related to climate change is likely to increase exponentially over the second half of this century. As for the orientation, with African displacement being predominantly internal (sub-regional at most),<sup>97</sup> only a small number of affected people would be able to undertake transcontinental migration.<sup>98</sup> This is despite the fact that some alarmist estimations insist that, by 2020, some 60 million Africans will move from other regions to northern Africa and Europe to flee the adverse effects of climate change.<sup>99</sup>

Conscious of internal displacement as a source of suffering and specific vulnerability for millions of people, a driver of continuing instability, food insecurity and a barrier for human and sustainable development, the heads of state and governments of the Member States of the African Union showed their willingness, commitment and determination to address such a challenging predicament by establishing an appropriate legal and comprehensive binding regional framework for the protection of and assistance to IDPs across the region, the Kampala Convention.

## II.2. Scope of the Kampala Convention on the protection of environmental IDPs

### II.2.1. The paradigm of State sovereignty as Responsibility to Protect IDPs

Unanimously celebrated as a ground-breaking convention, the first and so far only regional legally binding instrument for the protection and assistance of IDPs is premised on the new legal, political and ethical paradigm from which premise the AU aims to address forced displacement: the 'Responsibility to Protect' (R2P) principle.

It should be recalled, in this sense, that the change from the Organization of African Unity (OAU) to African Union (AU), in 2000, represented a significant qualitative leap in the goals and orientation of the pan-African organisation, which decided to shift from a non-interference to a non-indifference-based attitude. This led to the assumption of R2P as the appropriate paradigm to handle the continent's enormous challenges, forced migration included.<sup>100</sup>

At this point, it is worth to bear in mind that, in contrast to the trend to dissociate IDPs and the R2P, excluding those from the conceptual and operational scope of this emerging international regulation, the AU reaffirms the historical and factual proximity between the need for protection of IDPs and the R2P principle.<sup>101</sup> In this sense, it should be stated that the Kampala Convention represents a qualitative contribution coming from the pan-African organisation to the doctrinal and normative development of State sovereignty assumed as R2P. The maximum regional normative expression in this regard is enshrined in Articles 4 (h) (j) and 23.2 of the AU Constitutive Act. Both articles make up the cornerstone of the African system for the protection of populations in peril, including IDPs. Therefore, the Constitutive Act establishing the AU (2000) has turned into the first international treaty to stipulate the obligation and responsibility for regional and international organisations to intervene in a particular Member State in order to assure human protection. Therefore, the above mentioned Article 4 of the AU Constitutive Act, clearly reflected in Article 8 of the Kampala Convention, represents, at least on paper, a significant endpoint in the evolution of international discussions on the so-called 'right to humanitarian intervention'.

With that said, it is opportune to mention that, from the chronological perspective, the first formal collective manifestation of the R2P paradigm took place at the Great Lakes sub-regional level, through its incorporation into the *Great Lakes Pact* (2006). Thanks to its *Protocol on the Protection and Assistance of Internally Displaced Persons*, that Pact became the first multilateral instrument in the world to commit States to adopt the United Nations Guiding Principles on Internal Displacement (1998)<sup>102</sup> as a legally binding instrument. In this sense, this sub-regional legal instrument

95 Solà Pardell, *Desplazados medioambientales*, pp. 27–8.

96 Statement available at [www.climdev-africa.org/content/fact](http://www.climdev-africa.org/content/fact) (accessed 29 Apr. 2018).

97 Sara Mercandalli and Bruno Losch (eds.), *Rural Africa in motion: Dynamics and drivers of migration South of the Sahara* (Rome: FAO and CIRAD, 2017).

98 IASC, 'Climate change, migration and displacement: who will be affected?'; Working Paper submitted to UNFCCC Secretariat by the informal group on Migration/Displacement and Climate Change of the Inter-Agency Standing Committee, 31 October 2008, <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf> (accessed 29 Apr. 2018).

99 'ONG reclaman que se reconozca a los 'desplazados ambientales'', [www.elmundo.es](http://www.elmundo.es), 25 May 2010.

100 Tim Murithi, 'The African Union's transition from non-intervention to non-indifference: an ad hoc approach to the Responsibility to Protect?', *IPG*, 1 (2009), pp. 90–106; Paul D. Williams, 'From non-intervention to non-indifference: the origins and development of the African Union's security culture', *African Affairs*, 106, (2007), pp. 253–79.

101 Outlined in paragraphs 138–9 of the 2005 World Summit Outcome (A/60/150), this principle refers to the obligation of States toward their populations and all populations at risk of genocide and other mass atrocity crimes. It consists of three levels or pillars of responsibility: i) every State has the Responsibility to Protect its populations from mass atrocity crimes (genocide, war crimes, crimes against humanity and ethnic cleansing); ii) the wider international community has the responsibility to encourage and assist individual States in meeting that responsibility; iii) if a State is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.

102 E/CN.4/1998/53/Add.2, annex.

proved to be an authentic embryonic experience for the Kampala Convention and its R2P approach.<sup>103</sup> Similarly to the above-mentioned Protocol, the Kampala Convention proceeds from the premise of the primary responsibility of the State in addressing internal displacement and directly incorporates the Guiding Principles on Internal Displacement. Yet, it goes beyond the Guiding Principles, since it articulates the need for a holistic response to internal displacement based on a combined framework of international human rights law and international humanitarian law, as Chaloka Beyani pointed out.<sup>104</sup>

As aforementioned, in its preamble the Kampala Convention clearly recognises that in addition to generating specific suffering and vulnerability for the victims, displacement caused by natural or man-made disasters, including climate change, has a devastating impact on human life, peace, stability, security and the development on the continent. Starting from this observation, the Convention, besides encouraging the exercise of national sovereignty as R2P, also fosters collective responsibility at regional, international and global levels for the sake of a new solidarity, as a *sine qua non* strategy to successfully deal with adverse climate change impacts on human life and mobility.

### II.2.2. Key provisions on environmental IDPs

The conceptual scope of environmental IDPs can be found within the general definition of IDP, enshrined in Article 1(k) and (l) of the Kampala Convention. That is, environmental IDPs qualify as a subcategory of:

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 generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

Those persons who move in anticipation of avoiding the effect of disasters, both sudden-onset (e.g. floods) and slow-onset (e.g. droughts and soil degradation), also qualify as environmentally displaced. Moreover, environmental IDPs and, therefore, the subjects of the Convention, are likewise those people displaced as a result of States' adaptive measures, such as evacuations or relocation, as stated in Article 1(l), especially when such measures are arbitrary. Thus, in its Article 4(4)(f), the convention goes even further by clearly defining as arbitrary any 'forced evacuation 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'.

Under Article 5(4) of the convention, States Parties are required to take measures to protect and assist people displaced in the context of natural or human made disasters, including climate change. In areas of potential displacement, these measures include the devising by States Parties of continental early warning systems, as well as the establishment and implementation of disaster risk reduction strategies, emergency and disaster preparedness and management measures. And, where necessary, States are required to provide immediate protection and assistance to IDPs. This also means that a State's responsibility for preventing environmental displacement implies the adoption of appropriate legislation and policies, the designation of a national focal point, and the allocation of necessary funds for protection and assistance, without prejudice to international support (Article 4).

In addition to the above, States should assess or facilitate the assessment of the needs and vulnerabilities of displaced populations and host communities, a task requiring a national registry of victims and areas at risk. The set of national preventive measures must be harmonised with the alert system of the AU, which development is foreseen under Article 13 of the AU Constitutive Act.

State responsibility in the context of environmental displacement also includes the adoption of special measures to ensure protection against environmental degradation, the obligation to treat victims without discrimination and to respect their right to seek safety elsewhere inside or outside their country (Articles 9[2][e] and 20[1]). All this is closely related to displacement induced by so-called 'development projects', carried out both by public authorities or private agents. The significant development-based displacement the continent is experiencing is yet to gain prominence in the international media and political agenda. Indeed, even though this root cause of internal displacement prevails in many African countries, it has largely gone unnoticed in discussions on humanitarian protection by regional and international agencies.<sup>105</sup> Worse still, there is some political resistance of States and multinational companies to addressing this pressing problem.

Under the convention, Article 10(3), States must carry out the necessary environmental impact assessment before a particular project is undertaken. With regard to arbitrary displacement, special attention should be addressed to civil liability of multinational enterprises and other non-state actors, in particular those whose activities in extracting and exploiting economic and natural resources may degrade the environment and, consequently, generate displacements (Article 3[1][h]).

<sup>103</sup> About the similarities and differences between both instruments, see International Refugee Rights Initiative, *Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact. A briefing note by the International Refugee Rights Initiative*, January 2014, [www.refugee-rights.org/Assets/PDFs/2013/Comparative%20Note%20on%20the%20Kampala%20Convention%20and%20IDP%20Protocol%20FINAL.pdf](http://www.refugee-rights.org/Assets/PDFs/2013/Comparative%20Note%20on%20the%20Kampala%20Convention%20and%20IDP%20Protocol%20FINAL.pdf) (accessed 29 Apr. 2018).

<sup>104</sup> A/HRC/26/33.

<sup>105</sup> Romola Adeola, 'What does development-caused displacement look like in Africa?', IDMC, December 2016, [www.internal-displacement.org/library/expert-opinion/2016/what-does-development-based-displacement-look-like-in-africa](http://www.internal-displacement.org/library/expert-opinion/2016/what-does-development-based-displacement-look-like-in-africa) (accessed 29 Apr. 2018).

Furthermore, by analogy to the *non-refoulement* principle, forced return or resettlement is prohibited, especially to places where, due to environmental reasons, people's life, safety, freedom and health may be at risk (Article 9[2][e]). Conversely, States are required to promote and create satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity (Article 11[1]).

In a similar way, effective protection measures to be taken by States must include the establishment of an adequate legal framework in accordance with international standards, providing fair and equitable compensation and other forms of reparation to people affected by damages in the wake of displacement. In this regard, the State's obligation of due diligence is of the utmost importance, since the State must assume responsibility for the reparation and compensation that people deserve for displacement and damages as a result of negligence and inaction by public authorities in relation to the prevention of predictable disasters (Article 12). This provision is particularly relevant with regard to assets left behind by IDPs, for which Article 9(2)(i) requests States Parties to take necessary protective measures.

At this point and in line with a number of analysts, it is worthwhile noting that, despite being an instrument shaped to regulate internal displacement including that which is motivated by disasters related to climate change, the Kampala Convention may have indirect implications for the protection and assistance of external EDPs. Certainly, a vacuum will still persist in this regard both in the international and in the AU regional arenas. Yet, the Kampala Convention aptly can make up an initial step towards the establishment of the much-needed international legal, policy and institutional framework for the protection and assistance of those EDPs who manage to cross an internationally recognised State border. Without prejudice to the above, the following section will attempt to examine the degree of implementation of the Kampala Convention particularly focusing on environmental IDPs.

### III. The implementation of the Kampala Convention

Regretfully, the weakness of the pan-African organisation with regard to the implementation of its own legal and political instruments is far from being new. For this reason, our starting point in assessing the effectiveness of the Kampala Convention is cautiously and justifiably pessimistic. This, however, instead of conditioning our gaze, provides us with preparedness to identify, value and celebrate possible good practices that may exist in the region regarding the domestication and implementation of the said convention.

#### III.1. Identifying good practices in domestication and implementation

##### III.1.1. The Harare Plan of Action for the implementation of the Kampala Convention

When it comes to identifying good practices in domestication and implementation, the first meeting of the Conference of States Parties to the Kampala Convention, held in Harare, Zimbabwe on 5 April 2017, may be considered as a good starting point. Along with showing political will to fulfill States' obligations towards IDPs, this landmark event itself says much about the 27 States Parties' strong commitment to make concrete progress on implementing the convention.

States Parties seem to be aware of the fact that, although the adoption of the Kampala Convention is generally heralded as a momentous achievement for the African Union, like other instruments, its effectiveness lies in its holistic implementation as well as in the translation of its provisions into protection and assistance to IDPs across the continent. In this sense, convened by the African Commission in accordance with Article 14 of the Kampala Convention, the aforementioned first meeting aimed to explore ways of strengthening cooperation and solidarity among States Parties in dealing with the issue of internal displacement and mechanisms and ways of enhancing the domestication and implementation of the convention.<sup>106</sup>

Certainly it is useful to take a look back to see what progress has been made since the Kampala Convention was adopted (eight years ago) and came into force (five years ago to date). Understandably, those who attempted to turn theory into practice<sup>107</sup> did not manage going beyond the evaluation of the ratification process. Indeed, ratification is the most basic criterion to be considered in carrying out the assessment that is intended here. As of April 2018, 40 of 55 Member States of the African Union had signed the Kampala Convention, while 27 had ratified it, including the Sahrawi Arab Democratic Republic, which is not a State member of the United Nations.<sup>108</sup> Therefore, to date the ratification of the convention has been a successful process, so much so that it became the fastest AU treaty to enter into force. However, although is important, ratification itself is nothing but a step forward to make effective an instrument conceived and aptly considered a road map for action.<sup>109</sup>

In order to facilitate the implementation of the Kampala Convention, the above referred first meeting of the Conference of States Parties set the Harare plan of action (PoA) with priorities and activities to be adopted by the AU, States Parties,

<sup>106</sup> AU, Plan of Action for the implementation of the Kampala Convention adopted by conference of states parties, 5 April 2017, available at <https://au.int/en/pressreleases/20170406/plan-action-implementation-kampala-convention-adopted-conference-states> (accessed 29 Apr. 2018).

<sup>107</sup> IDMC, *The Kampala Convention One year on: Progress and prospects*, Geneva, 2013; IDMC, *The Kampala Convention two years on: time to turn theory into practice*. Briefing Paper, Geneva, 2014.

<sup>108</sup> See 'List of Countries which have signed, ratified/acceded to the Kampala Convention', [https://au.int/sites/default/files/treaties/7796-sl-african\\_union\\_convention\\_for\\_the\\_protection\\_and\\_assistance\\_of\\_internally.pdf](https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf) (accessed 29 Apr. 2018).

<sup>109</sup> A/HRC/26/33, p. 8.

Regional Economic Communities (RECs) and partners.<sup>110</sup> This collective effort towards the implementation of the convention and strengthening of mechanisms for cooperation, solidarity and coordination among member States, the AU and other stakeholders has been rightly considered another fertile opportunity in pursuit of the aspirations of *Agenda 2063*,<sup>111</sup> which principally lays emphasis on root causes, prevention and durable solutions to progressively eliminate forced population displacement across the continent.<sup>112</sup>

Previous to the Harare PoA, in 2014 the African Union Commission on International Law launched a *Draft AU Model Law for the Implementation of the Kampala Convention*,<sup>113</sup> which is still under debate and intended to be used as a resource in the drafting process of national legislation to implement the Kampala Convention at the national level. It is expected that it will help expedite States Parties' implementation of incorporate[ing] their obligations under this Convention into domestic law by enacting or amending relevant legislation on the protection of, and assistance to, IDPs in conformity with their obligations under international law.<sup>114</sup>

For their law and policy-making processes on internal displacement, States Parties of the Kampala Convention can likewise find support, among others, in the following tools:<sup>115</sup> Domesticating the Kampala Convention: Law and Policy-making (2014); Capacity-building on law and policy-making on internal displacement (2016); National Instruments on Internal Displacement: A Guide to their Development (2013); and Regulatory Frameworks on Internal Displacement (2016).

## 1.2. Some country examples, brief critical notes

As tabulated below (Figure 3), several African countries have developed or are developing domestic laws,<sup>116</sup> policies<sup>117</sup> and strategies on IDPs, using the Guiding Principles, the 2006 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons or the Kampala Convention as points of reference.

Figure 3: African countries that have adopted laws and/or policies on internal displacement

Countries that have adopted laws on internal displacement	Angola, Kenya, Sudan
Countries that have adopted policies on internal displacement	Burundi, Somalia, Uganda, Sudan, Zambia
Countries in the process of developing a law or a policy on internal displacement	Central African Republic (CAR), Chad, Democratic Republic of Congo (DRC), Kenya, Liberia, Libya, Mali, Niger, Nigeria, South Sudan

110 'The PoA is structured around five objectives of the Kampala convention:

- Establish a framework for solidarity, cooperation and promotion of durable solutions between states parties
- Establish a policy framework for the prevention, protection of and assistance to internally displaced persons (IDPs) at national level
- Promote and strengthen regional and national measures to prevent and eliminate the root causes of internal displacement and provide for durable solutions
- Promote the obligations and responsibilities of State Parties
- Identify specific obligations, roles and responsibilities of armed groups, non state actors and other relevant actors including civil society organisations'

('1st meeting of the conference of states parties to the Kampala Convention', <https://au.int/en/newsevents/20170403/1st-meeting-conference-states-parties-kampala-convention> (accessed 29 Apr. 2018)).

111 Adopted on 26 May 2013, in Addis Ababa, Ethiopia, Agenda 2063 is a strategic framework for the socio-economic transformation of the continent over the next 50 years. It is built on, and seeks to accelerate the implementation of past and existing continental initiatives for growth and sustainable development. It is available at <https://au.int/agenda2063>.

112 'Concept Note', [https://au.int/sites/default/files/newsevents/conceptnotes/32304-cn-concept\\_note\\_-\\_cosp\\_meeting\\_2017.pdf](https://au.int/sites/default/files/newsevents/conceptnotes/32304-cn-concept_note_-_cosp_meeting_2017.pdf) (accessed 29 Apr. 2018).

113 AUCIL/Legal/Doc.6 (IX).

114 As foreseen under Article 3(2) of the Kampala Convention.

115 All of them are available at <http://internal-displacement.org/law-and-policy>.

116 This meaning laws *sensu stricto* and other forms of binding regulation. Following IDMC/Brookings-LSE Project on Internal Displacement, *National Instruments on Internal Displacement. A Guide to their Development*, August 2013, p. 38, the term laws refers to domestic legal orders, which vary considerably, with the national constitution generally being the highest-ranking legal norm. As such, it often contains a bill of rights which applies without reservation to all IDPs. The constitution is usually followed by acts of parliament (laws), and other binding regulations such as decrees, executive orders and ordinances. Constitutional amendments will rarely be needed in the development of a national instrument, but laws and other forms of regulation may be relevant. They create entitlements for individuals, identify national authorities' obligations and designate bodies responsible for carrying them out. They also usually refer to applicable judicial or administrative procedures to enforce the law or other form of regulation.

117 This meaning a statement of basic principles and declared objectives that guide and direct a government and other parties in their actions to pursue the longer term goals it contains. According to the aforementioned the *National Instruments on Internal Displacement. A Guide to their Development*, this term refers to policies, strategies and action plans that can be developed and adopted more rapidly than laws, as they usually entail fewer formalities. Such instruments are not legally binding in principle, but they may still be so at an administrative level, in that public servants may be obliged to abide by them because they have been approved by cabinet or a relevant ministry. In some countries, policies may be made binding by an act of parliament.

Countries that have a law and a policy on internal displacement	Sudan
Countries that have a law and are developing a policy	Kenya, Burundi
Countries with other instruments relevant to displacement <sup>118</sup>	Angola, Burundi, Cameroon, CAR, RDC, Eritrea, Ethiopia, Kenya, Liberia, Malawi, Nigeria, Sierra Leone, Somalia, South Sudan, Sudan, Uganda, Zambia, Zimbabwe

Source: Global Protection Cluster<sup>119</sup>

It is important to note that not all the above-tabulated States are legally bound by the Kampala Convention. And the laws and policies developed by some of them, such as Angola (2000), Burundi (2001), Sierra Leone (2002), Uganda (2004), the Sudan (2009) and Kenya (2012), were adopted before their ratification of the convention. Another important aspect deserving to be highlighted is that the domestic frameworks adopted so far vary in scope, the guarantees of protection and assistance, as well as the coverage of relevant issues. In fact, as Chaloka Beyani notes, 'not all the laws and policies include an appropriate definition of an internally displaced person or clearly identify institutional responsibilities, and some address only a particular cause or stage of displacement, such as conflict or return, while others focus only on particular rights.'<sup>120</sup>

This, however, does not preclude recognition that a number of States are taking important steps that may contribute to making the Kampala Convention an integral part of their domestic law. This is the case, for example, in Uganda, Kenya, Burundi, DRC, Burkina Faso, Mauritius and Senegal.

Figure 4: Some States' examples of good practices

<i>Uganda</i>	Its National Policy for Internally Displaced Persons, adopted in 2004, is broad in scope, including the establishment of a national coordination body, detailed arrangements, for intergovernmental coordination at the national and the local levels, specific provisions for aspects of protection and assistance, and arrangements for public education. A multi-stakeholder review of the Policy's implementation was undertaken in 2006.
<i>Kenya</i>	Developed and adopted a comprehensive framework to address displacement. 'Although Kenya is not a party to the Kampala Convention, its efforts to develop a national policy on internal displacement stands out as an example of a good practice and should be built upon to guide other countries in the African Union.' <sup>121</sup>
<i>Burundi</i>	Its comprehensive peace agreement (the Arusha Peace and Reconciliation Agreement for Burundi, 2000) includes multiple provisions relating to internal displacement that are consistent with the Kampala Convention.
<i>DRC</i>	Its Child Protection Code (2009) includes a provision on the rights of displaced children, which specifies their right to protection and humanitarian assistance. This is an interesting example of a legal basis for protecting and assisting IDP children, even in the absence of specific legislation implementing the Kampala Convention.
<i>Burkina Faso, Mauritius, Senegal</i>	Their national laws have criminalised forced displacement as a crime against humanity and a war crime for both international and non-international armed conflicts.
<i>Rwanda</i>	Its national law provides for the criminalisation of acts of arbitrary or forced displacement. More precisely, its Penal Code (2012) includes crimes and penalties relating to arbitrary displacement.

Source: The International Committee of the Red Cross (ICRC), *Translating the Kampala Convention into practice: a stocktaking exercise*, Geneva, October 2016, pp. 26–7.

Bearing in mind the initial purpose of this paper, and considering the increasing real affirmation of climate change as a major driver of forced displacement, it is justified to ask to what extent the above-mentioned national policy and regulatory frameworks go beyond conflict and are effective in preventing environmental displacement and protecting the victims.

