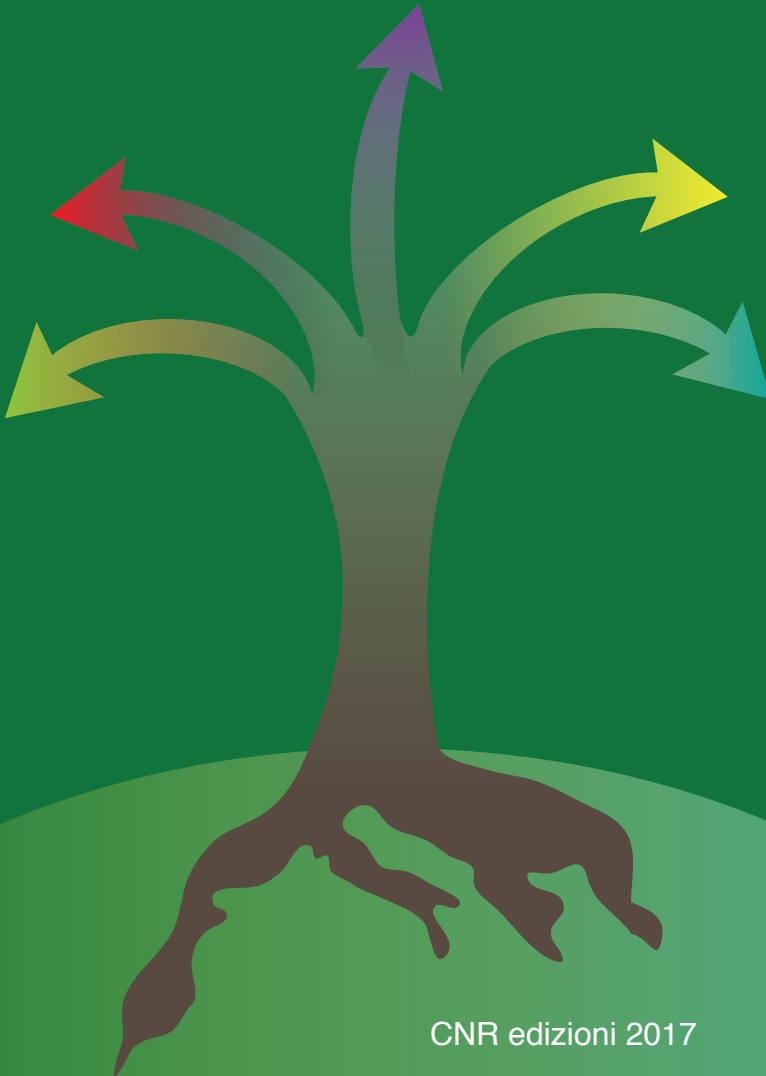


# MIGRATION AND THE ENVIRONMENT

## Some Reflections on Current Legal Issues and Possible Ways Forward

*Edited by* Giovanni Carlo Bruno  
Fulvio Maria Palombino  
Valentina Rossi







# MIGRATION AND THE ENVIRONMENT

## SOME REFLECTIONS ON CURRENT LEGAL ISSUES AND POSSIBLE WAYS FORWARD

*edited by* GIOVANNI CARLO BRUNO  
FULVIO MARIA PALOMBINO  
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## PREFACE

The link between migration and the environment is not new. Environmental concerns have always influenced human mobility; people have always been moving either temporarily or permanently in response to environmental changes. However, the nature, the dynamics and the scale of environment-related migration have dramatically changed, in recent years, and there has been a growing recognition that environment induced migration is likely to become one of the key challenges of the 21st century, which must be addressed to ensure human security and sustainable development.

This new attitude is due to the changing nature of environmental degradation. A number of global environmental problems, including climate change, destruction of rainforests, land degradation, loss of biodiversity, oceanic and riverine pollution, drought and natural disasters, is increasingly stressing the earth's ecosystems and reducing the ability to provide services to human beings. Among those problems, climate change poses the most severe threats. The harmed equilibrium of all the world's ecosystems is expected to have a growing impact on human environment, resulting in widespread socio-economic vulnerability. In this perspective, climate change adds new complexity to the relationship between environmental degradation and migration, a relationship which is already complex for several reasons.