118 This meaning a wider set of normative tools, which comprises instruments or statements confirming the validity of the Guiding Principles, including peace treaties referring to them, laws or policies relevant but not specifically focused on displacement. See Global Protection Cluster – Task Team on Law and Policy, *IDP Laws and Policies. A mapping tool*, [www.internal-displacement.org/law-and-policy](http://www.internal-displacement.org/law-and-policy) (accessed 25 Apr. 2018).

119 Ibid.; *Regulatory Framework on Internal Displacement. Global, regional and national developments*, May 2016, [www.internal-displacement.org/assets/publications/2016/UNHCR-GPC-Reg-Framework-IDP.pdf](http://www.internal-displacement.org/assets/publications/2016/UNHCR-GPC-Reg-Framework-IDP.pdf) (accessed 25 Apr. 2018).

120 A/HRC/26/33, p. 16.

121 A/HRC/26/33, p. 16.

Yet, it should be noted that, to date (April 2018), out of the 27 States parties to the Kampala Convention, only one – Angola – has enacted national legislation on internal displacement, and just two – Uganda and Zambia – have adopted specific policies in this area. I therefore intend to briefly examine in the following subsection the possible incorporation of the Kampala Convention into Angolan domestic legislation, its implementation and, in particular, its present and future impact and effectiveness on the protection of IDPs.

## 2. Are the IDPs being protected courtesy of the Kampala Convention? Angola case at a glance

The foregoing suggests that, to some extent, domestic regulatory frameworks water down the scope of the Kampala Convention, particularly with respect to environmental IDPs due to slow-onset disasters and climate change. This is mainly due to the extended lack of comprehensive legal and policy national instruments that may cover all causes and phases of displacement and address current and future situations, offering greater protection to displaced communities and providing the authorities responsible for IDPs with a solid regulatory basis to address all phases of a variety of displacement situations.<sup>122</sup> However, to be coherent, this partial conclusion must also and primarily consider how deep and effective the commitments and efforts of States and the AU are in establishing and advancing the agenda of disaster risk reduction strategies on the continent, that the fight against anthropogenic climate change and its terrible consequences is demanding.

### 2.1. Bringing together the Kampala Convention and the disaster risk reduction agenda

Adopted in Nairobi, on 16 April 2010, the Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015) aimed to contribute to the attainment of sustainable development and poverty eradication through a substantial reduction in the social, economic and environmental impact of disasters, including risks associated with climate change. It starts by acknowledging the fact that the occurrence of disasters, and the social and economic losses caused as a result, are rising in Africa, which poses a great threat to Africa's ability to achieve sustainable development. Then, it states that '**disaster risk reduction (DRR) policies and institutional mechanisms do exist at various degrees of completeness in African countries. However, their effectiveness is limited.** Hence a strategic approach to improving and enhancing their effectiveness and efficiency by emphasising disaster risk reduction is needed' (emphasis added).<sup>123</sup>

In 2013, the *Africa Position for the 4th Global Platform for Disaster Risk Reduction*,<sup>124</sup> after taking note of the ratification of the Kampala Convention, acknowledged the responsibilities of governments to protect people displaced by disasters and climate change and took measures to mitigate such displacement. It recognised the ongoing efforts to strengthen the monitoring, evaluation and reporting system for the Africa Regional Strategy and importance of verifiable reporting of disaster losses. It also indicated that 'Africa has developed an *Africa Status Report* for DRR, which is a detailed analysis of the state of disaster risk reduction in the region, based on national and sub-regional reports, summarizing achievements as well as emerging trends and challenges'.

Launched in 2016 by the United Nations Office for Disaster Risk Reduction (UNISDR), the *Disaster risk reduction in Africa: Status report (2015)*<sup>125</sup> 'examines risk drivers that exacerbate natural hazards' impacts on populations, and analyses the state of Africa's preparedness against the risk of disaster in relation to the Hyogo Framework for Action<sup>126</sup> (HFA, 2005–2015). Having profiled the frequency, location and severity of natural hazards across Africa, the report found this continent is one that 'holds half of the world's most risk-prone countries, and is experiencing a rising number of disasters'.

Organised around five indicators such as: hazard and disaster impact profile of Africa, disaster risk drivers in Africa, status of Africa's implementation of the HFA, investment and financing for disaster risk reduction in Africa, and the transition from the HFA to the Sendai Framework for Disaster Risk Reduction<sup>127</sup> key findings of the report include the following:

122 This is said without ignoring that limiting the scope of a national instrument is possible and, in light of the particularities of the displacement situation (such as a particular cause of displacement, geographical area, phase of the displacement process, timeframe) may be appropriate, as long as such limitations must not be discriminatory and must not exclude certain IDPs from exercising their rights. See IDMC/Brookings-LSE Project on Internal Displacement, *National Instruments on Internal Displacement*, p. 35.

123 AU, *Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015)*, Nairobi, 16 April 2010, [www.unisdr.org/files/13655\\_POAinEnglishadoptedinNairobi16April1.pdf](http://www.unisdr.org/files/13655_POAinEnglishadoptedinNairobi16April1.pdf) (accessed 29 Apr. 2018).

124 Held in Geneva on 19–23 May 2013.

125 UNISDR, *Disaster risk reduction in Africa: Status report (2015)*, 2016, [www.unisdr.org/we/inform/publications/51078](http://www.unisdr.org/we/inform/publications/51078) (accessed 25 Apr. 2018).

126 Adopted by the World Conference on Disaster Reduction, held by the Member States of the United Nations in Kobe, Hyogo, Japan, on 18–22 January 2005, the Hyogo Framework for Action (HFA) is the key instrument for implementing disaster risk reduction. Its overarching goal is to build resilience of nations and communities to disasters, by achieving substantive reduction of disaster losses by 2015 – in lives, and in the social, economic, and environmental assets of communities and countries. It offers five areas of priorities for action, guiding principles and practical means for achieving disaster resilience for vulnerable communities in the context of sustainable development. The HFA is available at [www.unisdr.org/files/1217\\_HFAbrochureEnglish.pdf](http://www.unisdr.org/files/1217_HFAbrochureEnglish.pdf) (accessed 27 Apr. 2018).

127 Being the successor instrument to the HFA, the Sendai Framework for Disaster Risk Reduction 2015–2030 was adopted by United Nations Member States on 18 March 2015 at the Third UN World Conference on Disaster Risk Reduction in Sendai City, Japan. It is a 15-year, voluntary, non-binding agreement which recognises that the State has the primary role to reduce disaster risk but that responsibility should be shared with other stakeholders including local government, the private sector and other stakeholders. It, therefore, aims at 'the substantial reduction of disaster risk and

Africa faces a huge challenge from climate change. About 22 African countries are highly vulnerable to climate change, often manifested through drought. Progress has been slow in the implementation of the Hyogo Framework for Action. (...) While DRR in Africa is being financed through national budget allocation, the private sector and international sources, it is clear more needs to be done. *An immediate priority is to enhance the existing mechanisms and tools that measure progress in DRR, and review and assess risk baselines against the guidance contained in the Sendai Framework (emphasis added).*

The report concludes revealing that no tools have been set up to measure preparedness under the Sendai Framework for Disaster Risk Reduction (2015–2030). This aspect and all the above tell much about the progress made to date, but also the long way to go to achieve the full implementation of both the Kampala Convention and the DRR regional agenda.

## 2.2. The case of Angola

With the adoption in 2001 and 2002, respectively, of the *Norms on the Resettlement of Displaced Populations*<sup>128</sup> and the *Standards on the Resettlement of Displaced Populations*,<sup>129</sup> Angola became the first country to incorporate the Guiding Principles on Internal Displacement (1998) into its domestic legislation, with the aim of regulating the process of return and/or temporary or permanent resettlement of more than 4 million IDPs.<sup>130</sup>

In September 2004,<sup>131</sup> the Government announced that some 4 million IDPs had been resettled. And the remaining 340,000 should return to their places of origin as soon as possible, given the Government's willingness to declare the closure of the resettlement process at the end of the year and the consequent closure of all the existing reception centres and camps for displaced persons, a measure justified by the need to 'normalise and stabilise the country'.<sup>132</sup>

According to the Angolan Government, with the exception of the Cabinda enclave,<sup>133</sup> IDPs have ceased to exist in Angola as of 2005. Consequently, since that time, there has been no monitoring of this phenomenon in the country, nor has the situation of the former IDPs and the level of their socio-economic integration<sup>134</sup> been examined.

However, sooner rather than later, the events showed that forced displacement of populations is still a real and potential problem in this country. In fact, it is likely to be more structural than cyclical in nature, reinforced by the persistence and mutations of its predominantly political historical causes, which are exacerbated by environmental and economic factors. The poorly healed and even bleeding wounds of the 27-year-long armed conflict are being compounded by the impacts of climate change and exclusionary development projects that, in many cases, target the same victims as in the past of war.

By adopting the Guiding Principles on Internal Displacement into its national legislation, the Angolan Government assumes as root causes of forced displacement not only armed conflicts and situations of widespread violence, but also human rights violations, natural and man-made disasters as well as large-scale development projects.

Having overcome the first cause, war – but not its deep and lasting consequences – the other causes, perhaps surreptitious and less noisy, emerge in a disturbing degree in the current socio-political and economic context of the country. However, they seem to receive very little attention from national authorities, despite the fact that, if they are not tackled in a timely and appropriate manner, they could prove devastating in the foreseeable future.

In line with what was discussed above in section II, it should be stressed that, in addition to the extreme weather events that occur suddenly (especially floods), those of a slow and progressive nature, such as desertification, drought, erosion and soil degradation, are also of great concern in Angola.<sup>135</sup> As the National Adaptation Plan of Action (NAPA) refers to, in this country

the possible effects from the scenarios generated by the global models for a 50 to 100 year timescale may be the following: the occurrence of extreme climatic events; the extension of arid and semi-arid areas in the south of Angola; a reduction in rainfall below the dividing line between

losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries' (<<https://www.unisdr.org/we/coordinate/sendai-framework> (accessed 27 Apr. 2018).

128 Council of Ministers Decree Number 1/01, 5 January 2001.

129 Council of Ministers Decree Number 79/02 of 6 December, adopted to ensure the implementation of the 'Norms on the Resettlement of Displaced Populations'; approved by Decree 1/01 of 5 January, to facilitate the organised resettlement and return to IDPs to their areas of origin. Attached to the decree are the implementing regulations, known as 'Standard operational procedures of the Norms on Resettlement of Displaced Populations'.

130 In 2003, this figure of Angolan IDPs was estimated at 4.6 million. See HRW, *World Report 2003* (Angola section), 14 January 2003, [www.hrw.org/legacy/wr2k3/africa1.html](http://www.hrw.org/legacy/wr2k3/africa1.html) (accessed 27 Apr. 2018).

131 IDMC, *The government announces that 340,000 IDPs should return by the end of the year* (September 2004), [www.refworld.org/pdfid/3ae6a6200.pdf](http://www.refworld.org/pdfid/3ae6a6200.pdf) (accessed 27 Apr. 2018).

132 Lari, Andrea, 'Returning home to a normal life? The plight of Angola's internally displaced', *ISS Paper 85*, Pretoria: ISS (February 2004), p. 2.

133 IDMC, *Angola: Former IDPs share the common challenge of recovery and reconstruction*, 12 December 2007, pp. 4–5, <<http://www.internal-displacement.org/countries/angola> (accessed 27 Apr. 2018).

134 Ibid.

135 Oliver Sykes, *Vulnerabilidade rural, alterações climáticas y adaptação em Angola*, Christian Aid, June 2013, p. 17.

Lubango, Huambo and Malange; an increase in rainfall in the north of Angola; changes in ocean currents; an increase in average sea levels leading to changes in erosion and sedimentation; changes in river currents, leading to modified erosion and sedimentation patterns; change of temperature in lagoons.<sup>136</sup>

It is estimated that as a consequence of some of these phenomena, around 431,000 Angolans have been displaced between 2008 and 2012.<sup>137</sup> Furthermore, available data and projections<sup>138</sup> suggest that unless necessary adaptation and mitigation measures are taken, the scale of environmental displacement in Angola tends to increase.

Angola's ratification of the Kampala Convention on 14 May 2013 is good news and a demonstration of the willingness of national authorities to be legally bound to prevent forced displacement and protect their citizens from it. This task requires, among other measures, the implementation of the aforementioned NAPA, as well as the elaboration of a *National Disaster Risk Reduction Plan*, which Angola still lacks. Equally commendable, in this regard, is the effective execution of the *National Action Programme to Combat Desertification*, adopted by the Government in June 2015, in compliance with the *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (UNCCD).<sup>139</sup>

Certainly, Angola's commitment to environmental and climate change issues is evident in the large number of relevant international legal instruments (treaties and agreements) to which the country is or in the process of becoming a party.<sup>140</sup> Meanwhile, although all this indicates progress – at least on paper – in relation to the prevention and protection against environmental displacement in the country, there is still a great need to define and promote a national legal and political framework that, under the Kampala Convention, seriously takes this problem and its complexity in current and future development context of the country, where socio-political and economic vulnerabilities may easily be exacerbated by the impacts of climate change.

It should be noted that, although the Angolan law on internal displacement was considered by many to be 'excellent',<sup>141</sup> its implementation was fraught with profound irregularities and contradictions, having led to the worsening of the vulnerability and helplessness of many IDPs. Many of them were involuntarily resettled, exposed to landmines, severe weather events and deprived of basic social infrastructure and services. Many others remained or returned to the urban suburbs, mainly in the capital Luanda, where they remain trapped in chronic and intergenerational poverty.

Linked, therefore, to the mismanagement of the end of war-induced displacement factors such as persistent poverty, scandalous social-economic inequality, growing land speculation, exclusionary development projects, as well as extreme environmental events related to climate change are banishing large numbers of Angolans, turning many of the former war-IDPs into 'development-induced displaced persons' and/or environmental IDPs.

The domestication, operationalisation and implementation of the Kampala Convention in Angola should translate into a strong multi-level commitment of the State to this present and future challenge, subsuming the existing *Norms on the Resettlement of Displaced Populations* into a new and comprehensive legal and policy framework, which should merit a systematic and effective budgetary allocation. So far there is no sign in this direction. Preventing environmental displacement and protecting the victims in accordance with the Kampala Convention remains a real pending issue in Angola.

## Conclusion

Is the implementation of the Kampala Convention effective in protecting IDPs by disasters and climate change?

The response to this apparently simple question has been far from straightforward. First, it has required taking an overview of the African context of internal displacement, with special mention to disasters and climate change as growing major drivers of such displacement, as well as to the provisions of the convention in this regard. Secondly, I reviewed and delved into the ongoing academic debate around the nexus between climate change and human mobility, and also the evolving of international legal and political system in addressing protection needs of IDPs in context of disasters related to climate change. Finally, the process of domestication and implementation of the said convention was examined, seeking its holistic character and, therefore, the effective attention that it dedicates to environmental IDPs.

The Kampala Convention clearly establishes the responsibilities of governments to protect people displaced by natural and human-made disasters, including climate change, and take measures to prevent and mitigate such displacement. Roughly five years since it came into force, challenges for its full implementation remain. Arguably, remarkable efforts have been made in this regard. However, its concrete impact on enhancing protection of and assistance to IDPs due to disasters and climate change is still imperceptible. Much needs to be done to achieve the adoption of

<sup>136</sup> Government of Angola, *Angola National Adaptation Programme of Action under the United Nations Framework Convention on Climate Change*, Luanda, December 2011, p. 89.

<sup>137</sup> AU / NRC, *The Kampala Convention. One year on: Progress and prospects*, (Geneva: IDMC, October 2013), p. 28.

<sup>138</sup> Sykes, *Vulnerabilidade rural, alterações climáticas*.

<sup>139</sup> Adopted in June 1994, it entered into force on 26 December 1996 and was ratified by Angola on 30 June 1997.

<sup>140</sup> Governo de Angola, Ministério do Urbanismo e Ambiente, *Relatório do Estado Geral do Ambiente em Angola*, 2006, capítulo 5, pp. 29–34.

<sup>141</sup> HRW, 'Coming Home: Return and Reintegration in Angola', Human Rights Watch, March 2005, 17, no.2(A).

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disaster preparedness and disaster management laws, and ensure that existing laws on disaster preparedness are comprehensive in nature, so as they encompass disaster risk reduction and management. Efforts are required to introduce proactive strategies to prevent or minimise displacement, and planned relocations, when appropriate, as well as the adoption of pre-emptive internal migration, which should be based on sound national policies and used as a coping or adaptive mechanism in the case of slow-onset disasters, and which should lead to durable solutions.

## Responding to climate change and migration: adaptation and state obligations

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### Abstract:

This paper aims to concretise climate change adaptation obligations in the context of international migration. The movement of individuals and entire communities is predicted to be one of the gravest consequences of climate change. Migration is one form of response that has the potential to be both beneficial and destructive for those facing the impacts of climate change. Managed migration is also a process states will likely initiate. This could take advantage of the opportunity to plan for predicted impacts, but it will also risk substantial human suffering – especially in states that have poor human rights records. Until now, however, the nature of state obligations and responsibilities to adapt or assist others with adaptation has not been given sufficient consideration, particularly in the context of migration.

There are three adaptation obligations – of action, assistance, and cooperation – established by the United Nations Framework Convention on Climate Change (UNFCCC). Every United Nations member state is a party to the UNFCCC, which means that these obligations are potentially powerful tools in the effort to address the impacts of climate change, including through migration. Yet the UNFCCC and climate change regime provide little guidance as to the meaning of these obligations. This paper therefore argues for the integration and application of other rules and principles of international law in the interpretation and implementation of adaptation obligations. By drawing on human rights law, principles of environmental law, guidance on resettlement and relocation, and work done by the Nansen Initiative, this paper seeks to develop and clarify the adaptation obligations of both countries of origin and destination for international migration.

### *Keywords*

climate change adaptation, migration and displacement, human rights law, treaty interpretation, public international law

## I. Introduction

Climate change is causing or contributing to an increase in the frequency and intensity of climate events. These events and their impacts, along with some measures undertaken by states in response to climate change, adversely affect the livelihoods and human rights of growing number of individuals and communities. These adverse impacts, combined with existing vulnerabilities and other socio-economic conditions, serve as drivers in an expected increase in the movement of people. Such movement has long prompted concern; in its first report in 1990, the Intergovernmental Panel on Climate Change's (IPCC) warned that the 'gravest effects' of climate change may be those on migration, predicting that millions might migrate due to coastal flooding, shoreline erosion, and agricultural disruption.<sup>1</sup> In response, some scholars and international organisations have sought to develop new legal categories of persons or proposed new legal agreements or frameworks to provide protection for those who will move in the context of climate change.<sup>2</sup> These efforts have thus far failed.

Instead of offering a variation on attempts to create new legal vehicle or category, this paper builds on developments within the climate change regime.<sup>3</sup> It aims to take advantage of the 'opportunity' climate change offers to bring migration protection to the forefront in international discussions.<sup>4</sup> Within the regime, the connection between climate change and migration has been recognised by decisions of the Conference of the Parties (COP),<sup>5</sup> the Paris Agreement,<sup>6</sup> and ongoing work of various committees.<sup>7</sup>

The climate change regime also creates legal obligations for states, although it does not specifically link these obligations to migration: states have legal obligations to prevent, to mitigate, and to adapt to the impacts of climate change.<sup>8</sup> The focus on reaching an agreement to reduce emissions has led to more development of the obligations related to mitigation and prevention. But with growing understanding about the impacts of climate change and their occurrence, and the knowledge that at least some of these impacts will occur even in best-case scenarios, adaptation efforts have become increasingly important. As this paper argues, if clarified, obligations related to adaptation have the potential to be a powerful source of protection for persons affected by climate change, including those who move.

This paper therefore focuses on the obligations related to adaptation within the climate change regime. It identifies three adaptation obligations – the obligation to facilitate adequate adaptation, to assist, and to cooperate – and seeks to concretise these obligations in the context of international migration.<sup>9</sup> To accomplish this concretisation, this paper integrates other rules and principles of international law in the interpretation and implementation of adaptation obligations. Integration is more than recognising that other international law rules or general principles apply alongside climate change agreements. It is, instead, an understanding of these obligations in their normative context, which includes other principles and rules of international law. These other principles and rules must be accounted for as a matter of treaty interpretation.<sup>10</sup> They can also be used to provide content and clarify adaptation obligations.<sup>11</sup>

The approach in this paper represents an attempt to work with existing and evolving legal tools. This is intended as a starting point, and not a holistic solution. And while the analysis bears in mind the call to return to first principles, and

1 IPCC, 'Climate Change: The 1990 and 1992 IPCC Assessments, IPCC First Assessment Report Overview and Policymaker Summaries and 1992 IPCC Supplement' (IPCC, 1992).

2 For example, the 2011 attempt by UNHCR to introduce such a framework failed due to 'a lack of willingness by a majority of governments, whether from reasons of sovereignty, competing priorities or the lead role of UNHCR in the process' (Walter Kälin, 'From the Nansen Principles to the Nansen Initiative', *Forced Migration Review*, 41 (2012), pp. 48, 49); see Jane McAdam, 'From the Nansen Initiative to the platform on disaster displacement: shaping international approaches to climate change, disasters and displacement', *University of New South Wales Law Journal*, 39 (2016), pp. 1518, 1521.

3 The climate change regime refers to the United Nations Framework Convention on Climate Change (UNFCCC), subsequent agreements – including the Paris Agreement – and decisions of the Conference of the Parties, and the institutions that develop rules and implement agreements.

4 See Benoît Mayer and Christel Cournil, 'Climate change, migration and human rights: towards group-specific protection?', in Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2015), p. 185.

5 Within the UNFCCC, the Cancun Adaptation Framework was the first output of the COP to recognise the issue. It invited all parties to take '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' (UNFCCC COP, 'Outcome of the work of the ad hoc working group on long-term cooperative action under the Convention (Cancun Agreements)' (2010) FCCC/CP/2010/7/Add.1 para 14(f)).

6 The preamble of the Paris Agreement suggests that parties should consider their human rights obligations to migrants when taking action to address climate change (Adoption of the Paris Agreement, 12 December 2015 (FCCC/CP/2015/L9/Rev.1) preamble).

7 Parties at the Paris COP 21 also requested that the Executive Committee of the Warsaw International Mechanism (WIM) establish a task force to develop recommendations and approaches on displacement related to the adverse impacts of climate change (UNFCCC COP, 'Addendum, Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session, Decision 1/CP.21' (2016) FCCC/CP/2015/10/Add.1 21 para 39). The work of the task force is ongoing, and includes analysis of migration, displacement and planned relocation.

8 See United Nations Framework Convention on Climate Change 1992 (1771 UNTS 107; S Treaty Doc No 102–38; UN Doc A/AC237/18 (Part II)/Add.1; 31 ILM 849) art 4; Paris Agreement, arts 4, 6, 7.

9 While the focus of this paper is on cross-border migration, these obligations can also be concretised as applied to internal migration. The author is addressing both international and internal migration in her doctoral research.

10 Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331) art 31.

11 See ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi' (ILC 2006) UN Doc A/CN.4/L.682 209 para 415; Campbell McLachlan, 'The principle of systemic integration and Article 31(3)(C) of the Vienna Convention', *International and Comparative Law Quarterly*, 54 (2005), pp. 279, 312; Richard K Gardiner, *Treaty Interpretation* (2nd edn, Oxford: Oxford University Press, 2015), pp. 320–21.

warning that the use of existing legal tools might constrain thinking, it also takes seriously requests by some states and international actors to find solutions using existing law.<sup>12</sup>

The arguments presented in this paper also aim to be consistent with a shift in focus away from protection based on the categorisation of migrants and to the drivers of movement, human needs, and how movement is playing out in different forms.<sup>13</sup> It is thus premised on the impacts of climate change continuing to play a key but not necessarily exclusive role in whether an individual moves. Moreover, as discussed below, a focus on adaptation avoids the retroactive focus on labelling migrants for the purposes of protection and the need for a new instrument.<sup>14</sup>

In order to ensure conceptual clarity, Section II of this paper first introduces key concepts and explains terminological choices. Because the subsequent legal analysis will refer to specific forms of migration and their attendant legal complexities, this section also includes a discussion of human mobility in the context of climate change. While sudden onset events are briefly discussed in this section, the analytical focus of this paper is on slow onset events, because (1) the longer time scale of their occurrence lends itself well to planning and preparation – and hence adaptation; (2) there is more uncertainty about sources of protection for migration across borders for those leaving areas impacted by slow onset events; (3) current humanitarian responses and work being done on disaster displacement and risk reduction aligns better with movement triggered by sudden onset events, leaving a bigger protection gap for slow onset events; and (4) migration as adaptation tends to be associated with slow onset events. Slow onset events are considered a greater challenge to fit into current legal frameworks, in part, due to this final factor; departure is perceived to be voluntary<sup>15</sup> – migration as adaptation – and thus is not captured by protection frameworks based on forced movement.

Section III then discusses legal gaps in protection, with a particular focus on attempts to extend refugee protections to those who move in the context of climate change. This section confirms the need for legal approaches that can support the protection of those who move in the context climate change, but which do not rely on creating a new form of protected status for individual persons. Section IV develops the argument for adaptation obligations and international mobility. It looks, in part, to areas of law discussed in Section III that, in isolation, are insufficient to protect people on the move in the context of climate change – and applies them to migration as adaptation. Section IV begins with the obligations of a country of origin. It then turns to the obligations of receiving states, as well as obligations that are collective. The paper concludes with a discussion of what meeting these some of these obligations might entail.

## II. Key concepts

### 1. Terminology

The discourse about climate change and human mobility includes wide range of terminology that defines and characterises movement and its causes. Confusion is created by the use of overlapping terms, and the lack of a universal legal definition or way to describe people who move in the context of climate change. Within the climate change regime, for example, movement has been categorised as ‘climate change induced displacement, migration and planned relocation.’<sup>16</sup> Displacement is generally thought to be movement that is forced or compelled, whereas migration is considered a predominately voluntary form of mobility. However, movement does not fit neatly into categories but rather is understood as part of a continuum with most movement falling somewhere between entirely forced or voluntary.

Multiple factors contribute to whether a person moves from their place of residence.<sup>17</sup> This includes environmental change, which can influence migration directly, or indirectly through impacts upon other drivers.<sup>18</sup> The analytic focus of this paper is on adaptation, with the goal to facilitate voluntary, informed and enabled movement. Such movement, however, will not necessarily occur without other compelling or external drivers; rather it reflects an effort to seek opportunities elsewhere in order to build resilience or avoid significant or further harm before it occurs. Thus, this paper primarily uses the term migration to refer to various forms of movement in the context of climate change.

12 Contra McAdam, ‘From the Nansen Initiative to the Platform on Disaster Displacement’, p. 1539; to The Nansen Initiative, ‘Global Consultation Conference Report: Geneva, 12–13 October 2015’ (2015) 110–11, 140 (statements made by EU and Lesotho delegation representatives); IOM, ‘No. 18 International Dialogue on Migration: Climate Change, Environmental Degradation, and Migration’ (2012), p. 30.

13 McAdam, ‘From the Nansen Initiative to the Platform on Disaster Displacement’, p. 1540.

14 For criticisms of a new agreement or mechanism, see Jane McAdam, ‘Swimming against the tide: why a climate change displacement treaty is not the answer’, *International Journal of Refugee Law*, 23 (2011); Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (UNHCR 2012).

15 See The Nansen Initiative, ‘Agenda for the protection of cross-border displaced persons in the context of disasters and climate change’ (The Nansen Initiative 2015), vol 1, p. 24 para 36.

16 UNFCCC COP, para 14(f); see also The Nansen Initiative, ‘Nansen Protection Agenda Vol 1’ (gathering information and best practices on these three forms of mobility); Koko Warner and others, ‘Changing climate, moving people: framing migration, displacement and planned relocation’ (UNU-EHS 2013) Policy Brief No 8 (noting that the needs of persons under each of these categories of mobility differs).

17 See Kälin and Schrepfer, *Protecting People Crossing Borders*, 22; Warner and others, ‘Changing climate, moving people’, p. 40; OHCHR, ‘Protection of the human rights of migrants: strengthening the promotion and protection of the human rights of migrants, including in large movements’ (2016) A/HRC/RES/32/14 Resolution adopted by the Human Rights Council para 7.

18 See François Gemenne, ‘Migration doesn’t have to be a failure to adapt’, in Jean Palutikof and others (eds), *Climate Adaptation Futures* (John Wiley & Sons, 2013), p. 235; Susan Martin, Sanjula Weerasinghe and Abbie Taylor, ‘What is crisis migration?’, *Forced Migration Review*, 45 (2014), p. 6.

Displacement and planned relocation will also be discussed, as their use in other legal guidance and forums to describe forced movement is relevant.<sup>19</sup>

This paper analyses migration associated with climate events. These events are generally distinguished by the rate at which they occur. Sudden onset events tend to be discrete and last for a matter of hours or days. In contrast, slow-onset events create incremental change that alters the natural environment over a course of months to many years.<sup>20</sup> Slow onset events include increasing temperatures, sea level rise, ocean acidification, glacial retreat, salinization, land and forest degradation, loss of biodiversity, and desertification.<sup>21</sup> Sudden and slow onset events do not always act as drivers of movement in isolation, but interact with one another and other factors to influence migration. For example, while sea level rise may gradually erode coastal land, it may be an increase in storm surges and salinization that leads people to move away from the area.

A few spatial and temporal considerations will also factor into the migration analysed in this paper. First, migration has long been a form of adaptation, although its perception as a failure to adapt presents practical challenges in pushing for its use as an adaptation measure.<sup>22</sup> Second, as previous studies of migration related to environmental change indicate, most people initially move internally.<sup>23</sup> Likewise, in the context of climate change, most migrants are expected to remain within a country.<sup>24</sup> Planned relocation will also generally be internal. International movement and relocation, however, will occur. This creates the need for responses from both the country of origin and destination, which are the focus of this paper. Finally, adaptation is a response that can either seek to avoid impacts or mitigate the harm after it occurs. Movement as a form of adaptation can also address impacts before or after they occur.

## 2. Vulnerability and the multi-causality of migration

This paper is premised on several conclusions about climate change and the nature of migration. The first conclusion is about the multi-causality of most migration. While the primary reason for migration may be environmental change (some sudden onset events for example), it is often the result of the interaction multiple factors. These include individual vulnerabilities and preferences and social, economic, political and demographic factors. These factors may change over time, and include age, gender, ethnicity, livelihood and income, governance structures, insecurity and exposure to hazards.<sup>25</sup> A person's vulnerability, or propensity to be adversely affected by climate change,<sup>26</sup> can also shift as their individual experiences or the broader context changes. The impacts of climate change disproportionately affect those already marginalised or facing discrimination,<sup>27</sup> and this in turn can increase the pressure to migrate. Yet while vulnerability and environmental change can result in migration, it may also lead others to stay out of choice or necessity.<sup>28</sup> Without state intervention, international migration tends only to be possible for those who have the means to travel over longer distances.

Those who move out of necessity rather than choice face increased risk of human rights violations.<sup>29</sup> The conditions migrants face can exacerbate vulnerabilities, and put rights at risk in transit, crossing borders, and upon arrival. An international law system that enables these conditions and other barriers to entry, and which does not include a general right to enter a foreign country, further contributes to these risks.<sup>30</sup>

19 The Nansen Initiative Protection Agenda, for example, describes 'disaster displacement' as the forced or obliged departure of people from their homes as a result of natural disasters or to avoid the immediate and foreseeable impacts of a natural hazard. See The Nansen Initiative, 'Nansen Protection Agenda Vol 1', 16 para 16; see also Jane McAdam and Elizabeth Ferris, 'Planned relocations in the context of climate change: unpacking the legal and conceptual issues', *Cambridge Journal of International and Comparative Law* (2015), pp. 140–41 (discussing meaning of 'relocation' and 'resettlement').

20 See UNFCCC, 'Slow Onset Events – Technical Paper' (2012) FCCC/TP/2012/7.

21 The COP considers these events as slow onset. See *ibid.*, paras 26–49; UNFCCC COP, para 25.

22 See François Gemenne and Julia Blocher, 'How can migration support adaptation? Different options to test the migration-adaptation nexus' (IOM Working Paper Series no. 1, 2016), <http://environmentalmigration.iom.int/migration-environment-and-climate-change-working-paper-series-no-12016> (accessed 28 March 2017).

23 See Gemenne, 'Migration doesn't have to be a failure to adapt', p. 238; Koko Warner and Tamer Afifi, 'Enhancing adaptation options and managing human mobility: the United Nations Framework Convention on Climate Change', *Social Research: An International Quarterly*, 81 (2014), p. 307.

24 See, e.g., Chaloka Beyani, 'Protection of and assistance to internally displaced persons: report of the Special Rapporteur on the Human Rights of Internally Displaced Persons' (United Nations 2011) A/66/285 para 19.

25 See Foresight, 'Migration and global environmental change' (UK Government Office for Science 2011) Final Project Report 11–12; OHCHR and Global Migration Group, 'Principles and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations – draft' (2017).

26 GIPCC, 'Annex II: Glossary', *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2014), p. 128.

27 See UNFCCC COP preamble.

28 See Foresight, 'Migration and global environmental change', pp. 9, 12; Gemenne and Blocher, 'How can migration support adaptation', p. 5 (stress on resources might reduce ability to move).

29 See OHCHR, 'Situation of migrants in transit' (2016) para 11.

30 See, e.g., Jaya Ramji-Nogales, 'Migration emergencies', *Hastings Law Journal*, 68 (2017), pp. 609–26.

### 3. Examples of mobility in the context of climate change

The connection between climate change and migration has been the subject of numerous predictions, which has prompted discussion about the implications of this relationship and potential responses. These discussions are important to advance potential protections for those who will move. However, sweeping estimates that attribute environmental or climate factors as *the* cause of future mobility are now met with scepticism.<sup>31</sup> This is due in part to the multi-causality of migration, which makes it difficult to isolate environmental change – and slow onset processes in particular – as a driver of migration.<sup>32</sup> Anticipating migration is also contingent: what occurs in the future will be greatly influenced by how humanity chooses to respond to climate change, now and in the coming years. Yet the impacts of climate change are and will continue to be a key driver in migration, which under some conditions can serve as an adaptation strategy.<sup>33</sup>

A few concrete examples illustrate how this might occur, and provide context for the legal analysis to come. Sea level rise is a paradigmatic example of a slow onset event that will likely have significant impacts on human mobility. An increase in global temperatures will cause sea level rise, although how much will depend on the increase. The IPCC predicts that temperatures will increase, and that absent mitigation global temperatures will rise by more than 1.5°C by the end of the century, and by more than 2°C without any intervention.<sup>34</sup> This could lead to a global mean sea level rise somewhere between 0.26 and 0.82 metres above 1986 to 2005 levels by the end of the century.<sup>35</sup> Ice sheet loss and sea level rise are expected to cause low-lying areas to experience adverse impacts, including submergence, coastal flooding, and erosion.<sup>36</sup>

For a state like Bangladesh, for example, where nearly one-quarter of the country is less than seven feet above sea level, and two-thirds is less than 15 feet above, there is a risk to a significant portion of the population. If the sea level rises by one metre, this could affect 18 to 20 per cent of the state's total land mass and leave up to an estimated 15 million people without homes.<sup>37</sup> Challenges from sea level rise are compounded by expected increases in river flooding, more intense tropical storms, soaring temperatures, and declining crop yields and availability of clean water.<sup>38</sup> These impacts will disrupt livelihoods, affect health, and increase a risk of injury and death.<sup>39</sup>

This leaves affected persons and the state several options: to adapt and build resilience in order to stay; to migrate in advance of the most severe impacts; to wait and potentially face displacement; or to undertake a planned relocation. Given the predicted impacts, if there is not a state response to facilitate migration or relocation, then there will be people in impacted areas that will be forced to move. Furthermore, while migration may initially be internal, international movement will become increasingly likely as the impacts of climate change render more of a country uninhabitable or incapable of consistent agricultural outputs that many depend on for food and livelihoods, and as internal migration pushes those who can move abroad out of the country.<sup>40</sup> Migrants are also more likely to cross borders if they are not provided with adequate protection, assistance, and durable solutions within their own country.

Sea level rise also threatens the territorial integrity of small island states. It can lead to submergence of land and saltwater intrusion of aquifers, and combine with storm surges and other environmental changes to affect migration. In this context, the need for international mobility options has been a focus of government delegations and academic analysis.<sup>41</sup> This has raised questions about planned relocation, potential statelessness, and governance.<sup>42</sup> Yet, even within some of these states, those living on outer islands are likely to move internally before pursuing options overseas. The international movement that does occur is likely to be planned and pre-emptive, which will require cooperation with other states.<sup>43</sup>

31 See, e.g., Stephen Castles, 'Afterword: What now? climate-induced displacement after Copenhagen', in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010), p. 242.

32 The lack of data on migration related to environmental changes makes predictions difficult, particularly for slow onset events. See Dina Ionesco, Daria Mokhnacheva and François Gemenne, *The Atlas of Environmental Migration* (Routledge, 2016), p. 12.

33 See, e.g., IPCC, 'Summary for policymakers', *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), p. 20.

34 The IPCC has high confidence in these predictions. IPCC, 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC, 2014), p. 10.

35 Ibid, p. 13.

36 IPCC, 'Summary for policymakers', p. 17.

37 See The World Bank, *Bangladesh – climate change and sustainable development* (The World Bank, 2000), p. 40; Sonja Butzengeiger and Britta Horstmann, 'Sea-level rise in Bangladesh and the Netherlands: one phenomenon, many consequences' (Germanwatch, 2004), p. 6, <https://germanwatch.org/en/2755> (accessed 2 May 2017).

38 See The World Bank, 'Turn down the heat: climate extremes, regional impacts, and the case for resilience' (2013), pp. 110, 119.

39 See IPCC, 'Summary for policymakers', p. 13.

40 Rice production in the Ganges-Brahmaputra-Meghna Delta region of Bangladesh, for example, accounts for 34% of national production that is exclusively used for domestic consumption. Much of this area is less than five metres above and at risk from rising sea levels (see The World Bank, 'Turn down the heat', p. 129). See also Jane McAdam (ed), *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012), pp. 171–2 (while climate-related migration will mainly be internal, this might have a 'domino' effect that will push those with means to migrate abroad).

41 See, e.g., Jane McAdam, 'Disappearing States', statelessness and the boundaries of international law' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010), pp. 121–6 (describing occasions when small island states raise relocation in context of climate change, as well as historical challenges with its use).

42 McAdam, 'Disappearing States'; McAdam, *Climate Change, Forced Migration, and International Law*, pp. 119–60.

43 See McAdam, *Climate Change, Forced Migration, and International Law*, pp. 93–4.

Desertification and other climate events will likewise exacerbate existing socio-economic vulnerabilities. Water availability is crucial; and during periods of long-time drought will make accessing the resources necessary to subsist increasingly difficult. In the Sahel region, for example, drought and environmental changes already cause seasonal migrations of agricultural workers and pastoralists.<sup>44</sup> The region is also experiencing changes in rainfall patterns that have also caused heavy flooding. The existing patterns of migration in the region, which have been established over many years, can provide information on how those facing the impacts of climate change will move.<sup>45</sup> The stressors from climate change, however, are compelling movement that is no longer part of a regular pattern of building resilience but rather a negative means to cope with increasing vulnerabilities.<sup>46</sup>

As these examples indicate, movement related to climate events will not occur as a single or uniform phenomenon. There will be a number of different scenarios, with contextual factors that require consideration in responses.<sup>47</sup> Yet these factors need not be in tension with the analytic project of this paper. Thus, an effort to find a way to legally ground movement as adaptation can include obligations that are consistent across states, while remaining flexible enough to account for contextual differences.

### III. Legal gaps in protection for cross-border migration

This section will briefly discuss current legal protection frameworks and their shortcomings as applied to movement related climate change. It will not go into great detail about the legal gaps created by current protection frameworks, as this has been done well elsewhere.<sup>48</sup> A summary is necessary, however, to establish the extent that these frameworks provide protection – if at all – and how these areas of law might interact with adaptation obligations. It also establishes the need for new approaches to fill the gap in protection, which the rest of this paper seeks to explore.

#### 1. Challenges and gaps in legal protection

There are several international legal frameworks that are relevant to migration and climate change: refugee law, law on statelessness, human rights law, and the climate change regime. The use of these frameworks to provide protection to migrants is limited. Those who migrate or are displaced in the wake of a climate event will not generally qualify as a refugee under the definition of the 1951 Refugee Convention.<sup>49</sup> There will, however, be cases where discrimination or persecution occurs on a protected ground in the context of climate change. Thus, if a state discriminates in its provision of protection from or assistance after a climate event, this could create the circumstances necessary to meet the refugee definition. Gender-based violence and discrimination could also increase in the aftermath of climate disasters.<sup>50</sup> In such cases, however, the trigger for protection is not the climate event itself, but the discrimination that followed.<sup>51</sup> If the refugee definition is interpreted broadly, any movement resulting from the social position of an individual, which is based on discriminatory state policies or actions, could also allow for a refugee claim.<sup>52</sup>

Similarly, international law on statelessness will not provide most migrants protection. As discussed above, populations of small island states are likely to move before territory disappears or the state ceases to exist, and most of those who move will not fit the definition of a stateless person.<sup>53</sup> The situation of these states is unprecedented; a shift in government is not contemplated or wanted, and even when certain criteria of statehood are not met, international law presumes the continuity of states.<sup>54</sup>

44 See Richard Black, Dominic Kniveton and Kerstin Schmidt-Verkerk, 'Migration and climate change: toward an integrated assessment of sensitivity' in Thomas Faist and Jeanette Schade (eds.), *Disentangling Migration and Climate Change: Methodologies, Political Discourses and Human Rights* (Springer Netherlands, 2013), p. 35.

45 See *ibid* 37; see also 'Climate change, environment and migration in the Sahel' (Micle 2012), [www.micle-project.net/news.18.0.html?&L=2&tx\\_ttnews%5Btt\\_news%5D=53&cHash=af2e0ced92447b3cfd9d311ed573e936](http://www.micle-project.net/news.18.0.html?&L=2&tx_ttnews%5Btt_news%5D=53&cHash=af2e0ced92447b3cfd9d311ed573e936) (accessed 3 May 2017); UNEP, 'Livelihood security: climate change, migration and conflict in the Sahel' (UNEP 2011) 22–47, <http://drustage.unep.org/disastersandconflicts/livelihood-security-climate-change-migration-and-conflict-sahel> (accessed 3 May 2017).

46 See, e.g., Alice Thomas, 'Sahel villagers fleeing climate change must not be ignored', *The Guardian*, 2 August 2013, [www.theguardian.com/global-development/poverty-matters/2013/aug/02/sahel-climate-change-displacement-migration](http://www.theguardian.com/global-development/poverty-matters/2013/aug/02/sahel-climate-change-displacement-migration) (accessed 3 May 2017) (describing recurrent crises of droughts and flooding forcing people to move in the Sahel).

47 For an overview of displacement scenarios from climate events (sudden, slow-onset), the case of small island states, high risk areas within a state, and climate-induced unrest, see Walter Kälin, 'Conceptualising climate-induced displacement' in Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010).

48 See, e.g., McAdam, *Climate Change, Forced Migration, and International Law*; Ben Boer, 'Climate change and human rights in the Asia-Pacific – a fragmented approach' in Ottavio Quirico and Mouloud Boumghar (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2015); Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) (forthcoming).

49 Convention Relating to the Status of Refugees, 28 July 1951; Protocol Relating to the Status of Refugees 1967.

50 See Elizabeth Ferris, 'Disasters and displacement: what we know, what we don't know' (Brookings Institute, 2014), [www.brookings.edu/blog/planetpolicy/2014/06/09/disasters-and-displacement-what-we-know-what-we-dont-know/](http://www.brookings.edu/blog/planetpolicy/2014/06/09/disasters-and-displacement-what-we-know-what-we-dont-know/) (accessed 25 March 2017).

51 See McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement', p. 1535; *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* (2015) [2015] NZSC 107 para 25, 27; *AF (Kiribati)* [2013] NZIPT 800413 (Immigration and Protection Tribunal New Zealand) para 64 (application of Refugee Convention determined on a case by case basis).