The first reason is the range of environmental phenomena that cause migration flows, which are induced both by sudden events, such as natural disasters, and by gradual processes of environmental change, but in different ways. To date, event-

driven displacements have tended to be temporary; wherever possible affected populations come back to their homes after the events and their consequences have ceased. Differently, gradual processes of environmental deterioration impact on the existing livelihood and socioeconomic fabric and may generate different types of migration: temporary and/or circular (for example, as a consequence of periods of drought), or permanent migration (due to sea level rise or desertification). As a consequence of these events and processes, affected persons may move internally or internationally. Current studies indicate that quite a large part of environment-related displacements are taking place within national borders, at first; however, there are some indications of an increasing number of environmentally-induced migrants across international borders. Although the exact 'push and pull factors' are still unclear, recent studies show how today's Internally Displaced Persons (IDPs) are tomorrow's refugees, asylum seekers and migrants (Internal Displacement Monitoring Centre, Global Report on Internal Displacement, 2016 and 2017). Frequently, IDPs are people that simply have not yet crossed an international border; for example, around 55 per cent of the Afghan refugees and 85 per cent of the Syrian refugees interviewed in Greece, in early 2016, reported that they had been IDPs before crossing the national border.

Another issue that makes the relationship between migration and the environment not easy to outline is the difficulty of isolating environmental factors from other political, social and economic drivers of migration. In fact, environmental factors are usually associated with other social, economic and political factors. As regards environmental events, drivers such as governments' policies and communities' resilience to natural disaster contribute to the degree of vulnerability of geographical areas and of affected communities. Similarly, migration flows generated by gradual environmental degradation phenomena, at least at an early or intermediate stage, are usually associated with some pull factors, be it social or economic.

Consequently, it is difficult to differentiate between forced and voluntary migration. Classifying environmental migration as forced may be relatively uncontroversial in cases of a natural disaster. Similarly, we can say that, at the early and intermediate stages of environmental degradation processes, migration is more likely to be voluntary and to be used by the affected populations as an 'adaptation strategy'. However, for the most part, the distinction is not clear-cut. There is a complex chain of causality between environmental change, loss of economic opportunities and migration. Furthermore, the decision to move has to be analyzed in the context of viable

alternatives. The ability to migrate is a function of both financial and social resources and the most vulnerable people will often not be in a position to migrate.

Given the complexity of the links and interactions between environmental change and human mobility, current estimates of the number of people moving in response to environmental factors, either directly or indirectly, either within their countries or across borders, either permanently or temporarily, vary enormously. In this perspective, innovative approaches are being developed to study environmental migration and provide insights for informing policies (i.e., International Organization for Migration, Global Migration Data Analysis Centre). Further, the complexity of this phenomenon is reflected in the number of expressions used to describe it: “environmental refugees”, “climate change migrants”, “climate refugees”, “forced environmental migrants”, “environmentally displaced persons”, “disaster refugees”, “environmentally motivated migrants”. There are no internationally accepted definitions for persons moving for environmental reasons. Expressions in current use are descriptive terms; they have no legal basis and do not indicate a status that confers obligations on States.

As a matter of fact, people induced to move for environmental reasons do not fall entirely within the categories provided by the existing international legal framework and show the limitations of the current paradigm in which migration is largely framed. In several international fora, it is increasingly recognized that there are certain groups of people who move for environmental reasons and are in need of assistance and who currently fall outside the scope of international protection. There is a growing acknowledgment that existing gaps need to be bridged. Actually, countries are left to define their own standards and their own interpretation of existing norms and human rights obligations, and they offer varying levels of protection, with the risk of engaging in a ‘race to the bottom’.

Different initiatives are under ways and possible solutions are being discussed by the international community to protect the fundamental rights of people induced to move for environmental reasons. A wide and complex process is taking place, giving rise to a rich and fragmented practice.

The rationale behind the volume on *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward* is to provide a comprehensive and critical review of the major outcomes, implications and achievements on the relevant questions of international law on international migration and

the environment. The ultimate objective of the volume is to foster the debate among experts, scholars and policy makers. To this end, the collected papers analyze from different perspectives the link between migration and the environment and the phenomenon of environment-related migration, discuss the extent to which people whose movements are induced by environmental factors are protected under the existing international legal framework, investigate the main legal issues and normative gaps and analyze the solutions at stake.