52 Discussion with Professor James Hathaway, University of Michigan, October 2016 (notes on file with author).

53 See Convention Relating to the Status of Stateless Persons, 28 September 1954.

54 For more on statelessness and climate change see McAdam, *Climate Change, Forced Migration, and International Law*, pp. 138–43; Mayer and

International human rights law will play an important role in providing protection for migrants. However, there are several challenges to accessing human rights as a direct source of protection for international migrants. The first is an issue of admittance. Under current international law, a migrant seeking to enter a state not his or her own must either be admitted at the discretion of that state or because the principle of *non-refoulement* legally binds the state not to expel or return a person who is a refugee or who would face arbitrary deprivation of life, torture, or cruel, inhuman and degrading treatment.<sup>55</sup> The latter prohibition is a cornerstone of complementary protection – a reference to the human rights-based protections that complement those provided by the Refugee Convention.<sup>56</sup> The impacts of climate change are predicted to reach this threshold, where life is at risk or cruel, inhuman and degrading and inhuman treatment is likely upon return. Regional case law has interpreted the obligation to protect life to apply in the context of natural disasters, requiring a state to implement warning or defence systems for foreseeable disasters.<sup>57</sup> This could be extended to prevent removal to a state that has failed to account for or mitigate harm from such disasters.<sup>58</sup> To date, however, courts have not seen the threat of climate change as sufficiently severe enough to trigger *non-refoulement* obligations.<sup>59</sup> Furthermore, inhuman and degrading treatment tends to require a state action or omission, and the general poverty or poor conditions a migrant may face upon return are generally insufficient to prevent removal.<sup>60</sup>

The second challenge is the accessibility of rights. All persons under a state's jurisdiction, including international migrants, are entitled to human rights. Human rights apply universally, and are interdependent; yet there is often a lack of 'focused protection' that makes accessing rights difficult.<sup>61</sup> The positive aspects of human rights obligations may be difficult to enforce, and the remedial nature of mechanisms that focus on violations may offer recourse too late for those in need of protection in the context of climate change. Indeed, as the analysis of adaptation obligations will make clear, impacts to the enjoyment of human rights caused by climate change do not automatically equate with a violation of an obligation.<sup>62</sup> Moreover, a right may involve several obligations, including obligations to protect, respect, and fulfil that right. Thus, a government must not act in a way that violates human rights when responding to climate change, but it may be able to satisfy its human rights obligations in a number of different ways.<sup>63</sup>

In summary, to gain protection under current frameworks, a migrant must either fall under a legal category (refugee or stateless person) or be at grave risk upon return (complementary protection). These determinations are made after movement, with protection afforded to those forced to flee their country.<sup>64</sup> Much of the movement discussed in this paper will occur in anticipation of significant impacts from climate change, and even when not entirely voluntary, will not fit into any existing migration category. Thus, significant protection gaps remain – especially for people who cross international borders.

## 2. Migration policies and barriers to entry

The primary gaps in legal protection for international migrants come at the border and upon entry into another state. International law currently lacks legal obligations or clarity regarding admission into a country for most migrants, access to basic services upon arrival, legal status during one's stay, and conditions for return.<sup>65</sup> As discussed above, it may, in specific circumstances prevent return, but access to another state's territory is not clearly mandated. There are also no specific obligations that address cross-border movement in response to natural disasters or impacts linked to climate change, including slow onset events.<sup>66</sup> This enables migration policies and practices that criminalise entry or

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Cournil, 'Climate change, migration and human rights', pp. 180–1.

55 This principle can be derived from the language of the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture, and customary international law. See International Covenant on Civil and Political Rights, 16 December 1966 (United Nations, Treaty Series, vol 999, 171) art 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 art 3; see also Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement (Opinion)', in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 151–8.

56 See McAdam, *Climate Change, Forced Migration, and International Law*, p. 53.

57 See *Budayeva v Russia* (Applications nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) (ECtHR).

58 See McAdam, *Climate Change, Forced Migration, and International Law*, p. 60.

59 See, e.g., *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, p. para 55.

60 See McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement', pp. 1537–8.

61 See Stefan Gruber, 'Human displacement and climate change in the Asia-Pacific', in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015)

62 Environmental pollution can prevent the enjoyment of a human right, but in order to constitute a violation, it must adversely affect a protected right rather than simply cause degradation of the environment. See *Kyrtatos v Greece* (Application no 41666/98) (ECtHR) para 52.

63 See Bodansky, Brunnée and Rajamani, *International Climate Change Law*.

64 This distinction is seen as important, as the international community 'commonly acknowledged that those forced to leave their country face a heightened degree of vulnerability and thus have specific protection and assistance needs'. The Nansen Initiative, 'Nansen Protection Agenda Vol 1', p. 22 para [32].

65 See Jane McAdam and Marc Limon, 'Human rights, climate change and cross-border displacement: the role of the international human rights community in contributing to effective and just solutions' (Universal Rights Group 2015) Policy Report 18; The Nansen Initiative, 'Nansen Protection Agenda Vol 1'.

66 See IOM, 'Discussion Paper for WIM Technical Meeting: Synthesis of Relevant Information, Good Practices and Lessons Learned in Relation to Pillar 3: Enhancing Action and Support' (2016).

stay, border closures, pushbacks and other barriers to international migration. As a result, irregular migrants often face uncertain and dangerous conditions in transit and as they cross borders.<sup>67</sup>

The construction of international law and its current approach to migration has been criticised as contributing to so called 'migration emergencies', the result of a failure to effectively govern contemporary migration flows. Jaya Ramji-Nogales highlights the way that law helps construct crisis, rather than how it responds to or is shaped by such crises.<sup>68</sup> In doing so, she explores examples where migration is the predictable outcome of an international legal framework that relies on the 'path-dependent' backward looking application of the refugee regime and the principle of *non-refoulement*. Ramji-Nogales discounts the idea that migration emergencies or crises are always unpredictable and suggests a new approach – one that anticipates and addresses migration flows proactively to better ensure safe transit for migrants.<sup>69</sup> Climate change lends itself well to such a new approach; its impacts possess an element of predictability that can be better managed with planning and cooperation.

## IV. Adaptation obligations and international migration

### 1. Obligations of the state of origin

There are two primary obligations of the state of origin: to facilitate adequate adaptation and to cooperate in preparing for adaptation.

#### 1.1. Obligation to facilitate adequate adaptation and plan for and implement adaptation actions

Under the UNFCCC, states 'shall ... (f) formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing... measures to **facilitate adequate adaptation** to climate change'.<sup>70</sup> The Paris Agreement builds on this, enhancing implementation of the UNFCCC's overall objective by '[i]ncreasing the ability to adapt to the adverse impacts of climate change'.<sup>71</sup> It also establishes a 'global goal on adaptation' and creates a new legal obligation to plan for and implement adaptation actions.<sup>72</sup> This requirement is softened, however, by the qualification that such planning and implementation is necessary 'as appropriate', which creates room for discretion in determining whether and how to meet this obligation.<sup>73</sup> Yet adaptation can take different forms, and the generality also affords the opportunity to tailor actions to context, on the scale of international migration, or for specific instances of such migration.

#### a. Human rights law and the precautionary principle

To achieve such tailoring, the analysis turns next to how adaptation obligations relate to the cross-border scenarios introduced above. It answers this question in several ways: first, in the interpretation of any obligation, it is necessary to take the context of the treaty into account.<sup>74</sup> The context includes the preamble, and the preamble of the Paris Agreement reminds parties of their human rights obligations when taking action to address climate change, specifically highlighting the rights of migrants.<sup>75</sup> As a general matter, this means human rights must be considered in all migration related adaptation. This accords with the second tool to tailor adaptation to the migration context: the integration of human rights law as a relevant rule of international law.<sup>76</sup>

This integration has specific implications for the mobility that may arise in adaptation. An adaptation obligation combined with the integration of a relevant human rights law principle can result in the need to take a specific adaptation action, under circumstances that protect human rights. The state's obligation to protect against arbitrary or forced migration provides a good example of this integration in practice. In some circumstances, where the expected impacts are likely to render other adaptation efforts insufficient, migration might be the appropriate adaptive response. This could be the case in parts of Bangladesh, where flooding begins to make land difficult to inhabit, or for small-island states, where sea level rise is expected to force mobility in the future. The inability to adapt in situ, combined with the obligation to protect against arbitrary displacement, could necessitate migration or planned relocation as an adaptation measure. Migration in this case would be a means to satisfy the obligation to plan for and implement adaptation, which becomes a *necessary* measure once the human rights based protection against arbitrary or forced displacement is integrated into the analysis. Thus, integration of a prohibition of arbitrary displacement into an understanding of adaptation obligations

67 See OHCHR, 'Situation of migrants in transit', paras 12, 15.

68 See Ramji-Nogales, 'Migration emergencies'.

69 Ibid., pp. 611–15.

70 UNFCCC, art 4.1(b) (emphasis added).

71 Paris Agreement, art 2.1(a).

72 Ibid., art 7. The article states that each party 'shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include: (a) The implementation of adaptation actions, undertakings and/or efforts...'; *ibid.* art 7.9.

73 See Lavanya Rajamani, 'The 2015 Paris Agreement: interplay between hard, soft and non-obligations', *Journal of Environmental Law*, 28 (2016), pp. 343, 352–3.

74 VCLT, art 31(2).

75 Paris Agreement, preamble.

76 VCLT, art 31(3).

for a specific context – impending flooding in Bangladesh, or sea-level rise in small-island states – necessitates certain migration actions. These actions, in turn, should also comply with human rights.<sup>77</sup>

Human rights obligations may also create multiple duties that implicate a variety of different actions, much like adaptation obligations. For example, the prohibition on arbitrary displacement is partially derived from the freedom of movement and choice of residence owed to all lawfully within a state.<sup>78</sup> This right may involve multiple duties: for the state of residence to respect an individual's liberty of movement by avoiding any actions that might infringe on this right, and a positive duty to protect this right, especially if movement is also needed to access other human rights. These rights must be protected by the state of origin or residence, which has jurisdiction over and obligations to those within their territory. For international migration, individuals have a right to leave any country, which can only be limited when necessary to safeguard a state's national security, public order (ordre public), public health or morals, or rights and freedoms of others.<sup>79</sup> There is also no corresponding right to enter another country. This presents a challenge in crossing a state border, which will be discussed in the next section. Thus, states must ensure the protection of liberty of movement, amongst other human rights of a migrant, up to the point that they reach and are seeking to cross an international border.

The precautionary principle provides further interpretive context for an understanding of adaptation obligations. The UNFCCC's operative principles include an instruction that parties should take 'precautionary measures' to address climate change and 'mitigate its adverse effects'; when impacts pose threats of serious or irreversible damage, such measures should not be postponed due to a lack of scientific certainty.<sup>80</sup> These principles continue to apply to actions undertaken by parties, and the obligations contained in the Paris Agreement.<sup>81</sup> Within the climate change regime, the precautionary principle is effectuated through concrete actions like adaptation. The principles contained in the UNFCCC do not create standalone obligations, but are linked to other obligations to provide guidance on how they should be implemented and understood. For adaptation obligations, the precautionary principle serves as a general catalyst for actions to adapt.<sup>82</sup> The legal status of the precautionary principle as a norm of customary law is less certain.<sup>83</sup> If it has risen to this level, then it further strengthens arguments for proactive adaptation. Its role within the regime, however, is clear: it is part of the treaty's interpretive context, is included in the principles that guide the treaty's implementation, and applies to adaptation measures.<sup>84</sup>

Taking a precautionary approach also addresses difficulties establishing human rights violations instead of accounting for risks to rights, and problems that arise in attributing causation for violations to those who have caused climate change. This analysis tends to happen after harm has occurred – which for those moving in the face of disasters and events related to climate change is often too late.<sup>85</sup> Yet the dispositive question, as Special Rapporteur John Knox asks, is not whether impacts violate human rights, but which 'human rights obligations provide important protection to the individuals whose rights are affected by climate change.'<sup>86</sup>

Interpreting adaptation obligations in a context that includes the principle, along with the integration of human rights law, could further strengthen arguments that states are obliged to facilitate migration with dignity and ensure meaningful and informed participation in any decision-making that affects migrants.<sup>87</sup> Integration works with a variety of rights that are put at risk by foreseeable or actual impacts of climate change. Human rights obligations can assist in clarifying how much protection is needed and which measures to achieve this protection.<sup>88</sup> Regional case law has already established that the right to life, for example, requires that governments regulate certain environmental risks and take positive actions to secure human rights.<sup>89</sup>

In *Budayeva and others v. Russia*, the European Court of Human Rights found that Russia had violated the right to life in its handling of a mudslide that killed eight people. The government was aware that there was a risk of such a

77 See Paris Agreement preamble; see also *infra*.

78 ICCPR art 12; see UN Human Rights Committee, 'CCPR General Comment No. 27: Article 12 (Freedom of Movement)' (1999) CCPR/C/21/Rev.1/Add.9 para 7 (right to reside in place of one's choice includes protection against forced displacement).

79 ICCPR art 12(1), (3); but see Mayer and Cournil, 'Climate change, migration and human rights' (the necessary bases to limit freedom of movement and departure [e.g. national security, public order] are flexible); Bridget Lewis, 'Balancing human rights in climate policies', in Ottavio Quirico and Mouloud Boumghar (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2015), p. 45.

80 UNFCCC art 3(3).

81 See Rajamani, 'The 2015 Paris Agreement', p. 342.

82 See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), pp. 24–8.

83 See *Nuclear Tests case (Request for an Examination of the Situation)* (ICJ) paras 87, 91 (precautionary principle may now be customary international law relating to the environment); Roda Verheyen, *Climate Change Damage And International Law: Prevention Duties And State Responsibility* (Martinus Nijhoff Publishers 2005) 75 (considers the principle, as stated in the Rio Declaration, to be part of general customary international law).

84 See VCLT art 31(2) (context for treaty interpretation includes treaty text).

85 See OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (United Nations Human Rights Council 2009) A/HRC/10/61 para 70.

86 John H. Knox, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (United Nations Human Rights Council 2016) A/HRC/31/52 para 36 (quoting OHCHR at para 71).

87 Human rights law should also be incorporated to ensure the human rights of migrants for any climate change related migration scenario. See OHCHR, 'Key messages on human rights, climate change, and migration' (2017).

88 See Knox, 'Report of the Special Rapporteur on the issue of human rights obligations', para 33.

89 See *ibid.*, paras 37–39; Alan Boyle, 'Human rights and the environment: where next?', in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015), p. 204.

mudslide before it occurred, and it did not implement sufficient planning or relief policies or inform the public about the risk, even after the mudslide had begun.<sup>90</sup> This case has parallels to climate change: the Russian government was not responsible for the mudslide; similarly, many developing countries including those in the concrete examples above (Bangladesh, small island states, countries in the Sahel) are not responsible for the events or disasters that contribute to risks to human rights. However, state governments in both cases are responsible for taking steps to safeguard the right to life. In *Budayeva*, the court found that a state's general discretion to select what preventive measures should be undertaken to protect this right has limits; and taking *no* action is insufficient.<sup>91</sup> Consequently, the right to life creates a positive obligation for states 'to take appropriate steps to safeguard the lives of those within their jurisdiction.'<sup>92</sup>

Domestic courts have made similar findings, as specifically applied to the risks created by climate change. The first case brought by citizens of a state to succeed in holding their government to account for climate change action was the *Urgenda Foundation v. The State of the Netherlands* case. It was also the first successful case that invoked human rights obligations and the precautionary principle: the court found the principles of the UNFCCC, namely the precautionary principle and inter and intra-generational equity, particularly relevant for establishing a duty of care and scope for climate policymaking. It also found the right to life relevant to the case, and it cited the recognition of human rights risks in the Cancun Agreements.<sup>93</sup> In a different case a few months later, the Lahore High Court in Pakistan held that the government failed to implement its 2012 National Climate Policy and Framework. In doing so, the court declared that:

'Climate change is a defining challenge of our time' that for Pakistan 'primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of society who are unable to approach this Court.'<sup>94</sup>

The court cited the right to life, noted that this right includes the right to human dignity and a clean and healthy environment, and read these rights alongside Pakistan's constitutional principles of equality, sustainable development, equity and the precautionary principle, amongst others. It also expanded its concern, from environmental justice to 'climate change justice', which moves beyond localised and state bounded ecosystems and biodiversity.<sup>95</sup> This implies a broader response, as well as action on the ground that prioritises adaptation.<sup>96</sup>

Other human rights can be integrated into an understanding of adaptation obligations, implemented through a precautionary approach. For example, rights to adequate housing, food, water, and the highest attainable standard of health are all put at risk by the impacts of climate change.<sup>97</sup> Integration of obligations to protect, respect, and fulfil these rights might necessitate adaptation that includes migration or relocation in some contexts. For international migration, the confluence of these obligations and principles could necessitate state actions to facilitate adaptation across borders, or relocation to another state. The obligations of the state of origin, up to the border and aside from the cooperation required to implement such international migration, are the same as those owed to all migrants within their jurisdiction.

Planned relocation, however, is not an adaptive measure that has a strong human rights record. In the development context, relocation and resettlement have been used as a means to move individuals and communities away from areas where large-scale projects will be constructed. Without adequate planning and consideration of human rights greater suffering and impoverishment of relocated people is likely.<sup>98</sup> Resettled communities are often worse off in their relocation site, although degraded land or impacts to living conditions from other climate related events may make remaining impossible or conditions elsewhere more promising.<sup>99</sup> Most relocation will likely be internal. Yet, there will be impacts – like sea level rise for small island states – where international migration may be necessary. In the Pacific, as elsewhere, past planned relocations have serious consequences, which go beyond physical changes to affect identity and culture for many years after.<sup>100</sup>

These problems and the exacerbation of prior vulnerabilities and risks to human rights should make planned relocation a measure of last resort.<sup>101</sup> Planned relocation must be undertaken with caution. The use of planned relocation as a form of adaptation, especially in a preventive rather than reactive manner, risks creating a justification for states to

90 *Budayeva v Russia* (Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02).

91 *Ibid.*, para 156.

92 *Cyprus v Turkey, Merits, App no 25781/94* [2001] ECtHR 35 EHRR 30 para 219.

93 See *Urgenda Foundation v The State of the Netherlands* [2015] The Hague District Court C/09/456689/HA ZA 13–1396 paras 2.38, 2.49, 4.56. The court, however, focused on mitigation as the most effective tool because it considered adaptation unable to fully eliminate the danger of climate change (*ibid.*, paras 4.71, 4.75).

94 *Asghar Leghari v Federation of Pakistan* [2015] Lahore High Court W.P. No. 25501/2015 para 6.

95 *Ibid.*, para 7.

96 See *Asghar Leghari v Federation of Pakistan (second order)* [2015] Lahore High Court W.P. No. 25501/2015.

97 See OHCHR, '2009 Report'.

98 See, e.g., UNHCR, 'Planned relocations, disasters and climate change: consolidating good practices and preparing for the future' (2014), pp. 34–48 (discussing lessons learned from development-induced displacement and resettlement).

99 See UNHCR, 'Planned relocations, disasters and climate change', para 26.

100 See Jane McAdam, 'Historical cross-border relocations in the Pacific: lessons for planned relocations in the context of climate change', *The Journal of Pacific History*, 49 (2014).

101 See *ibid.*, p. 305; The Nansen Initiative, 'Nansen Protection Agenda Vol 1', p. 9 para 94; OHCHR, 'Key messages on human rights, climate change, and migration'.

use it as a tool accomplish other goals. Indeed, the endeavour of this thesis to understand how adaptation obligations can be concretised in the context of migration presents such a risk. But planned relocation is a process states will likely undertake as the impacts of climate change become more severe. It also offers an opportunity to plan in advance for such movement, a critical component of a successful relocation.<sup>102</sup>

International relocation – like internal – must comply with international law, and must take the domestic laws of both countries involved into account. There are several uses of planned relocation as adaptation. The first is as a preventative measure, to move people away from a hazardous location; the second is to enable a durable solution within a country for those already displaced; and the third, considered exceptional, is relocation to another country where large portions are not fit for habitation.<sup>103</sup> Communities might also be relocated to make room for mitigation or adaptation projects, much like they have been in for large-scale development projects. In all cases, as relocation in other contexts has taught, informed participation of affected persons is both legally required and results in better outcomes. Affected persons have the right to participate in any government decisions on adaptation.<sup>104</sup> Procedural rights are particularly important in planned relocation, to ensure that any relocation is not forced and does not violate the prohibition against forced evictions.<sup>105</sup>

Relocation is also more successful in the long-term when those participating do not believe their movement was coerced.<sup>106</sup> As with other forms of movement, however, the distinction between forced and voluntary relocation is not categorical. Voluntary does not necessarily equate with full choice to move, but implies that other options might exist; forced tends to mean that no such realistic options are available.<sup>107</sup> The concept of voluntary relocation is also complicated by the goal of relocation as a last resort, which if the case, may mean that no other options exist. Furthermore, the human right to return to one's own country also implies the right to remain in that country.<sup>108</sup> This may undermine voluntariness in international relocation for those who do not want to leave their country.

To better ensure any movement involves choice rather than a necessity, states undertaking relocation should provide for the meaningful participation and consultation of all affected persons, including relocated and receiving communities. For international relocation, this will require the participation of more than one state and communities in different countries, which again underscores the importance of fulfilling obligations to cooperate. For resettlement that impacts indigenous peoples' rights, States must obtain their free, prior and informed consent as required by the United Nations Declaration on the Rights of Indigenous Peoples.<sup>109</sup> And, any planned relocation must provide affected persons their full enjoyment of human rights and protect rights to self-determination, culture, freedom of movement, and family unity. Guidance on relocation further emphasises the need to restore and maintain previous living standards for relocated persons and receiving communities.<sup>110</sup>

To prepare for any managed migration, especially on a larger scale, requires planning, clear guidance, and legal and policy frameworks on adaptation that integrates relevant human rights. For international migration, this requires identifying a site for relocation, agreeing upon how border crossings should proceed, and whether and when return is contemplated.<sup>111</sup> As discussed above, the current legal frameworks on their own cannot provide legal guidance on all of these issues. The limits to collective and cooperative obligations will be discussed below; but, at a minimum, the integration of human rights and precautionary measures into adaptation obligations mandates that proactive measures are taken to ensure migration occurs with dignity, and that any movement required to ensure human rights continues to protect these rights through the process of migration, from departure until after arrival. While most adaptation policies benefit some individuals more than others, any measure must be undertaken without discrimination.

102 Further policy and non-legal benefits of relocation and international migration will be discussed *infra*.

103 See The Nansen Initiative, 'Nansen Protection Agenda Vol 1', para 96; McAdam and Ferris, 'Planned relocations in the context of climate change', p. 139.

104 See, e.g., The Universal Declaration of Human Rights, 10 December 1948 (GA Resolution A(III)) arts 19–21 (rights to information, association, assembly, freedom of expression, which includes right to receive information and participate in government); ICCPR, art. 19 (right to freedom of expression includes right to receive and impart information).

105 The obligation to protect against forced evictions arises from the human right to adequate housing and non-discrimination provisions. See International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (United Nations, Treaty Series, vol 993, 3) art 11 (right to adequate housing); Convention on the Rights of the Child, 20 November 1989 art 27; see also 'Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (Office of the United Nations High Commissioner for Human Rights 2007) A/HRC/4/18, [www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf).

106 See McAdam, 'Historical cross-border relocations in the Pacific', p. 326.

107 See Warner and others, 'Changing climate, moving people', p. 40 (Walter Kälin on distinguishing voluntary and forced movements of people); McAdam and Ferris, 'Planned relocations in the context of climate change', p. 143 (discussing same).

108 ICCPR, art 12(4); see UN Human Rights Committee 'CCPR General Comment No. 27: Article 12 (Freedom of Movement)', para 19 (right to return creates right to remain).

109 United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007 art 18.

110 See The Brookings Institution and others, 'Guidance on protecting people from disasters and environmental change through planned relocation' (2015) para 15 (guidelines for internal relocation); Warner and others, 'Changing climate, moving people', pp. 31–5 (Elizabeth Ferris on planned relocation); 'Basic Principles and Guidelines on Development-Based Evictions and Displacement', paras 52–58.

111 See Gruber, 'Human displacement and climate change in the Asia-Pacific', p. 194.

## b. Policy support and best practices for migration as adaptation

In addition legal obligations and principles, there are policy reasons and best practices that support adaptation action on migration and provide guidance on how those who move should be treated. These arguments support the legal analysis of this paper, and offer suggestions for the development of law and policy to better address gaps in current protection frameworks. Some of these suggestions come from various processes that are working on separate but related areas on human rights, climate change, and migration. These processes could also inform and draw on one another, so that they incorporate relevant legal obligations, remain consistent, and do not duplicate efforts to protect those on the move in the wake of a changing climate.<sup>112</sup> The New York Declaration on Refugees and Migrants, for example, references the Nansen Initiative, Paris Agreement, and Sendai Framework, while setting out a goal to negotiate Global Compacts on refugees and migrants, respectively.<sup>113</sup> These Compacts aim to create a 'range of principles, commitments and understandings... regarding international migration in all its dimensions'.<sup>114</sup>

The Nansen Initiative's Protection Agenda provides references to legal protections and best practices to understand the implications of cross-border movement following natural disasters and events. It also reframes the perception of migration and climate change, which has leaned heavily on discourses that highlight the potential crises involved with large-scale movement and national security risks migrants might pose.<sup>115</sup> The Agenda instead emphasises the importance of planning and proactive measures that are cornerstones of the approach advanced by this paper. It advocates for properly managed migration to help cope with the effects of climate change.<sup>116</sup> And it suggests ways that this can be accomplished for cross-border movement, so that people can move before land becomes uninhabitable. These include mechanisms that are not legally mandated but could be a manifestation of cooperation within or outside of the climate change regime, such as visas that authorise entry and stay or bilateral or regional free movement agreements.<sup>117</sup>

The Agenda also recognises that governments are already using planned relocation, encourages improved use as both a preventative and responsive measure to disaster risk and displacement, and suggests certain factors to make for a more sustainable relocation. Some of these factors are legally required, as discussed above (participation, respect of human rights). Other factors may not rise to the level of legal obligation, but are best practices, like accounting for affected persons community ties, cultural values, and psychological attachment to their residence.<sup>118</sup> Finally, there are mechanisms – risk and impact assessments – that have a legal basis but that are not universally accepted as legally required.<sup>119</sup>

The Nansen Initiative and its Agenda focuses primarily on the phases of displacement. It links other forms of migration to displacement as a means to reduce its risk. It also discusses protection and assistance during displacement, and solutions and protections after displacement.<sup>120</sup> Adaptation is needed throughout these phases, to reduce the likelihood of displacement and respond after it occurs. Responses to displacement also fall within multiple areas of the climate change regime's focus; both as adaptation, as argued in this paper, and within the regime's focus on loss and damage. Planning and preparation for displacement can include migration or relocation, but it can also involve efforts to boost resilience and adaptive capacity that helps people stay or prevents the need for mobility. Any mobility decision should involve choice, which ideally maintains the either the right to stay or the right to leave.<sup>121</sup> This in turn increases the likelihood that a migrant can access known benefits of migration: livelihood opportunities, resilience, financial and social capital, and remittances that can help those in communities that do not move.<sup>122</sup> These benefits are not limited to the migrant. As the Swedish delegate to the Nansen consultations noted, 'migration can bring benefits to the countries of origin, countries of destination and the migrants and their families, if it's responsibly facilitated'.<sup>123</sup>

In addition to being rooted in legal obligations and systemic integration, a rights and human centred approach to climate change responses is supported by ethical and climate justice arguments. As Mary Robinson explained:

The human rights approach, emphasising the equality of all people, is a direct challenge to the power imbalances that allow perpetrators of climate change to continue unchecked. The human

<sup>112</sup> See, e.g., McAdam and Limon, 'Human rights, climate change and cross-border displacement', pp. 21–3.

<sup>113</sup> UN General Assembly, 'New York Declaration on Refugees and Migrants: Resolution / Adopted by the General Assembly' (2016) A/RES/71/1 paras 18, 42, 50 (recognising other initiatives and processes).

<sup>114</sup> *Ibid.*, Annex II, para 2.

<sup>115</sup> Lauren Nishimura, 'Climate change migrants': impediments to a protection framework and the need to incorporate migration into climate change adaptation strategies', *International Journal of Refugee Law*, 27 (2015), pp. 120–1.

<sup>116</sup> The Nansen Initiative, 'Nansen Protection Agenda Vol 1', p. 9.

<sup>117</sup> See *ibid.*, pp. 26–7 paras 47, 51, 88; McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement', pp. 1543–4.

<sup>118</sup> The Nansen Initiative, 'Nansen Protection Agenda Vol 1', pp. 9, 38 para 95.P

<sup>119</sup> *Ibid.*, pp. 34–5 paras 77, 82; see UNEP, 'Climate Change and Human Rights' (UNEP, 2015), p. 22; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [Aarhus Convention] 1998.

<sup>120</sup> McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement', pp. 1520–1

<sup>121</sup> See Jon Barnett and Michael Webber, 'Migration as adaptation: opportunities and limits' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010), p. 38.

<sup>122</sup> See Gemenne and Blocher, 'How can migration support adaptation?', p. 7 (describing benefits of migration); Barnett and Webber, 'Migration as adaptation', pp. 38, 44 (analysing positive contributions of migration as adaptation).

<sup>123</sup> See The Nansen Initiative, 'Global Consultation Conference Report', p. 182.

rights framework gives us the legal and normative grounds for empowering the poor to seek redress.<sup>124</sup>

Likewise, the vulnerabilities migration can create mean that access to rights and remedies are needed as a matter of law and justice. Draft Principles and Guidelines intended to protect vulnerable migrants advocate for human rights to be at the centre of all responses to migration and treatment of migrants. These Guidelines suggest that states take steps to achieve policy coherence on human rights and migration at local, national, regional and international levels.<sup>125</sup> Indeed, policy consideration – and how climate policy is made – will influence whether mobility improves the welfare of those on the move or exacerbates risks to rights and human security.<sup>126</sup> Again, while not legal obligations, Guidelines like these further indicate a trend towards holistic approaches to migration, protection throughout the process, and the contribution of a confluence of drivers including climate change. These, and other initiatives, further show the difficulty in finding space to shape law internationally, and the importance of the climate change regime in its recognition and will to address migration and climate change as a topic that can be planned for and managed.<sup>127</sup>

## 2. Obligations of the receiving state and collective obligations

This section turns to the obligations of a receiving state for international migration associated with climate change, as well as collective obligations of multiple states to assist and cooperate in adaptation. As with obligations of the country of origin, it will present sources that clarify or strengthen adaptation obligations on both legal and policy grounds. This section will also contemplate potential answers to the question of whether assistance and cooperation obligations in the climate change regime may in some way address a state's sovereign right to control entry and stay of foreigners.

### 2.1. Obligations to assist

The UNFCCC and Paris Agreement include several assistance obligations, primarily focused on technological or financial assistance. On their face, these obligations do not appear to speak to international migration, or adaptation measures. However, the evolution of adaptation within the regime, from the Cancun Agreements to Paris, supports an argument that states *should* – and potentially must – assist other states when they undertake planned relocation or facilitated migration as a form of adaptation under the regime. At a minimum, states are obliged to assist developing country Parties in their adaptation efforts.

Under the UNFCCC, developed country Parties are required to provide financial resources 'needed by the developing country Parties to meet the agreed full incremental costs' of implementing measures that include those required to facilitate adequate adaptation. These costs must be agreed between the developing country Party and the financial mechanism for the climate change regime.<sup>128</sup> The UNFCCC also requires developed country Parties to assist developing country Parties 'that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.'<sup>129</sup>

The Paris Agreement expands the assistance obligations, declaring that 'continuous and enhanced international support shall be provided to developing country Parties' to implement other adaptation obligations.<sup>130</sup> These include strengthening cooperation on adaptation, adaptation planning processes and implementation, and adaptation communication to the regime. This is a hard legal obligation.<sup>131</sup> But it is not clear which states are bound by this obligation, and the nature and extent of this assistance is open to interpretation. Developed states might also owe a general duty to assist developing states under human rights law.<sup>132</sup> Such an obligation could arise, for example, under a duty to fulfil human rights and could require assistance in mitigating or adapting to climate change.<sup>133</sup>

The provision of any adaptation related assistance in the context of mobility and climate change is also unclear. At a minimum, developed country Parties are required to provide financial resources 'to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.'<sup>134</sup>

124 Mary Robinson, 'Climate change and justice' (Barbara Ward Lecture, Chatham House, London, 11 December 2006), <http://pubs.iied.org/pdfs/G00271.pdf>.

125 OHCHR and Global Migration Group, 'Principles and guidelines', principle 1.6.

126 Warner and others 'Changing climate, moving people', p. 8.

127 See *ibid.*, p. 15; Mayer and Cournil, 'Climate change, migration and human rights', p. 185 (link between climate change and migration provides opportunity to bring protection of migrants to forefront of political discussions).

128 UNFCCC, art 4.3.

129 *Ibid.*, art 4.4. Developed country Parties are further obliged to provide assistance to developing countries through access to and transfer of technology and knowledge, which could be necessary for some adaptation activities (*ibid.*, arts 4.3, 4.5).

130 Paris Agreement, art 7.13 (emphasis added).

131 See Rajamani, 'The 2015 Paris Agreement', p. 351.

132 See ICESCR, art 2; UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (1990) E/1991/23 para 14.

133 Daniel Bodansky, 'Climate change and human rights: unpacking the issues', *Georgia Journal of International & Comparative Law*, 38 (2010), p. 521.

134 Paris Agreement, art 9.1.

Other parties are also encouraged to do the same voluntarily.<sup>135</sup> This creates a collective obligation owed by developed countries – who have as a group benefitted from and contributed most to the causes of climate change – to developing countries – those considered most vulnerable and who have benefitted least from carbon emitting technologies. Despite the mandatory nature of this obligation, financial assistance to date has been voluntary, the result of pledges from public and private sources. The pledge leading up to Paris, for example, promised a combined \$100 billion of public and private funding by 2020. The decision adopting the Paris Agreement recognised this goal and encouraged significant increases in adaptation finance, which would better balance climate funding between mitigation and adaptation.<sup>136</sup> The climate change regime's Adaptation Committee is exploring how to mobilise such support; deployment of funding for adaptation could come from multiple sources, although access to and implementation of funding in practice has been challenging.<sup>137</sup> As this aspect of the regime develops, this could prove to be a valuable source in funding assistance to migrants, both internal and international. The IOM appears to agree, citing one of its current areas of intervention as facilitating access to the Green Climate Fund for human-mobility related actions.<sup>138</sup> Within the regime, funding of up to \$3 million per country for national adaptation plans or similar planning processes has recently been approved.<sup>139</sup> Many such plans to date, however, do not have detailed discussions of migration and/or on the role of human rights.<sup>140</sup>

Direct assistance in the process of migration or to assist migrants impacted by natural disasters and climate change is also lacking. There is no explicit duty of an outside state to provide assistance or a right to such assistance in these cases, although the Draft articles of protection of persons in the event of disasters create a duty for affected states to seek assistance if it does not have the capacity to respond, which outside states and other actors can provide.<sup>141</sup> Other international law mechanisms create limited obligations to assist. The United Nations Convention on the Law of the Sea includes a duty of a ship flying a state's flag to render assistance and rescue anyone in distress at sea, so long as this assistance does not put the ship in serious danger.<sup>142</sup> It does not clarify what to do with persons rescued, including migrants, at sea and where they should be disembarked.<sup>143</sup> This is consistent with one of the biggest issues in international migration: there is simply no right of admission into another country for most migrants. There are other means to gain entry, which as a non-refugee are either based on human rights protection and *non-refoulement* or the discretion of another state. At present, human rights concerns offer the best protections against *return* once a foreign state has exercised jurisdiction or a migrant has gained access to territory. But this hinges on the migrant's state failing to protect human rights, and as Jane McAdam argues, it might be difficult to argue that a state is violating human rights to this degree if they are taking some steps to address the impacts of climate change.<sup>144</sup> For disaster-induced displacement generally, the requisite imminent harm has not been met.<sup>145</sup> This may change, as conditions deteriorate due to impacts, although the goal of migration as adaptation is to avoid the potential for such serious harm. Grounds for admission could be potentially expanded, when considering international solidarity or cooperation obligations, as will be discussed. Addressing this gap has also been highlighted by the Protection Agenda, which suggests that states either admit people and allow them to stay or refrain from returning them to places where they face risks.<sup>146</sup>

The need to assist could potentially be drawn from remedial sources as well, although the focus of this thesis is on obligations in the first instance. Jacqueline Peel analyses shared responsibility for the impacts of climate change. She looks to hold those responsible for the harm climate change will cause, and bases potential claims for reparation on climate justice and principles within the climate change regime, including inter and intra-generational equity.<sup>147</sup> Intergenerational equity is one of the bases for ongoing litigation in the United States, in a case where a group of young people are seeking declaratory and injunctive relief from the government.<sup>148</sup> Peel further concludes that the

135 Ibid. art 9.2.

136 See *ibid.* para 115.

137 See Anju Sharma and others, 'Pocket Guide to the Paris Agreement' (ecbi 2016), pp. 16, 18–20.

138 IOM, 'IOM Contributions to Global Climate Negotiations: 22nd Conference of Parties to the United Nations Framework Convention on Climate Change (UNFCCC)' (2016), p. 5. The Protection Agenda noted that 'it remains to be seen to what extent climate change adaptation funding and other relevant funding will be available to address human mobility challenges. The Nansen Initiative, 'Nansen Protection Agenda Vol 1', pp. 18–19 para 28.

139 See COP, 'Decision 10/CP.22: Report of the Green Climate Fund to the Conference of the Parties and Guidance to the Green Climate Fund' (2017) FCCC/CP/2016/10/Add.1.

140 See, e.g., Mary Robinson Foundation – Climate Justice, 'Incorporating Human Rights into Climate Action' (Mary Robinson Foundation 2016) version 2, [www.mrfcj.org/wp-content/uploads/2016/05/Incorporating-Human-Rights-into-Climate-Action-Version-2-May-2016.pdf](http://www.mrfcj.org/wp-content/uploads/2016/05/Incorporating-Human-Rights-into-Climate-Action-Version-2-May-2016.pdf) (accessed 22 Sept. 2016); Mary Robinson Foundation – Climate Justice, 'Incorporating Human Rights into Climate Action' (Mary Robinson Foundation 2014) version 1, [www.mrfcj.org/resources/incorporating-human-rights-into-climate-action/](http://www.mrfcj.org/resources/incorporating-human-rights-into-climate-action/) (accessed 22 Sept. 2016).

141 'Draft Articles on the Protection of Persons in the Event of Disasters' (ILC 2016) Report of the ILC A/71/10 arts 11–12.

142 Convention on the Law of the Sea 1982 art 98.

143 See Ramji-Nogales, 'Migration emergencies', p. 630.

144 McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement', p. 1536; Michelle Foster, 'Non-refoulement on the basis of socio-economic deprivation: the scope of complementary protection in international human rights law', *New Zealand Law Review*, 257 (2009), p. 284 (non-refoulement evolving and could include concerns about economic, cultural, and social rights).

145 *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, para 55; see McAdam, *Climate Change, Forced Migration, and International Law*, pp. 49–50.

146 The Nansen Initiative, 'Nansen Protection Agenda Vol 1', pp. 7, 22 para 20.

147 Jacqueline Peel, 'Climate change', in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017), p. 1015.

148 See *Kelsey Cascadia Rose Julian, et al v United States of America, et al* US District Court, District of Oregon 6:15-cv-01517-TC.

FCCC's principles might give rise to collective obligations for Parties to protect against climate change and respond.<sup>149</sup> Thus, if states breach obligations that exist under the climate change regime, or customary law obligations to prevent environmental harm (the 'no-harm rule'), then remedial responses might be owed to those states harmed by climate change.<sup>150</sup> In theory, these responses could include adaptation measures, and assistance with migration or displacement. Nothing within the FCCC or regime sets out the legal consequences for a breach of obligations. However, the obligation owed under customary law is focused on preventing *environmental* harm, rather than violations of human rights associated with impacts from climate change and human mobility. Such claims would need to be assessed on a case-by-case basis, limiting their utility for handling the problem of migration in general. Shared responsibility has also been suggested for the *refoulement* of refugees, the state of origin and the state expelling a refugee.<sup>151</sup> However, this requires an exercise of jurisdiction over the refugee by the receiving state and most who move due to climate change will not qualify as refugees.

Once a migrant is inside a new country, human rights duties apply to that state in virtually same manner as in state of origin. For international migration or planned relocation, integration of human rights means that affected persons are essentially owed the same substantive and procedural rights as they would be entitled in their home state. For relocation, the receiving state and community must participate in meaningful consultation, the state must provide information and access to effective remedies. Yet there are critical differences that leave international migrants with uncertainty. There is, for example, no right to remain in a country that is not one's own. A principle of 'temporary refuge' might be able to provide some time-bound recourse. According to Guy Goodwin-Gill, this principle is rooted in customary international law and should be more broadly applied than *non-refoulement*. Both create obligations of admission and non-return, but Goodwin-Gill suggests that the two should not be linked, with the principle of refuge being the focus of protection of those who would be at risk if returned.<sup>152</sup> Like *non-refoulement*, this is not the kind of proactive measure that is advanced by this paper. Nor is it clear what kinds of rights or entitlements are associated with the principle.<sup>153</sup> If integrated into or linked to adaptation obligations, then this principle could provide a starting point to argue for admissions and stay. The risks to person within their country of origin must be established to justify its application. But if state practice develops around assistance in the context of natural disasters, then it is possible for the principle to become a more plausible legal tool to apply to climate change.

As with measure to take within the country of origin, more concrete interventions have been offered outside of legal treaties. These include the Protection Agenda's call for regional cooperative frameworks, the use of special and humanitarian visas, new temporary protection regimes, stays of deportation, and the provision of assistance to help avoid the need for migration.<sup>154</sup> Any collaborative or cross-border initiative will require cooperation, which is also an obligation of the climate change regime.

## 2.2. Obligations to cooperate

The general duty of international cooperation underpins efforts to tackle climate change. Without concerted action, reducing emissions to a less dangerous threshold or adequate adaptation are not possible. The UNFCCC includes an obligation for Parties to '[c]ooperate in preparing for adaptation to the impacts of climate change.'<sup>155</sup> The Paris Agreement further emphasises the importance of cooperation as it applies to adaptation and suggests that Parties strengthen their cooperation on adaptation to enhance adaptation actions while taking into account the Cancun Adaptation Framework.<sup>156</sup> The Agreement highlights the provision of assistance to developing country Parties, as well as technical support and guidance.<sup>157</sup> It also acknowledges the breadth of adaptation and the need for a collaborative global approach: 'adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions', which is a key component to 'the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change'.<sup>158</sup>

The link to the protection of people and their livelihoods brings together adaptation with human rights concerns. This provides an indication of one of the purposes of adaptation, as well as an understanding of what cooperation entails within the Agreement. Interpretation of this obligation also requires consideration of other relevant rules of international law.<sup>159</sup> For cooperation, other relevant rules can be found in human rights law and the UN Charter. Both

149 Peel, 'Climate change', p. 1024.

150 See Peel, 'Climate change'; *Trail Smelter Arbitration, United States v Canada (1938 and 1941)* 3 R.I.A.A. 1905.

151 See Maarten den Heijer, 'Refoulement', in André Nollkaemper and Ilias Plakokofalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017), pp. 481–2.

152 Guy S Goodwin-Gill, 'Non-refoulement, temporary refuge, and the 'new' asylum seekers', in *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill, 2014), p. 458.

153 McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement', p. 1540.

154 See The Nansen Initiative, 'Nansen Protection Agenda Vol 1', p. 46; The Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change' (The Nansen Initiative 2015) Vol 2.

155 UNFCCC, art 4.1(e).

156 Paris Agreement, art 7.7.

157 *Ibid.*, arts 7.7, 10.2.

158 *Ibid.*, art 7.2.