The volume does not aim at covering all the issues connected to the legal questions related to migration and environment. Nevertheless, we tried to offer to the readers a good selection of papers on the subject.

The first five essays deal with some basic questions: how to deal with a phenomenon relatively 'new' through existing legal rules?

The possible inclusion of the so-called 'environmental refugees' under the umbrella of the 1951 Refugee Convention is dealt with by Mariana Ferolla Vallandro do Valle in her paper on "Six of One, Half a Dozen of the Other: the Inefficiency of Recognizing Refugee Status to Environmentally Displaced Persons". The "popularization of the term 'environmental refugees' started in the 1970s" (p.3), but "despite its common usage", the notion of environmental refugees finds no legal basis under international refugee law, especially in the light of the Refugee Convention". Thus, the author analyzes, thoroughly and critically, the proposals for extending the application of the 1951 Refugee Convention to environmentally displaced persons, to conclude that the expansion of the protection offered by the said convention cannot be a solution for 'filling the gap' and offering a solution for the problem.

Fulvia Staiano, in her paper on "State Responsibility for Climate Change under the UNFCCC Regime: Challenges and Opportunities for Prevention and Redress", explores the 2016 Paris Agreement, which may reinforce some change of perspective, when analyzing human mobility caused by climate change, state responsibility and liability under the United Nations Framework Convention on Climate Change. The issue of state responsibility in relation to greenhouse gases is firstly examined, focusing also on the broader international law regime on state responsibility. The possibility of using climate change litigation, by States or groups of individuals, for "their potential to indirectly provide protection and redress to displaced individuals as a result of environmental degradation or disasters" (p. 27) is then taken into consideration, to review some

of cases dealt with by domestic tribunals (*Urgenda v. the Netherlands*) and international bodies (the Inter-American Commission on Human Rights).

Moving to EU Law, Giuseppe Morgese, in his “Environmental Migrants and the EU Immigration and Asylum Law: Is There Any Chance for Protection?”, examines two out of the three statuses granted in each Member State on the basis of EU standards, namely refugee status and subsidiary protection status, to conclude that “the mere environmental disaster-related migration” (p. 52) is not enough, *per se*, as an eligibility condition required by EU law for applying refugee or subsidiary protection status. After having explored other options, *i.e.* humanitarian provisions in EU law, resettlement programmes, humanitarian admission schemes, private sponsorships and protection within Regional Development and Protection Programmes, the “need for a European *ad hoc* legal instrument dealing with every aspect of the protection of environmental migrants” (p. 73) is sought, although the Author is aware of the fact that, “at least in the near future”, such a legal instrument will not be adopted.

The so-called Temporary Protection Directive provides for the third status granted by the EU law to international migrants in need of special protection. “Sudden-Onset Disasters, Human Displacement, and the Temporary Protection Directive: Space for a Promising Relationship”, by Giovanni Sciacaluga, analyzes this Directive, “expressly created to deal with mass influxes of migrants” (p. 76). The Author looks into the provisions of this Directive, which is “complementary to the Geneva Convention” (p.79). He also reviews the rare attempts to activate it, and the endogenous and external reasons behind the lack of activation. While calling for a pragmatic reform of the Directive, Sciacaluga concludes that it could be applied to human displacement for environmental reasons.

An overview of the little-known practice within some extra-European Regional Organizations is offered by Maria Vittoria Zecca, in her “The Protection of ‘Environmental Refugees’ in Regional Contexts”. Whereas the Author confirms that, under existing international law, environmental factors do not lead to the creation of the category of “environmental refugees”, Zecca examines the practice of regional organizations, in Africa, in Southern America, and in the Arab Region, to assess whether there are attempts “to overcome the limits of the Geneva Convention” (p. 121).

The last two papers of the volume focus on very specific issues, geographical peculiarities and soft law initiatives.

Ana Carolina Barbosa Pereira Matos and Tarin Cristino Frota Mont'Alverne, in their "The UN Ocean Conference and the Low-Lying States Situation: Would the UN SD Goal 14 Suffice to Avoid a Migratory Emergency?", analyze the situation of the low-lying coastal States, which are "all experiencing some kind of induced climate changes negative impacts" (p. 124), including forced migration. The Authors suggest that the vulnerabilities of those States may be reduced by increasing resilience, and by making the most out of some instruments, also of soft law.

"The Nansen Initiative and Migrants in Countries in Crisis Initiative: New Frameworks for More Effective Migrants' Protection" closes the volume, describing two initiatives providing "practical, non-binding and voluntary guidelines" to help migrants before, during and after emergencies (p. 148). Patrycja Magdalena Zgola describes their main features, with the aim of providing "good examples for further actions" (p. 166), to be included in future binding instruments.

The present volume is another result of the scientific cooperation on the issue of Migration and Development between the Department of Law of the University of Naples Federico II and the Institute for Research on Innovation and Services for Development (IRISS) of the National Research Council of Italy.

We would like to thank the colleagues who enthusiastically replied to the call for papers we launched on February 2017 and made the publication of this volume actually possible.

We are particularly grateful to Adriana Di Stefano, Anna Liguori and Flavia Rolando, reviewers of the draft contributions.

We would like to thank also Giorgia Bevilacqua, for helping us in the pre-print phase. Thanks to Angela Petrillo and Stefano Carotenuto, for the graphic project of the cover and the assistance in the preparation of camera-ready file, respectively.

Napoli, 30 December 2017

Giovanni Carlo Bruno  
Fulvio Maria Palombino  
Valentina Rossi

# 1. SIX OF ONE, HALF A DOZEN OF THE OTHER: THE INEFFICIENCY OF RECOGNIZING REFUGEE STATUS TO ENVIRONMENTALLY DISPLACED PERSONS

*Mariana Ferolla Vallandro do Valle \**

SUMMARY: 1. Introduction. – 2. The (Non) Recognition of Environmental Refugees under the 1951 Refugee Convention. – 3. Proposals to Include Environmental Factors in the Refugee Definition. – 4. Is the extension of the Refugee Convention the Best Solution? – 4.1. Overburdening Host States and the UNHCR. – 4.2. The Causal Link between the Fear of Persecution and Slow-Onset Degradation. – 4.3. The Impossibility of Including Internally Displaced Persons under the Protection of the Refugee Convention. – 5. Conclusions.

## *1. – Introduction*

In January 2010, an earthquake devastated Haiti, leaving around 230,000 dead and 1.5 million displaced.<sup>1</sup> As the effects of the earthquake continue to be felt in the country, thousands of Haitians keep emigrating and, only in 2015, around 14,000

\* The author wishes to thank the two anonymous referees of this volume, for reading the manuscript and providing useful comments. However, errors and omissions in the contribution are the sole responsibility of the author.

<sup>1</sup> “Haiti Earthquake Fast Facts”, CNN, available at: <<http://edition.cnn.com/2013/12/12/world/haiti-earthquake-fast-facts/index.html>>.

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migrated to Brazil.<sup>2</sup> Another 4.1 million persons were displaced in 2013 when Typhoon Haiyan hit the Philippines.<sup>3</sup> In 2015, it is estimated that 1.1 million people were displaced due to natural hazards, mainly floods, in 33 African States.<sup>4</sup>

These are only a few examples of the thousands of individuals who are displaced every year, both internally and internationally, due to environmental disasters and degradation. Although exact numbers of environmentally displaced persons may be difficult to estimate, it is said that they rival the number of refugees.<sup>5</sup> More recently, a study published by the Norwegian Refugee Council's Internal Displacement Monitoring Centre has calculated that natural disasters have displaced approximately 26.4 million people per year since 2008,<sup>6</sup> whereas the United Nations High Commissioner for Refugees ("UNHCR") estimates that there are currently 22.5 million refugees worldwide.<sup>7</sup>

The comparisons between refugees and environmentally displaced persons do not stop there. Those affected by environmental disasters and degradation are frequently subjected to extreme living conditions that bring about a level of harm comparable to or even greater than the one suffered by refugees. Indeed, people facing the impacts of environmental hazards may have to deal with contamination of drinking water, shortages of food, proliferation of diseases, inadequate sanitation, lack of housing, and many other hardships that amount to a deprivation of their basic rights.