159 VCLT, art 31(3)(c).

of these are discussed, for example, as sources for a duty to cooperate in the 2009 Office of the High Commissioner of Human Rights (OHCHR) report on the relationship between climate change and human rights. The report emphasised the importance of cooperation given the ‘significantly higher’ risk of climate change in low-income countries.<sup>160</sup> It found the sources – and hence guidance – for the obligation in the Charter of the United Nations and the ICESCR. The Charter sets out one of the purposes of the UN is ‘[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms . . .’<sup>161</sup> Cooperation is also called for to achieve ‘universal respect for, and observance of, human rights and fundamental freedoms.’<sup>162</sup> Likewise, the ICESCR instructs states to take steps to achieve the rights in the Covenant ‘individually and through international assistance and cooperation.’<sup>163</sup> Cooperation for the development and realisation of these human rights is an obligation of all states.<sup>164</sup> On its own, a duty to cooperate derived from human rights law and the Charter may be difficult to link to direct action on climate change.<sup>165</sup> John Knox acknowledges that while general, the language of the Charter suggests a commitment by states to act jointly to address global human rights challenges. Climate change is such a challenge, which presents a global threat that requires international cooperation to tackle.<sup>166</sup> By integrating these sources of cooperative duties into the obligation to cooperate within the regime, and human rights becomes an aspect of adaptation planning and implementation. As a result, protection of human rights in responses is required not just of a territorial state, but of cooperative efforts as well.

The need for greater cooperation and the sharing of responsibility has been called for repeatedly in the context of migration. The preamble of the Refugee Convention explicitly calls for such cooperation in order to address the international scope of the problem.<sup>167</sup> More recently, the New York Declaration recognised the importance of cooperation for refugees and migrants, as well as the differing capacities of states to respond to such movement. Cooperation is framed as offering ‘profound benefits for humanity.’<sup>168</sup> Yet the ability to control borders and prevent irregular crossings remains firmly entrenched, in tension with the need to protect rights and freedoms in transit and after arrival and the commitment to cooperate to ensure ‘safe, orderly and regular migration, including return and readmission.’<sup>169</sup>

The difficulty with generalising what the obligations to cooperate might entail is in mandating specific responses. This has been an issue for the refugee regime, where despite institutional guidance and statements that conclude that international cooperation is essential for the operation of an international protection system, there is continued uncertainty about how to manifest this cooperation and what form measures should take.<sup>170</sup> Knox makes the argument that environmental human rights and international cooperation could inform action on climate change in much the same way that this paper uses human rights law and principles to inform adaptation obligations. Cooperation under Knox’s framework could mean, for example, that states must assess actions joint, inform the public, and facilitate public participation in decision-making. Substantively, a cooperative framework would require adaptation activities to violate basic human rights.<sup>171</sup> This minimum threshold would thus require cooperation to address small island states, which requires some form of facilitated migration.

## V. Conclusion

The disaster and events caused by climate change, and the impacts upon individuals and communities are now a reality. As these impacts increase, and as states ramp up responses to climate change, the pressure for some individuals and communities to move will also rise. Climate change will exacerbate existing vulnerabilities and contribute to an increase in movement. This creates protection challenges for states experiencing and receiving more migration. There will be no single solution. This paper explored the role that international law might play, and the adaptation obligations within the climate change regime in particular. It sought to integrate and apply other rules and principles of international law in the interpretation and implementation of these obligations, and as applied to international migration. Such integration provides much needed content and guidance, although more work is needed to establish stronger links between financing, assistance, and adaptation activities.

160 OHCHR, ‘2009 Report’, p. 27 para 84.

161 Charter of the United Nations 1945 (1 UNTS XVI) art 1(3).

162 Ibid., arts 55–56. It has been argued that this creates an erga omnes duty to respect and observe human rights. Ottavio Quirico, Jürgen Bröhmer and Marcel Szabó, ‘States, climate change and tripartite human rights: the missing link’, in Ottavio Quirico and Mouloud Boumghar (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2015), p. 25.

163 ICESCR, art 2(1).

164 UN Committee on Economic, Social and Cultural Rights (CESCR), paras 12–13.

165 See Margaux J Hall and David C Weiss, ‘Avoiding adaptation apartheid: climate change adaptation and human rights law’, *The Yale Journal of International Law*, 37 (2012), pp. 309, 344.

166 John H Knox, ‘Human rights principles and climate change’, in Cinnamon P. Carlarne, Kevin R Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016), pp. 230–31.

167 1951 Refugee Convention, preamble.

168 UN General Assembly, ‘New York Declaration for Refugees and Migrants’, para 11.

169 Ibid., paras 24, 26, 41, 54.

170 See Volker Türk and Madeline Garlick, ‘From burdens and responsibilities to opportunities: the comprehensive refugee response framework and a global compact on refugees’, *International Journal of Refugee Law*, 28 (2016), pp. 656, 660.

171 Knox, ‘Human rights principles and climate change’, p. 231.

As a concluding comment, this paper will consider what cooperation could or should involve for climate change migration. The collective aspect of international cooperation contrasts with the jurisdictional requirements of human rights treaties, which generally trigger obligations only when jurisdiction has been exercised. This points to the need to act in the face of risks to human rights, even if these risks are extraterritorial. This paper has argued that concretising adaptation obligations, including cooperation on adaptation, requires the integration of human rights and environmental principles. In the context of potential proactive migration, this creates obligations for home states to facilitate migration from places where rights are at risk. For potential receiving states, or other states generally, this could require cooperation to allow for international migration. However, this creates a tension with border control and efforts by states to curb or regulate migration. As a legal argument, admitting non-nationals is tenuous. Some legal concepts are possible to strengthen this claim. Shared responsibility is a possible source of a remedial obligation, but as discussed this would be determined based on an individual case and may be too late for proactive movement.

The Sendai Framework for Disaster Risk Reduction 2015–2030 declares cooperation at multiple levels is ‘pivotal’ to disaster risk reduction and highlights small-island states, least developed countries, and land locked developing and African countries particularly in need of support due to their high vulnerability.<sup>172</sup> Cooperation and assistance could also be manifested through regional arrangements to facilitate migration, which is especially important in the Pacific where small island states face inundation and loss of land.<sup>173</sup> This is also the case in Latin America and the Caribbean, where a number of governments have already declared that cross border migration and displacement, and the challenges created by climate change and natural disasters, require a cooperative framework and plan. In this region, states have encouraged the creation of effective mechanisms of solidarity and international cooperation.<sup>174</sup>

Solidarity is called for in other international legal declarations, and is considered one of the ‘fundamental values to be essential to international relations in the twenty-first century’ by the UN Millennium Declaration. Shared responsibility and a respect for nature are also fundamental values. Solidarity as a value in the Declaration means that ‘[g]lobal challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.’<sup>175</sup> Solidarity as a concept can refer to the provision of support by states to others, and often support from one state to another that requires more assistance than others.<sup>176</sup> It is the achievement of common objectives through differentiated obligations, and the adaptation of actions to benefit particular states or groups.<sup>177</sup> Within the climate change regime, differentiation can be seen in the distinction between developed country Parties, who are tasked in various ways with assisting developing country Parties. The overarching purpose for all state Parties is the same: to avoid dangerous climate change or strengthen global responses to the threats it causes.<sup>178</sup>

In the context of migration, cooperation and solidarity could focus on efforts to ensure the safety and dignity of migrants. States should consider their contribution to the peril migrants currently face in transit, and uncertainty upon arrival. Efforts to prevent or punish entry into a state could have the effect of putting migrants life at risk, pushing people towards increasingly more dangerous journeys.<sup>179</sup> Additional measures to assist migrants, rather than barriers, are needed to address their protection needs when crossing borders.<sup>180</sup> Furthermore, once the complicity of states and the international system for conditions that put migrants lives and rights at risk is recognised, it is possible to reconceive assistance and cooperation as a responsibility of states who contribute to these conditions.<sup>181</sup> Admission and refuge then become more a matter of obligation than an act of humanitarian assistance or discretion.

172 Sendai Framework for Disaster Risk Reduction 2015–2030’ (UNISDR 2015) paras 8, 41.

173 See UN, ‘One humanity: shared responsibility, report of the Secretary-General for the World Humanitarian Summit’ (2016) A/70/709 para 88.

174 Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean’ (2014).

175 UN General Assembly, ‘United Nations Millennium Declaration, Resolution Adopted by the General Assembly’ (2000) A/RES/55/2 art 1.6.

176 Türk and Garlick, ‘From burdens and responsibilities to opportunities’, p. 661.

177 See Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn., Oxford University Press, 2015), p. 404.

178 UNFCCC, art 2; Paris Agreement, art 2.

179 See Ramji-Nogales, ‘Migration emergencies’, p. 645.

180 See UN, ‘One humanity: shared responsibility’, para 85.

181 See, e.g., Ralph Wilde, ‘Let them drown’: rescuing migrants at sea and the non-refoulement obligation as a case study of international law’s relationship to ‘crisis’: Part II, [www.ejiltalk.org/let-them-drown-rescuing-migrants-at-sea-and-the-non-refoulement-obligation-as-a-case-study-of-international-laws-relationship-to-crisis-part-ii/#more-15014](http://www.ejiltalk.org/let-them-drown-rescuing-migrants-at-sea-and-the-non-refoulement-obligation-as-a-case-study-of-international-laws-relationship-to-crisis-part-ii/#more-15014) (states’ non-entree measures partially to blame for the danger that causes the need for rescue; protection is thus less a charitable act due to state culpability).

# Sudden-onset disasters, human displacement and the Temporary Protection Directive: space for a promising relationship?

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## Abstract

This paper addresses the question of environmental displacement through the lens of EU asylum law, and, more specifically, by examining the potential application of directive 2001/55/CE (the Temporary Protection Directive, TPD) to persons fleeing environmental sudden-onset disasters.

The TPD (never activated though adopted in 2001) is designed to grant temporary protection to an entire category of persons arriving in the EU en masse because of civil war, endemic violence, or systematic violations of human rights occurring in their home country. This paper shows on the one side that the TPD suffers both from substantive and procedural characteristics that render its possible activation in response to civil wars and endemic violence extremely remote (at least in the current historical period).

However, the TPD may be fit to protect persons fleeing sudden-onset natural disasters, thus revealing itself one of the first supra-national legal frameworks able to face (at least one aspect) of the phenomenon of environmental displacement. The paper argues that EU Member States would presumably be more favourable to a TPD's activation if it were designed for displacement from rapid-onset natural disasters, since such disasters cause damages that are restorable in a relatively brief period. Hence, the paper calls for modification of the TPD with a view to rendering it more specifically disaster-oriented.

## *Keywords*

human displacement; temporary protection directive; sudden-onset disasters; Common European Asylum System

## I. Introduction

The current migration phenomenon has put the Common European Asylum System (CEAS) under severe pressure.<sup>1</sup> Facing unprecedented challenges, the European Union's reaction is far from unequivocal: it is on the contrary highly diversified, with some Member States enabling reception policies for immigrants, and others trying to enshrine the possibilities of access to their territories.<sup>2</sup>

In the light of the current contingencies, the EU is asked to review some of its migration and asylum policies, with the aim of more efficiently dealing with a crisis capable of shaking the very basis of the European integration process.<sup>3</sup> That is why a strengthening of the CEAS presently appears to be a priority. In this context, it might appear surprising, at least at first glance, that directive 2001/55/CE on temporary protection, the so-called Temporary Protection Directive (TPD),<sup>4</sup> is not taken into consideration at all.

The instrument was expressly created to deal with mass influxes of migrants to the EU, and although the current crisis could effortlessly be defined as a mass influx, the possible activation of the TPD is not even being discussed at the EU level. Indeed, with regard to art. 1 of this instrument, which states: 'the purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons', it is reasonable to wonder why European institutions are currently not even mentioning the TPD in the 2015 European Agenda on Migration,<sup>5</sup> and in the more recent Commission's Communication titled 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe'.<sup>6</sup>

This work, starting from what is already outlined in the relevant doctrine,<sup>7</sup> examines the reasons behind the lack of activation of the TPD. It also aims at showing that some significant modifications should be studied to realistically hope in its future activation. In this sense, the paper looks on the one hand – and in a comparative way – at the US Temporary Protection Status (TPS), and, on the other hand, it argues that a disaster-oriented evolution of the TPD might increase its chances of future utilisation, and meet at the same time the objective of granting some sort of protection for people fleeing sudden-onset environmental disasters.

## II. The TPD: structure, goals, and attempts of activation

Adopted in 2001, the TPD was the first European piece of legislation dealing with asylum policies after the entry into force of the Treaty of Amsterdam in 1997, that communitarised the subject, by imposing – with reference to temporary

1 The legal instruments composing the CEAS are directive 2011/95/EU (Qualification directive) in OJ L 304/12, 30.9.2004; directive 2013/33/EU (Reception directive) in OJ L 180/96, 29.6.2013; directive 2013/32/EU (Procedures directive) in OJ L 180/60, 29.6.2013; EU regulation nr 604/2013 (Dublin III regulation) in OJ L 180/31, 29.6.2013; and EU regulation nr 603/2013 (Eurodac regulation) in OJ L 180/1, 29.6.2013. See on the subject in legal scholarship *Dubolino D.*, 'L'identificazione dello Stato competente all'esame di una domanda di asilo: dalla Convenzione di Dublino al nuovo regolamento', in *Diritto dell'Unione europea*, 2004, p. 811; E. Fahey, 'Joining the dots: external norms, AFSJ Directives and the EU's role in the global legal order', *European Law Review* (2016), p. 105; S. Mananashvili, 'The diffusion of the EU Asylum Acquis in the eastern neighbourhood: a test for the EU's normative power', *European Foreign Affairs Review* (2015), p. 187; H. Lambert, J. McAdam, M. Fullerton (eds.), *The Global Reach of European Refugee Law* (Cambridge, 2013); den Heijer M., *Europe and Extraterritorial Asylum* (Oxford, 2013); O. Lynskey, 'Complementing and completing the Common European Asylum System: a legal analysis of the emerging extraterritorial elements of EU refugee protection policy', *European Law Review* (2006), p. 230.

2 In a nutshell, it is to remember that Germany has decided to open its borders and to grant unconditioned assistance to Syrian forced migrants, whereas other States have opted for an embitterment of border controls and reception policies for third-State individuals.

3 As witnessed, for instance, by the success of 'Leave', on 23 June 2016, in the UK's referendum on Brexit, in which the topic of migrants and/or asylum seekers has played a significant role. See *inter alia*: J. Vidmar and C. Egget, 'Brexit: Is everything going to change in law, so that very little would change in fact?', 27 June 2016, [www.ejltalk.org/brexit-is-everything-going-to-change-in-law-so-that-very-little-would-change-in-fact/](http://www.ejltalk.org/brexit-is-everything-going-to-change-in-law-so-that-very-little-would-change-in-fact/) (accessed 25 June 2018); N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', 27 June 2016, <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/> (accessed 25 June 2018); F. Savastano, 'Prime osservazioni sul diritto di recedere dall'Unione europea', *Federalismi*, 25 November 2015 (online); D. Harvey, 'In the light of the guidelines": Brexit and the European Council', 7 October 2016, <https://europeanlawblog.eu/2016/10/07/in-the-light-of-the-guidelines-brexit-and-the-european-council/> (accessed 25 June 2018).

4 Council 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, in OJ L 212/12, 7.8.2001.

5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration (Brussels, 13.5.2015, COM(2015) 240 final).

6 Communication from the Commission to the European Parliament and the Council: Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe (Brussels, 6.4.2016, COM(2016) 197 final).

7 See generally M. Ineli-Ciger M., 'Time to activate the Temporary Protection Directive', *European Journal of Migration and Law* (2016), p. 18; H. Beirens, S. Maas, S. Petronella, M. van der Velden, 'Study on the Temporary Protection Directive Final report', European Commission Directorate-General for Migration and Home Affairs, January 2016 (online); M. Ineli-Ciger, 'Has the Temporary Protection Directive become obsolete? An examination of the directive and its lack of implementation in view of the recent asylum crisis in the Mediterranean', in C. Balouz, M. Ineli-Ciger, S. Singer, V. Stoyanova (eds.), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill, 2015); N. Arenas, 'The concept of "mass influx of displaced persons" in the European Directive establishing the Temporary Protection System', *European Journal of Migration and Law* (2005), p. 435; M. Notarbartolo di Sciarra, 'Temporary Protection Directive, dead letter or still option for the future? An overview on the reasons behind its lack of implementation', *eurojus.it – Rivista* (online); V. Kolmannskog, 'Climate change-related displacement and the European response', paper presented in occasion of SID Vijverberg Session on Climate Change and Migration, The Hague, 20 January 2009 (online).

protection – the adoption within five years of ‘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.’<sup>8</sup>

The TPD establishes a legal framework that should be applied in case the Union is willing to provide some categories of third-country displaced persons – forced to massively emigrate because of armed conflicts, endemic violence, and/or the risk of systematic violations of their human rights (art. 2) – with a temporary protection regime. The TPD’s protection system can last at most for three years (art. 4), and envisages a burden-sharing mechanism according to which all Member States should host the regime’s beneficiaries ‘in a spirit of Community solidarity’, depending on their national reception capabilities (arts. 25 and 26). The instrument, which is one of a kind since it codifies a ‘new’ form of international protection,<sup>9</sup> introduces an exceptional procedure that can be activated by a qualified majority by the Council upon proposal by the Commission (art. 5). It aims to cope with emergency migration phenomena that cannot be managed through normal migration and asylum policies. The TPD is hence complementary to the ‘classical’ asylum policy of the Union, whose cornerstone is, as a matter of common knowledge, the 1951 Geneva Convention relating to the Status of Refugees (henceforth the Geneva Convention).<sup>10</sup>

The notion of ‘mass influx of displaced persons’ is the instrument’s most delicate and discussed element. Before the adoption of the TPD, such a concept had never enjoyed autonomous legal consideration,<sup>11</sup> since international refugee law, as disciplined under the Geneva Convention, essentially aims at protecting individuals from the well-founded fear of being subject to persecutions in their home country because of some inherent characteristic of their own (more precisely, due to reasons of race, religion, nationality, membership of a particular social group, or political opinion).<sup>12</sup> The TPD leaves the discriminatory and individual elements behind, so as to provide with international protection entire categories of persons – therefore via a collective assessment approach<sup>13</sup> – relying on the danger that these would experience in their country of origin: the necessity of a determined discriminatory motive as a ‘justification’ of the dangers and persecutions feared is therefore not directly significant to the international protection offered by the TPD.

This is why the instrument is complementary to the Geneva Convention, which offers, for clear historical reasons, a refugee definition anchored to the period in which it was adopted.<sup>14</sup> The classical definition of a refugee under international law is consequently nowadays limited if compared to the totality of individuals who actually need international protection.<sup>15</sup> It is in this sense that we should consider instruments such as the TPD or the Qualification Directive (where it enables subsidiary protection),<sup>16</sup> namely instruments granting international protection within the

8 Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, adoption 2 October 1997, entry into force 1 May 1999, art. 63.2a). As regards current primary EU law, see art. 78.2c) of the Treaty on the Functioning of the European Union: ‘2. For the purposes of paragraph 1, 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’. It is worth noting that the evolution of primary EU law has brought significant renovation as regards the EU competence on the subject: whereas the previous disposition only conferred to the EU institutions to adopt ‘minimum standards’, the EU is currently enabled to enact common procedures on asylum matters. See in this regard, F. Pocar and M.C. Barufi, *Commentario breve ai Trattati dell’Unione europea* (2nd edn., Trento, 2014), p. 480.

9 See D. Perluss and J. Hartman, ‘Temporary refuge: emergence of a customary norm’, *Virginia Journal of International Law*, 26 (1986), pp. 551–626.

10 Convention relating to the Status of Refugees (adoption 28 July 1951, entry into force 22 April 1954) to be read in conjunction with the Protocol relating to the Status of Refugees (adoption 31 January 1957, entry into force 4 October 1967). See *inter alia*, J.P. Gauci, M. Giuffré and E. Tsourdi (eds.), *Exploring the boundaries of refugee law: current protection challenges* (Leiden, 2015); E. Fiddian-Qasimiyeh, G. Loescher, K. Long and N. Sigona (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, 2014); L. Silinberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Oxford, 2014); F. Lenzerini, *Asilo e diritti umani: l’evoluzione del diritto d’asilo nel diritto internazionale* (Milan, 2009); G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford, 2007).

11 In this sense, see Arenas, ‘The concept of “mass influx of displaced persons”’, p. 437. See also Notarbartolo di Sciarra, ‘Temporary Protection Directive, dead letter or still option for the future?’, p. 1.

12 Art. 1(A)2 of the 1951 Geneva Convention.

13 Even though the assessment procedures are evidently different, it is useful to underline that in practice (at least) part of the refugee *status* assessments under the Geneva Convention are, *prima facie*, conducted on a collective rather than individual basis (see in this sense also Notarbartolo di Sciarra, ‘Temporary Protection Directive, dead letter or still option for the future?’, p. 2). Such a trend – at least in those States that are less equipped as regards reception facilities – is often due to the impossibility to determine the individual *status*es in case a State has to deal with tens of thousands of persons – if not even more – immigrating in its territory in the most disparate (and desperate) situations. In this sense, one of the ground weaknesses of the TPD already emerges: if one of its main aims is to provide relief to Member States national asylum systems in exceptional cases, it is important to underline how, *de facto*, the practice of collective assessments, theoretically exclusive to the TPD system, is also disseminated in the application of ‘classical’ refugee protection systems.

14 In this regard, see J. Fitzpatrick, ‘Temporary protection of refugees: elements of a formalized regime’, *The American Journal of International Law* (2000), p. 280: ‘The 1951 Convention constitutes a key-element of the post-Holocaust human rights system’.

15 For a first analysis concerning the question of the categories that, even though not falling within the classical definition of refugee, need international protection, see *ex multis* a D. Martin (eds.), *The New Asylum-Seekers: Refugee Law in the 1980s* (Martinus Nijhoff Publishers, 1988).

16 Since the Fifties, the question concerning the enlarging of the ‘classical’ definition has covered a relevant role in the doctrine and in States’ practice. Indeed, the Final Act of the Conference adopting the Geneva Convention provided that: ‘The Conference expresses the hope that the Convention [...] will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides’ (Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, para. IV, Recomm. E). According to some scholars (see T. Spijkerboer, ‘Subsidiarity in asylum law: the personal scope of international protection’, in Bouteillet-Pacquet (eds.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels, 2002)), such declaration is the legal basis for the subsequent development of international protection legal frameworks which operate on a subsidiary or complementary level to the Geneva Convention. In any case, it seems possible to argue that this disposition aimed (and still aims) at encouraging States to create *ex novo* international protection

EU to individuals that do not fall within the classical definition of refugee.<sup>17</sup>

Thanks to the TPD's adoption, the Union enjoys a legal framework whose main objective is, alongside with the obvious humanitarian considerations, to grant a 'safety valve' to Member States' national asylum systems in the hypothesis they are put under severe pressure by non-conventional migration fluxes. The collective assessment approach in presence of mass asylum applications phenomena is indeed thought to lighten Member States' financial and administrative burdens normally dedicated to individual assessment procedures.<sup>18</sup> If, for instance, the TPD were activated to protect Syrian residents fleeing the current civil war, the sole requisite of citizenship or continuous Syrian residence would suffice to enter the protection regime. It would then be unnecessary to examine the individual *status* of every single protection seeker. Such an approach – *de facto* unilaterally adopted by Germany in 2015<sup>19</sup> – would lighten the burdens necessary to complete the examination of individual cases. The German Federal Government, when deploying the prohibition of deportation to Syria because of humanitarian considerations,<sup>20</sup> has allowed for the release of temporary residence permits also for Syrians whose asylum applications had been denied or not been presented at all.

So, briefly, significant elements differentiate the Geneva Convention and the TPD: while the latter grants international protection (for instance substantially limited)<sup>21</sup> only for a pre-determined period of time (one year, up to a maximum of three years),<sup>22</sup> the former allows for more incisive and prolonged assistance, which is for sure more favourable for those who are entitled to it, and, consequently, evidently more 'burdensome' for the host country. Thus, the Union's interest in activating the TPD appears clear in case of a mass influx of displaced persons. Thanks to the instrument, Member States could protect entire groups of persons *just* for a limited period, hence undertaking politically sustainable paths.

Apart from that – and again in the view of the 'relief' to national asylum systems – it is furthermore sobering to consider art. 2a) of the directive, according to which temporary protection should be granted 'in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection'. It is today sufficiently clear that the efficient operation of some Member States national asylum systems is compromised. In the light of what has been assessed, for instance, by the Strasbourg Court and the ECJ in the cases *N.S.*,<sup>23</sup> *M.S.S. vs. Belgium and Greece*,<sup>24</sup> and *B.A.C. vs. Greece*,<sup>25</sup> it can be concluded that the Greek system is incapable of working in the correct way (namely in the full respect of the *non-refoulement* principle and of the fundamental rights of asylum seekers). At the same time, the ECHR judgment in case *Tarakhel vs. Switzerland*<sup>26</sup> has raised doubts concerning Italy's capability to face the current migration fluxes without compromising the correct functioning of its national reception system. Additionally, it remains to be seen how asylum policies enacted in Hungary<sup>27</sup> can be reconciled with a correct application of the legal obligations to which Member States and the Union have agreed. In this regard, there is even some scholar maintaining that '[t]he level of protection introduced by the Temporary Protection Directive [would] be higher than the protection available today for many asylum seekers and refugees in Italy, Hungary and Greece'.<sup>28</sup>

Ultimately, also in the light of art. 2a), the reasons why the TPD might be activated in response to the current 'refugee crisis' appear clear: (i) in a relatively brief period, third country nationals have massively entered the Union, (ii) often because of endemic violence or armed conflicts occurring in their home countries, and (iii) their need for international

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instruments which have to enlarge the realm of those who should be provided with international assistance. The TPD, a *sui generis* piece of legislation, is beyond doubt one of these.

17 Qualification directive (2011/95/EU). See, in particular, Chapter V.

18 In similar terms see Fitzpatrick 'Temporary protection of refugees', p. 280; see also M. Ineli-Ciger, 'Time to activate the Temporary Protection Directive', *European Journal of Migration and Law* (2016), p. 32.

19 In this sense see F. Munari, 'The perfect storm on EU asylum law: the need to rethink the Dublin Regime', *Diritti Umani e Diritto Internazionale* (2016), p. 536.

20 On the grounds of Section 25 (Aufenthalt aus humanitären Gründen) of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet. For more information see [www.asylumineurope.org/reports/country/Germany/asylum-procedure/treatment-specific-nationalities#footnote4\\_nllq8t0](http://www.asylumineurope.org/reports/country/Germany/asylum-procedure/treatment-specific-nationalities#footnote4_nllq8t0). Note that the German provisions implementing the TPD are to be found in Section 24 of the above-mentioned act. Its application relies on the Council's decision to activate the TPD, as disciplined by the directive itself.

21 See Chapter III of the directive. In a nutshell, TPD protected individuals benefit from residence and working permits, access to educational and/or professional programmes, housing, and – depending on their economic situation – social assistance (food sustenance and medical care).

22 TPD, art. 4.

23 CJEU, 21 December 2011, *N.S. and Others*, case C-411/10.

24 European Court of Human Rights, *case M.S.S. vs. Belgium and Greece* (Application nr 30696/09), (21 January 2011).

25 European Court of Human Rights, *case B.A.C. vs. Greece* (Application nr. 11981/15), (13 October 2016).

26 European Court of Human Rights, *case Tarakhel vs. Switzerland* (Application nr 29217/12), (4 November 2014), par. 115. On which see C.M. Cerna, 'Introductory Note to Tarakhel vs. Switzerland (Eur. Ct. H.R.)', *International Legal Materials* (2015), p. 367; G. Vicini, 'Regolamento Dublino e principio di "non-refoulement": "the neverending story": il caso "Tarakhel c. Svizzera"', *La Comunità Internazionale* (2015), p. 203.

27 In this sense, see declarations by J. Dalhuisen, Director of Amnesty International's Europe and Central Asia programme: 'L'Ungheria si è trasformata di fatto in un paese nel quale la protezione dei rifugiati non è prevista, in evidente contrasto coi suoi obblighi sui diritti umani e con l'ovvia necessità di lavorare insieme agli altri stati membri dell'Unione europea e ai paesi balcanici per trovare una soluzione collettiva e umana alla crisi in corso' (<http://www.amnesty.it/crisi-dei-rifugiati-Unione-europea-ammonisca-formalmente-Ungheria>). See also L. Gall, Human Rights Watch, 'Dispatches: Hungary puts asylum seekers at risk', [www.hrw.org/news/2015/08/13/dispatches-hungary-puts-asylum-seekers-risk](http://www.hrw.org/news/2015/08/13/dispatches-hungary-puts-asylum-seekers-risk). Further doubts relating the legality of the new Hungarian policies on migration and asylum may be inferred by the Commission's behaviour, that on December the 10th 2015 sent Budapest a notice of default, starting an infringement procedure against Hungary (see press release at [http://europa.eu/rapid/press-release\\_IP-15-6228\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6228_en.htm)). Note that there has subsequently been no following to the procedure.

28 Ineli-Ciger, 'Time to activate the Temporary Protection Directive', p. 32.

protection has compromised the correct functioning of different Member States' asylum systems. And yet, within the European institutions' attempts to activate the TPD are rare and, when undertaken, they result in silent failures. As the TPD is meant to face exceptional events, its lack of utilisation should not be a surprising factor itself: nonetheless an analysis of the past attempts of activation may be useful so as to argue why even a future activation of the instrument appears unrealistic.

The first genuine attempt<sup>29</sup> to activate the TPD dates back to 2011, after the beginning of the so-called Arab Spring: the collapse of Ben Ali's regime in Tunisia and Gheddafi's in Libya determined the structural failure of controls at the borders of the two countries, and many African inhabitants started with growing insistence to reach Italian or Maltese coasts.<sup>30</sup> In May 2011, after the arrival in several months of about 26.000 individuals on the island of Lampedusa,<sup>31</sup> two members of the European Popular Party started to lobby the Commission to activate its exclusive power of proposal of activation of the TPD. Their aim consisted in granting access to temporary international protection to the maritime migrants, and in redistributing them among Member States 'in a spirit of Community solidarity' in compliance with the burden-sharing mechanism which is established by Chapter VI of the directive<sup>32</sup> (as well as in accordance with art. 80 of the TFEU, which declares that policies on asylum and immigration 'shall be governed by the principle of solidarity and fair sharing of responsibility'). The Commission maintained, in response, that the situation could not be considered as a 'mass influx', and that there were hence no sufficient reasons to propose an activation of the TPD to the Council. Former Commissioner Malmström's argumentations appear in this sense enlightening: 'At this point we cannot see a mass influx of migrants to Europe even though some of our Member States are under severe pressure. The temporary mechanism is one tool that could be used in the future, if necessary, but we have not yet reached that situation.'<sup>33</sup>

It is then today legitimate to wonder when and how it may be possible to talk about a mass influx of displaced persons under the TPD: the European institutions are not willing to do that even after the exponential increase of immigrants and asylum seekers who entered the EU as a result of the civil war in Syria, and of the rising of the so-called Islamic State within the Fertile Crescent area.

So, ultimately, there was no mass influx in 2011 – when some tens of thousands reached few Member States<sup>34</sup> – and there is still no mass influx in the current period, when the Union as a whole with all its Member States are trying to deal with the arrival of hundreds of thousands of individuals in need.

This contingency raises profound doubts as to existence *tout court* within the competent authorities of the willingness to activate the directive. An evident dilemma emerges: in case a circumscribed and punctual mass influx putting under 'severe pressure' just few national asylum systems – as it was the case in 2011 – it seems unlikely that those Member States which are not directly involved in the crisis will be willing to accept the displaced persons' relocation and resettlement mechanism which is provided for by Chapter VI of the TPD, and this is essentially because the situation appears manageable without resorting to the instrument; on the other hand, in the hypothesis of a mass influx as the current one, which involves the majority of Member States, the reaction does not go in favour of granting international temporary protection to some categories of individuals, it tends rather to circumscribe (with some exceptions) as much as possible the migratory fluxes.

It appears then that the TPD system is ontologically flawed by a fatal short circuit, whose effect is to limit decisively the probability of activation of the instrument.

### III. The TPD: reasons behind the lack of activation

This part of the work analyses the reasons underlying the present lack of activation of the directive. For analytical purpose, the section is divided in two parts. The first part focuses on TPD's 'endogenous factors': terminological and structural characteristics that render it unfit to be applied to migration phenomena surging from political collapse or civil war undergoing in a third country. The second part focuses on 'external factors': general and political contingencies that render the TPD's activation far from probable as it currently stands and is interpreted. The analysis serves then to better understand how to enhance the instrument's chances of activation.

#### 1. Endogenous factors

The TPD describes mass influx as '[the] arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme'. Whereas the definition of displaced persons, contained in art. 2(c), results sufficiently clear (since it encompasses classical refugees, those who are entitle to subsidiary protection under the

29 For an exhaustive analysis of the cases that could/should have brought to a TPD's activation in the past, see Beirens et al., 'Study on the Temporary Protection Directive Final report', ch. 5.

30 See Ineli-Ciger, 'Has the Temporary Protection Directive become obsolete?', p. 225.

31 Ibid., p. 238.

32 See, in particular, TPD art. 25.1, and art. 26.1 and 26.2.

33 C. Malmström, 'Debate on migration flows' (2011), quoted in Ineli-Ciger, 'Has the Temporary Protection Directive become obsolete?', p. 238.

34 In similar terms see again Ineli-Ciger, 'Time to activate the Temporary Protection Directive', p. 32: 'If the current migration crisis in Europe does not qualify as a mass influx situation, it is hard to imagine what would qualify as one.'

Qualification directive,<sup>35</sup> and, more generally, all those fleeing endemic violence, armed conflict, and generalised violations of human rights), the notion of ‘mass influx’ remains ambiguous. Through a joint examination of the TPD and of the Commission’s Explanatory Memorandum,<sup>36</sup> we can nonetheless identify at least three elements characterising the existence of such an influx: (i) the displaced persons must come from an easily identifiable geographic area (as a State or a particular region), (ii) the arrivals’ intensity must be exceptional, and (iii) the normal reception and asylum mechanisms must reveal themselves not up to the task of correctly absorbing the migratory phenomenon. The UNHCR has adopted a very similar point of view in this regard.<sup>38</sup>

The necessity of identifying a circumscribed geographical zone of origin entails that the TPD regime cannot be applied to influxes of migrants and asylum seekers originating from various and heterogeneous third States. It appears thus legitimate to raise doubts about the potential activation of the TPD for migrants who come to the EU via maritime routes from North African coasts. These are points of departure for individuals of many and different nationalities, ethnicities, religions, etc, and it seems therefore too complex to delineate with sufficient accuracy the characteristics of the group that should be covered by a European temporary protection regime. In more direct terms, it would not appear justifiable, for instance, to grant protection to Libyan residents and not to those who, even though entering Europe in similar conditions (or even on the same boat), come from Sudan, Eritrea, or Somalia. Such a neat distinction between categories of individuals who often suffer from very similar human rights violations does not appear easily justifiable. An alternative scenario, similar in its effects but opposite in its premises, would on the other hand see the Union adopting a broad interpretation of the notion ‘specific geographical area’, considering as a unique region the whole area of North Africa and of the Horn of Africa. This would most likely lead to extremely harsh internal oppositions in Europe for the fear of an unsustainable migratory wave. In a nutshell, it is possible to maintain that the group(s) of individuals that reach the EU through the Mediterranean Sea lack(s) the ‘geographical requirement’ that is necessary to the activation of the TPD.

If this is true for migrants coming from North Africa, the same appears less clear with respect to those fleeing the Syrian civil war. In this case, it is beyond dispute that the EU is facing an exceptional influx, originating from a ‘specific geographical area’, and that is forcing some categories to flee their original regions because of the most brutal and systematic violations of their fundamental rights. Notwithstanding such considerations, the absence, within the TPD, of objective criteria capable of identifying clearly the existence of a mass influx attributes to the Council a broad margin of appreciation when it is called to decide on the directive’s activation.<sup>39</sup> And exactly because of the ambiguity surrounding a central notion of the instrument, the Council’s decision seems, in the end, almost exclusively bound to considerations of political utility rather than to the application of the law.<sup>40</sup>

In this sense, in 2005, years before the current migration phenomenon and the economic crisis that hit several EU countries, an insightful scholar was considering these problems, putting in doubt the very effectiveness of the TPD’s system.<sup>41</sup> After more than ten years, it remains difficult to contest the validity of these points.

Additionally, one further and frequently underestimated element makes the potential activation of the TPD even more remote: the ‘fear’ that the regime might ultimately become long-lasting, thereby losing its temporary (and thus politically sustainable) character. Such factor is particularly relevant in the hypothesis of a TPD’s activation for categories fleeing conflicts of indefinable duration (at least *a priori*), such as those today existing in Syria and Libya. Since the TPD offers temporary protection, the interest behind its activation would of course consist in the possibility of assisting the displaced only for a brief time, with the guarantee of repatriating them once the predetermined lapse of time has exhausted (one year, to a maximum of three). If the Union and the Member States cannot enjoy this certainty, the specific interest standing behind the activation of the directive disappears, since Member States would risk taking a no-way-out path by granting (probable) long-lasting protection.

Crises such as those in Syria and Libya are events whose end is not easy to hypothesise, and this uncertainty does not allow European institutions to activate the TPD without disproportionate concerns relating to the duration of the protection that its Member States should be granting. In this sense, art. 6.2 of the directive is highly relevant: ‘The Council Decision [determining the suspension of the regime before the programmed period] shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted

35 See generally J. McAdam, ‘The European Union Qualification Directive: the creation of a subsidiary protection regime’, *International Journal of Refugee Law*, 17 (2005), pp. 461 ff; K.M. Zwaan, ‘The Qualification Directive: central themes, problem issues, and implementation in selected member states’ (Nijmegen, 2007).

36 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/2001/0510 final – CNS 2001/0207 \*/.

37 In this sense see Notarbartolo di Sciarra, ‘Temporary Protection Directive, dead letter or still option for the future?’; Arenas, ‘The concept of “mass influx of displaced persons”’.

38 See *UN High Commissioner for Refugees (UNHCR)*, UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx, 15 September 2000, point 3 (online).

39 It is relevant to specify that at the time of the creation of the TPD, the adoption of a large notion of mass influx was intended to grant flexibility, and thus more application chances of the instrument. See in this sense Beirens et al., ‘Study on the Temporary Protection Directive Final report’, p. 2.

40 See in this sense H. Beirens, S. Maas, S. Petronella and M. van der Velden, ‘Study on the Temporary Protection Directive, Executive Summary’, European Commission Directorate-General for Migration and Home Affairs, January 2016 (online), p. 2: ‘The procedure to activate the TPD is subject to, and ultimately hampered by, political debates at each step of the procedure. In sum, this makes for a potentially lengthy and cumbersome procedure, with little chance of attaining a qualified majority in the Council.’

41 Arenas, ‘The concept of “mass influx of displaced persons”’, p. 438.

temporary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement'. If this disposition is valid for the termination of the temporary protection regime before its natural ending, it is not easy to understand why the (would be) protected categories could be repatriated (even in case of expiration of the predetermined period), in unsafe, violent, and unstable situations. In other words, we should wonder why Member States would want to activate the directive for entire groups of individuals fleeing a situation of political collapse (civil war, ethnic cleansing, brutal persecutions to the detriment of certain minorities, etc), if they are not sufficiently certain about the improvement – in one up to three years – of the situation in the area of origin of the displaced. If – hypothetically – the TPD had been activated in 2012 to protect Syrian citizens, a 'safe and durable return' could still not be granted nowadays after five years. If this had been the case, Member States would now be forced either to extend the duration of the temporary protection or to incur in a violation of the *non-refoulement* principle by repatriating the subjects in unsafe conditions. It appears in the end clear that to avoid a similar and not unlikely *impasse*, Member States have a particular interest in not activating at all the TPD.<sup>42</sup>

## 2. External factors

Moving forward, a framework comparison between the political conditions currently facing the EU and the conditions experienced in 2001, the year of adoption of the TPD, offers some interesting insights to understand the TPD's lack of activation. In fifteen years, two main events that took place make the directive far less attractive than it was in the past.

First, the increase in the Union's Member States from 15 to 28 makes it harder to reach the majority of States that is necessary to activate the directive.<sup>43</sup> If, of course, the proportion has not changed it is equally evident how it is more difficult to reach the sufficient votes nowadays, since the number of national political interests that must be taken into consideration (moreover concerning an issue like migration and international protection that is often highly politicised and sensitive) has in fact almost doubled since 2001.

Second, the impact of the economic and financial crisis that broke out in 2007, and that is still influencing part of the Western world, should not be underestimated. Political balances in many nations have shifted radically: in comparison to the first years of the millennium, many European States are experiencing a slowing down (if not even an inversion) of their economic growth. It is in this sense sobering to remember that from 2008 to 2014 the GDP in Greece has decreased by 33 per cent, in Spain and Hungary by 15 per cent, in Italy, the UK and Czech Republic by 10 per cent,<sup>44</sup> and that an economic recovery still appears remote in several European countries. In a similar climate, nationalist political forces, often radically adverse to policies of assistance for third-country individuals, have found fertile soil.

This environment, exacerbated by significant public safety concerns, renders the space for a system such as the TPD's always narrower. It appears quite clear that a temporary protection system aimed at protecting entire categories of individuals radically collides with the policies undertaken in several EU countries, such as Hungary, Austria, Croatia, and Slovenia, that have, for instance, built – or tried to build – barbed wire walls at their borders to slow down or stop influxes of migrants.

In addition, one further (and related) factor that may explain the lack of willingness in activating the TPD is enshrined in the notion of 'pull-factor'. It is commonly believed that the activation of the instrument would increase the attractive factor of the Union, thereby intensifying the immigration phenomenon, and worsening – rather than relieving – national asylum systems. Where the studies on migration issues find that an increase of the pull-factors may increase immigration into a specific area,<sup>45</sup> it appears reasonable to believe that the activation of the TPD would contribute to the intensification of immigration into the EU.

Notwithstanding this relevant point, it is important to underline that the 'attractive component' is, for those fleeing armed conflict and systemic violations of their human rights, quite marginal if compared to push-factors.<sup>46</sup> 'Persons fleeing armed conflict or violence do not necessarily look for a wealthier State or a State with better welfare conditions to flee to, but are in search of a secure place free from violence and persecution.'<sup>47</sup> Data regarding the number of migrants and asylum seekers fleeing the Syrian conflict seem to confirm such conclusions: the vast majority of the displaced is currently hosted in Turkey, Lebanon, and Jordan, while only about 10 per cent of Syrian forced emigrants have applied for asylum within the EU. Nonetheless, if the analysis shifts on this 10 per cent, an interesting element

42 In case of an extension of the TPD regime beyond its predetermined time limits, its beneficiaries would *de facto* enter a legal *vacuum*, since EU law does not provide for a similar circumstance. An application of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents would at a first glance be imaginable, since it provides for the granting of the *status* of long-term residents to third-country citizens that have legally and continuously stayed within a Member State for five years. However, notwithstanding the relevant time gap (it suffices to remember the TPD lasts as most for 3 years whereas directive 2003/109 applies after 5), it is worth highlighting that the latter, according to art. 3.2 specifically prohibits its application to third-country individuals allowed to stay in a Member State on temporary protection grounds.

43 Note that Denmark is not bound by the directive, as stated in the perambulatory clause nr. 26: 'In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of this Directive, and is therefore not bound by it nor subject to its application.'

44 Data source available at <http://data.worldbank.org/indicator/NY.GDPMKTP.CD>.

45 See *ex multis*: Luxembourg: Office for Official Publications of the European Communities, *Push and Pull Factors of international Migration: A Comparative Report, European Communities* (2000) (online).

46 See E. Thielemann, 'How effective are national and EU policies in the area of forced migration?', *Refugee Survey Quarterly* (2012), p. 21 ff.

47 Ineli-Ciger, 'Has the Temporary Protection Directive become obsolete?', p. 234.

emerges: from April 2011 to April 2016, according to UNHCR data, 800,509 Syrians have applied for asylum in the EU, with more than 60 per cent shared between Germany (401,018) and Sweden (110,333), 25 per cent among Hungary, Austria, Bulgaria, and the Netherlands, and less than 15 per cent among the remaining Member States.<sup>48</sup> What appears relevant here is the comparison between the number of asylum applications in Germany and the other countries that did not undertake the policies of broad reception that were mentioned at the beginning of this work: this comparison suggests that the pull-factor of temporary protection policies – such the one unilaterally enacted by the German government – may have a significant impact on the number of asylum applications.

Finally, in cases in which the TPD should be activated – namely in situations of exceptional humanitarian crisis – the importance of the ‘attractive component’ (although unquestionably marginal if compared to push-factors), should not be underestimated when thinking about the chances of activation of the directive. In conclusion, it appears possible to maintain that the TPD – as currently structured – suffers from an excessively maximalist approach,<sup>49</sup> incompatible with the current zeitgeist. The idea of granting immediate (though temporary) protection to entire categories of displaced persons to be shared among Member States in the name of the principle of solidarity was perhaps sustainable at the beginning of the millennium. The same system appears today all but sustainable.

#### IV. The way forward: a disaster-oriented TPD?

Bearing in mind the elements that render the TPD a non-attractive instrument – and assuming the necessity within EU law of an effective legal framework disciplining temporary protection – the final part of this work tries to identify how and when the directive could be realistically activated. One possible way to do that would consist in starting to consider the TPD as potentially able to address environmental displacement caused by sudden-onset disasters, namely events whose negative effects can be restored in relatively brief periods (and whose intensity and frequency is expected to increase due to climate change, thereby posing an increasing challenge to States, international organisations, and the international community as a whole).

To draw some inspirational elements from a different – but effective – temporary protection regime, it looks useful to look at the US Temporary Protection Status (TPS).<sup>50</sup> The TPS lies like the TPD on a complementary level to the Geneva Convention,<sup>51</sup> but it presents one major difference compared to the European instrument: whereas the latter allows the admission within the EU to third-country individual, the TPS simply prohibits repatriation of subjects being *already* in the USA, thereby ‘bypassing’ the TPD’s pull-factor concerns. When activated,<sup>52</sup> the TPS applies to individuals already physically present in the US, and who – even though not falling within the classical definition of refugee – need temporary protection because of some particular event occurring in their country.

More precisely, the TPS can be activated in three scenarios: (i) in case of armed conflicts seriously threatening the physical safety of the foreigner subject to the hypothetical repatriation, (ii) when a foreign State asks for its activation as it is temporarily unable to manage the repatriation of its citizens because of a natural disaster, (iii) if the foreign State faces extraordinary and temporary conditions that do not allow for a secure repatriation. In such circumstances, the Secretary of Homeland Security can apply the TPS to determined categories of individuals for a period of six up to 16 months (extendable if the conditions in the country of origin do not ameliorate), with the effect of providing foreigners who satisfy the necessary conditions<sup>53</sup> with temporary residence and work permits. The TPS is currently valid for more than 300,000 individuals coming from 13 different countries.<sup>54</sup> Three among the most recent activations (Nepal, Western Africa, Syria) show, indeed, how the TPS is in fact capable of covering a broad *spectrum* of hypothesis: pandemics, natural disasters, civil wars. (Relevant, in a comparison with what previously stated about the TPD, appears especially the TPS activation for Syrian citizens. Following the beginning of the civil conflict, the TPS was activated in March 2012 – and should be expiring in September 2018, because ‘conditions in Syria have worsened to the point where Syrian nationals already in the United States would face serious threats to their personal safety if they were to return to their home country.’)

The TPS can be held as a valid and effective instrument: its numerous and diverse applications in the last two decades and a half show, in comparison to the lack of utilisation of the European system, the latter’s inadequacy. Thus, it would

48 Source: <http://data.unhcr.org/syrianrefugees/asylum.php> (accessed 2 Sept. 2016).

49 In this regard see Ineli-Ciger, ‘Has the Temporary Protection Directive become obsolete?’, p. 227: ‘It can be concluded that the Directive has the potential to protect a broad range of individuals coming to the Eu when a mass influx situation occurs. It is thus reasonable to wonder if the totality of individuals that may potentially be covered by the TPD is excessively broad.’

50 Adopted in 1990 and part of the Immigration and Nationality Act: ACT 244 – Temporary Protected Status (Sec.244. 1/ [8 U.S.C. 1254]).

51 In the sense of an enlarging of the scope of application of international protection systems, and in particular with reference to the notion of ‘humanitarian migrant’, see C. Argueta and R. Wasem, ‘Temporary Protection Status: current immigration policy and issues’, Congressional Research Service, 18 February 2016 (online), p. 1: ‘If the motivation of the migrant is determined to be economic improvement rather than the political reasons that underpin the legal definition [of refugees], the person is not considered eligible for asylum. This distinction is sometimes difficult to discern, because persecution as well as war may lead to economic hardships, and economic deprivation may trigger persecution or insurrection. Since factors such as extreme poverty, deprivation, violence, and the dislocation brought on by famine or natural disasters may evoke a humanitarian response, the term humanitarian migrants encompasses all those who emigrate to the United States for such reasons, including those who receive asylum.’

52 By decision of the Secretary of Homeland Security.

53 Possession of the passport of the designated State and evidence of physical stay in the US from the activation of the TPS regime.

54 For more data, see [www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS](http://www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS); Argueta and Wasem, ‘Temporary Protection Status’, p. 7.

seem logical to advocate for a minimalist-oriented reform of the directive: if the European legislator's intent consists in strengthening the CEAS, a modification of the TPD should be oriented to an increase of its chances of activation, and this means towards more pragmatism. In this sense, the European system could 'import' some elements from the TPS.

First, a relevant element to be found in the TPS is the explicit reference to environmental disasters as events capable of determining its activation. A TPD's modification (or reinterpretation) should be oriented to protect categories of people displaced by events whose duration can be forecast without excessive doubts, and sudden-onset environmental disasters tend to clearly fall within this kind of events. Since the rationale of temporary protection systems consists, self-evidently, in granting temporary and not prolonged protection, it would be useful to equip the TPD with some further specifications regarding the sort of events that causes the mass influx, with the aim of circumscribing the chances of its activation in less vague boundaries. And it is precisely in this sense that it would be useful to explicitly underline in the text the role of sudden-onset disasters, such as floods, wind-storms, earthquakes, tsunamis, etc, which are major causes of displacement worldwide.

As shown, the activation of the TPD in case of mass influxes deriving from violent conflicts appears highly improbable. The directive would probably enjoy more chances of activation if it were (also) explicitly designed to face mass and temporary influxes of individuals displaced by natural disasters (similarly to what the TPS does).<sup>55</sup>

In this regard, art. 2c) of the directive is to be thoroughly analysed to understand to what extent the TPD is equipped for these events. The provision, when explaining the notion of 'displaced persons', underlines that their impossibility to return to the original countries must depend on 'the situation prevailing' there. It then offers some specifications as to the possible sorts of displaced that may fall within the definition (i.e., refugees and, more broadly, persons fleeing armed conflicts, endemic violence or generalised violations of human rights). The very broad notion of 'situations prevailing in the country of origin' clearly potentially encompasses environmental disasters, since the specifications that follow appear to have an explanatory rather than exhaustive function (as the wording 'in particular' suggests). Hence, the Council, upon proposal of the Commission, is not bound to strictly follow these specifications, and it appears in principle allowed to apply the TPD also in cases of mass influx deriving from sudden-onset disasters. Indeed, some major natural catastrophe can obviously create some 'prevailing situation' in the country of origin that could force entire categories to temporarily flee from their homes seeking protection abroad.

If this is the case, there would be no need to modify the directive, but just to begin reconsidering/reinterpreting it. A more careful analysis of the text suggests however that natural disasters, even though potentially falling within the realm of application of the directive, are not considered as possible causes of displacement under it. The text does not, in fact, mention at any time, neither in the preamble nor in its dispositions, such events. This is mainly because the instrument was adopted following the dissolution of Yugoslavia and the violence that broke out in the region during the Nineties.<sup>56</sup> In 2001, European institutions were willing to create a legal framework aimed at institutionalising at a supranational level the humanitarian assistance that some States had exceptionally offered during the diverse phases of the Yugoslavian Wars.<sup>57</sup> The TPD is hence (even though not being up to this task) almost exclusively designed to offer assistance to persons displaced by conflicts and generalised human rights violations. Natural disasters, although potentially relevant, appear to be not considered within its realm (at least according to the legislator's willingness). This is why a disaster-oriented modification or fundamental reinterpretation of the directive appears nowadays useful.

We have seen that the TPD's chances of activation currently appear very limited due to numerous reasons. Although some of the very same (enshrined in the pull-factor 'fear') would also apply to natural disasters-related displacement, this would at least avoid some.

For instance, sudden-onset disasters usually hit only limited and recognisable areas (with the exception maybe of droughts, whose sudden and temporary nature appears not certain at all), thereby satisfying the geographic requisite needed for the identification of the particular categories to be protected under the regime.

More importantly, this kind of disasters does not suffer from the dilemmas regarding the foreseeable temporariness of the protection to be provided. If, hypothetically, an earthquake struck Georgia, causing a mass but temporary emigration towards some EU Member States, a specifically disaster-oriented TPD could be activated to protect those forced to leave their country, and be used to redistribute them among different Member States according to their reception capabilities. Arguably, damage and devastation caused by the earthquake could be restored in the limited period envisaged by the TPD. Once normality in the country of origin is restored (namely rendering it capable of welcoming back its own citizens without precluding the correct enjoyment of their fundamental rights), the Union and its Member States would be able to enact manageable repatriation programmes (thus without incurring the paradoxes contained in the analysis of art. 6.2 of the TPD, according to which the categories protected by the TPD may be repatriated only in safe and stable conditions).

<sup>55</sup> See Immigration and Nationality Act – Temporary Protected Status Section: 'In general, The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if [...] (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 [...].'

<sup>56</sup> On the dawn of temporary protection frameworks in Europe see Fitzpatrick, 'Temporary protection of refugees', p. 286: 'In the early 1990s, European states found themselves in an unwonted frontline position, with respect to forced migrants from the former Yugoslavia. They responded by favouring temporary protection and avoiding grants of durable asylum; additional interim measures of protection were introduced in national law and practice'; Humanitarian Issues Working Group, *Survey on the Implementation of Temporary Protection*, (8 March 1995), online.

<sup>57</sup> See Fitzpatrick, 'Temporary protection of refugees', p. 280. See also Amnesty International, *Former Yugoslav Republic of Macedonia: The Protection of Kosovo Albanian Refugees* (AI Index No EUR 65/0399, 1999) (May 1999).

In a longer-term perspective, a disaster-oriented evolution of the directive could also be significant to provide a particular subset of the category of so-called 'environmental refugees', a category that neither international nor EU law is nowadays adequately covering, with international protection. So-called 'environmental refugees' can very synthetically be defined as those forced to migrate because of environmental degradations that make their areas of origin uninhabitable.<sup>58</sup> In some cases, an 'environmental refugee' might face difficulties determining the need for international protection, but under international refugee law (and also under complementary protection frameworks),<sup>59</sup> environment and its degradations are not considered causes of persecution depending on which the host country is obliged to grant international assistance. It is furthermore sobering to remember that the increase in the frequency and intensity of extreme meteorological events is a phenomenon related to the processes of global climate change we have started to experience in the current period,<sup>60</sup> and that the phenomenon of migrations forced by environmental degradation consequently appears destined to significantly increase its humanitarian and numerical significance in the near future.<sup>61</sup>

Under this perspective, the Union – also in the light of its leading international role in environmental and climate matters – might have a particular interest in equipping itself with one of the first supranational legal instruments specifically addressing (at least one part) of a problem that will likely cover a growing importance in the decades to come.<sup>62</sup> For the purpose of the present work, it is sufficient to stress that the macro-category of 'environmental refugees' (a definition that although legally flawed<sup>63</sup> remains symbolically effective) may be divided – in case of cross-border movements of people – into two different sub-categories: (i) those pushed to migrate because of slow-onset disasters (such as sea-level rise and desertification), and (ii) those fleeing sudden-onset events. Although this distinction surely suffers from oversimplification, it remains useful: it visibly clarifies that diverse protection regimes should be predisposed to protect the two different categories.

Persons belonging to the first category, consisting of those opting to emigrate from low-lying small island-States adducing as principal reason sea-level rise, do not, normally, experience absolute emergency situations, and their emigration is hence considerable as voluntary and pre-emptive, not deserving immediate and incisive international protection.<sup>64</sup> Nevertheless, if we are to believe to the overwhelming majority of climate science and its predictions, we already know that such individuals need relocation programs onto other national territories,<sup>65</sup> and/or evolutions in jurisdictional systems enabling for the application of the *non-refoulement* principle for those who would undergo – in case of repatriation to their (almost) uninhabitable home countries – inhuman or degrading treatments. Anyhow, in such a case the protection to be granted should be permanent, not temporary, thereby rendering the analysis of the TPD trivial for this specific category.

A disaster-oriented TPD would conversely be relevant for those fleeing the consequences of rapid-onset events. In this regard, it seems important to stress that the reflections of scholars and policy-makers should not concentrate only on climate change, a phenomenon that even though affecting climatic or meteorological disasters does not have any impact on others, such as geological ones. An excessive focus on the 'climate change discourse'<sup>66</sup> may, indeed, lead to

58 See generally J. McAdam (ed.), *Climate Change and Displacement, Multidisciplinary Perspectives* (Oxford, 2010). See also G. Hugo, 'Environmental concerns and international migration', *International Migration Review* (1995), p. 105 ff; EACH-FOR, Synthesis Report, 14 May 2009 (online); *Chairperson's Summary*, Nansen Conference on Climate Change and Displacement in the 21st Century, 6–7 June 2011, Oslo, para. 4 (online). As regards legal studies see among others A. Banwitiya Ntekangi, *Vers un droit international des réfugiés écologiques* (Kinshasa, 2014); J. McAdam, *Climate Change, Forced Migration, and International Law* (Oxford, 2012); Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in The Context of Climate Change: Normative Gaps and Possible Approaches* (UNHCR Legal and Protection Research Series, PPLA/2012/01, February 2012); N. Westra, *Environmental Justice and the Rights of Ecological Refugees* (London, 2009).

59 See in this regard J. McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards* (UNHCR, Division of International Protection, May 2011 (PPLA/2011/03)).

60 For an exhaustive synthesis on the relation between extreme events and climate change see IPCC, 'Summary for policymakers', in C.B. Field, V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor and P.M. Midgley (eds.), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*, a special report of Working Groups I and II of the Intergovernmental Panel on Climate Change (Cambridge, 2012), pp. 1–19.

61 See for instance W. Kalin, former Representative of the United Nations' Secretary-General on the Human Rights of Internally Displaced Persons, interview with *Friederike Bauer*, in Akzente, *The Giz Magazine*, March 2015 (online: <https://akzente.giz.de/en/artikel/were-talking-millions>).

62 In this sense, see also J.M. Bergoglio, *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for Our Common Home* (Vatican City, 2015), p. 23, para. 25.

63 From a purely legal point of view, a 'refugee' for environmental-related reasons does not exist. The 1951 Geneva Convention, as already mentioned, accords protection for those persecuted because of religion, nationality, race, membership of a particular political opinion or social group. There is no reference at all to environment or climate. From a historical perspective, this makes perfect sense, since in 1951 massive environmental degradation and climate change were just a very remote mirage.

64 See in this regard, among many others, G. Sciacaluga, '(Non) rifugiati climatici dal 1995 al 2015: perché il diritto internazionale dei rifugiati non può applicarsi al fenomeno delle migrazioni causate (anche) dai cambiamenti climatici', *Rivista Giuridica dell'Ambiente* (2015), p. 465 ff.

65 It is worth noting that the Maldives' Government has started discussion with Sri Lanka to by some latter's territories to be used in case of necessity. As regards internal relocations in the Pacific also due to climate change, note the case of Carteret Islands in Papua New Guinea (see S. Pascoe, 'Sailing the waves on our own: climate change migration, self-determination and the Carteret Islands', *QUT Law Review* (2015), p. 72 ff; B. Lewis, 'Neighbourliness and Australia's contribution to regional migration strategies for climate displacement in the Pacific', *QUT Law Review* (2015), p. 86 ff). Recently in the US \$52,000,000 has been allocated to relocate a Louisiana community which is losing its territory because of sea-level rise (see 'A Louisiana tribe is now officially a community of climate refugees', *Huffington Post*, 12 February 2016); similarly, a 600-inhabitant village in Alaska has decided to start relocation programmes for similar reasons in August 2016 (see 'U.S. village in Alaska votes to relocate due to climate change', *Grand Fork Herald*, 21 August 2016).

66 The 'climate change discourse', namely the totality of beliefs, scientific certainties and political-ideological behaviours that tend to identify

a hazardous reductionism, at least in the light of granting international protection to the victims of natural disasters. As law needs some precise boundaries to enjoy a degree of effectiveness, it is crucial to critically look at the panoply of proto-legal definitions that identify the categories of subjects that should be protected under international law, such as survival refugees, humanitarian refugees, hunger refugees, and environmental and climate refugees. As previously maintained, the TPD might become practically relevant if it were to protect those fleeing temporarily a sudden-onset natural disaster – irrespective of its cause<sup>67</sup> – whose effects can as a matter of fact be restored in one, two or three years at most.

Finally, some reflection should also be dedicated to the modifications to be brought to the TPD's activation procedure, thoroughly disciplined by art. 5. The Commission currently enjoys the exclusive power of proposal, and the Council has then to decide by qualified majority whether to activate the instrument or not. As shown, such a system concedes, to the end of favouring the TPD's utilisation, an excessive margin of appreciation to European institutions and, especially, to Member States national priorities. It would seem hence important to advocate for a modification of the system. It looks probable that a modification of the directive intended to enhance its chances of activation would encounter some political obstacles, at least in the current phase. It is nonetheless possible to make some propositions to foster the debate concerning this particular issue.

A first useful modification would probably consist in granting, as the US TPS does, a right to the third-State suffering from a particular event (and, more specifically, from a natural disaster), to ask the Commission to trigger its power of proposal. Furthermore, if such change was accompanied by the obligation – for the competent European institutions – to motivate in detail their decision regarding the TPD's use (e.g. by stating which quantitative requisites are needed to assess the existence of a 'mass influx'), it would be possible to limit the margin of appreciation which is today existing. Although the duty to state reasons is integral part of EU law, this paper argues that the TPD should call for a duty of detailed motivation upon competent institutions. For instance, if such approach had been followed in 2011, following the 'severe pressure' experienced by Italy and Malta, the Commission would have had to clarify the reasons why it was not possible, at that time, to 'see a mass influx of migrants to Europe'. Indeed, the Commission and the Council, even though remaining free to activate the system or not, would in this way inevitably shed some light on the scope of application of the directive.

Second, it would also be useful to make changes with respect to the power of proposal of activation recognised to European Member States. As the TPD currently stands, Member States can merely ask the Commission to take into consideration the proposal of activation, and the latter is then merely bound to an examination of the request ('[the Commission] shall also examine any request by a Member State', art. 5).<sup>68</sup> This paper argues that by granting Member States a greater incisiveness, it would be possible to stiffen the activation procedures, thereby increasing the chances of activating the TPD. For instance, a useful modification would consist in binding the Commission to propose the activation to the Council in case a determined quota of Member States agrees on this action. By so doing, a minority of Member States would *de facto* enjoy the power of proposal to the Council.

Furthermore, with the objective of raising the TPD's chances of activation (but also responding to the need for a more incisive democratic legitimation of EU decisions), the role of the European Parliament should also be strengthened. Art. 5 currently disposes that once the Council's decision is taken, the Parliament must be informed, thereby reducing the latter's role in the decision-making process to a mere passive actor. Again, it would seem reasonable to provide the Parliament with a (at least indirect) power of proposal of activation of the TPD, e.g. by obligating the Commission to trigger its proposal powers if a determined majority of the Parliament agrees on the activation.

Finally, a change would consist in decreasing the quota of votes needed in the Council to activate the directive. The need for a qualified majority sharply limits the chances of activation of the instrument even in the (hypothetical) introduction of the above modifications. Consequently, if the final objective consists in enhancing the TPD's chances of activation, it appears quite clear that the latter should, in the name of the principle of solidarity, be subject to a Council's decision taken by simple majority of its components. However, such proposal needs to be examined through the lenses of some sincere pragmatism, since it is as matter of fact highly improbable that the Union and its Member States will be willing to pursue such a path. Indeed, decisions in the Council are taken with a qualified majority (55 per cent of Member States accounting for at least 65 per cent of the European Union's population) in most issues. Unanimity decisions tend to cover the rest, whereas simple majority (required, according to art. 238.1 TFEU, when no explicit disposition is to be found) is in fact limited to a restricted number of issues, mainly concerning the Council's internal organisation. Being the Union an organisation of intergovernmental and supranational character, it is unlikely that the activation of an instrument like the TPD will be subject only to a simple majority decision.

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in climate change the principal challenge of the present century, and attributing to it the emergence of phenomena highly impacting on social, political, and economic balances, can be traced in a recent study by the US National Academy of Science (C.P. Kelley, S. Mohtadi, M. Cane, R. Seager and Y. Kushnir, 'Climate change in the Fertile Crescent and implications of the recent Syrian drought', *PNAS*, 112 (17 March 2015), which finds that the serious drought that has hit Syria before 2011 is *one* of the decisive drivers of the current civil war. The study, which was cited by many media, has fuelled the idea that the conflict is caused by climate change. Such a belief is obviously just an oversimplification of the articulated and complex thesis that is maintained in the study, which certainly helps to show how the Syrian drought – in whose causation and manifestation climate change has played a role – is a contributory cause to the conflict.

67 By so doing, the distinction between 'climate' and 'environmental' refugees falls without excessive complication.

68 Something that occurred in 2001 with the requests of activation of the TPD by Malta and Italy (see above).

## V. Conclusion

This paper has shown why it seems unrealistic to hope in the activation of the TPD as currently conceived and interpreted. The nature of the instrument, which was adopted in more prosperous times, appears nowadays incompatible with a Union of 28 Member States, suffering from negative economic fluctuations, and dealing with the greatest migration phenomenon since the end of WWII.

The lack of utilisation of the TPD is in part due to inherent terminological characteristics – the ambiguity of the notion of mass influx – which, alongside with the activation procedure – requiring the qualified majority in the Council –, leaves broad discretionary powers to national political priorities. In a period of economic weakness and concerns about internal political balance, such a margin of appreciation makes it possible for Member States to avoid the very discussion concerning the instrument's activation.

It seems hence appropriate, with the aim of strengthening the CEAS, to advocate for a pragmatic reform of the TPD system. This works calls therefore for a stiffening of the activation procedures, and, relying on the assumption that the Union and its Member States might uniquely be prone to use the instrument in response to events whose negative effects can be restored in a relatively brief period, it also calls for a sudden-onset disaster-oriented evolution of the directive. Furthermore, a disaster-oriented TPD would contribute to the solution (at least under EU law) of part of the problem concerning environmental displacement.



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