It is mainly in view of these adversities that individuals affected by environmental factors are commonly called "environmental refugees". This expression has long been criticised as legally inaccurate, since it is generally accepted that these persons do not qualify as refugees under the definition of the 1951 Convention relating to the

<sup>2</sup> VELASCO and MANTOVANI, "Em 10 anos, Número de Imigrantes Aumenta 160% no Brasil, diz PF", G1, 25 June 2016, available at: <<http://g1.globo.com/mundo/noticia/2016/06/em-10-anos-numero-de-imigrantes-aumenta-160-no-brasil-diz-pf.html>>.

<sup>3</sup> GOLDENBERG, "Natural Disasters Displaced More People than War in 2013, Study Finds", The Guardian, 17 September 2014, available at: <<https://www.theguardian.com/world/2014/sep/17/natural-disasters-refugee-people-war-2013-study>>.

<sup>4</sup> KEMP, *Africa Report on Internal Displacement*, Geneva, 2016, p. 10, available at: <<http://www.internal-displacement.org/assets/publications/2016/2016-Africa-Report/20161209-IDMC-Africa-report-web-en.pdf>>.

<sup>5</sup> TRINDADE, *Direitos humanos e meio-ambiente: paralelo dos sistemas de proteção internacional*, Porto Alegre, 1993, p. 137.

<sup>6</sup> YONETANI, *Global Estimates 201: people displaced by disasters*, Geneva, 2016, p. 11, available at: <<http://www.internal-displacement.org/assets/library/Media/201507-globalEstimates-2015/20150713-global-estimates-2015-en-v1.pdf>>.

<sup>7</sup> UNHCR, "Figures at Glance", available at: <<http://www.unhcr.org/figures-at-a-glance.html>>.



Status of Refugees (“Refugee Convention”). Nevertheless, the term is often employed with another objective in mind: to argue that the protection environmentally displaced persons *should* be ensured through an amendment to the Refugee Convention explicitly including a category of environmental refugees.

This article seeks to demonstrate that this position is flawed and that proposals for expanding the Refugee Convention are not an efficient means of providing protection to these persons. Accordingly, we will firstly analyse the elements of the refugee definition under the Refugee Convention in order to clarify that, under current interpretations, there is no legal basis for granting refugee status on the basis of environmental factors alone. In the third section, we will present some of the proposals for the creation of an “environmental refugees” category under the Refugee Convention, detailing how the elements of the current refugee definition would be altered in these proposals. It is important to clarify that proposals employing the term “environmental refugees” or “climate refugees”, but which suggest the creation of a new, independent framework of protection instead of an expansion of the Refugee Convention are outside of the scope of this article. Finally, we will discuss the practical obstacles for the implementation of these proposals, relating to how the recognition of environmental refugees would overburden the refugee protection system, the difficulties in assessing slow-onset degradation as the cause of persecution, and the fact that persons internally displaced by environmental causes would remain excluded from protection.

## *2. – The (Non) Recognition of Environmental Refugees under the 1951 Refugee Convention*

The popularization of the term “environmental refugees” started in the 1970s, when it was advanced by Lester Brown,<sup>8</sup> and has, ever since, been widely employed by the media and even scholars to refer to persons displaced mainly due to environmental factors, such as natural disasters or degradation of the environment, either naturally-occurring or manmade. Despite its common usage, the notion of environmental refugees finds no legal basis under international refugee law, especially in light of the Refugee Convention.<sup>9</sup>

<sup>8</sup> PEREIRA, “Uma visão brasileira do conceito ‘refugiado ambiental’”, in RAMOS, RODRIGUES, and ALMEIDA (eds.), *60 anos de ACNUR: perspectivas de futuro*, São Paulo, 2011, p. 221 ff., p. 222.

<sup>9</sup> Convention relating to the Status of Refugees. 28 July 1951, 189 UNTS 2545.

Article 1(A)(2) of the Convention, as amended by its 1967 Protocol (which removed the temporal and geographical limitations from the original refugee definition), establishes two essential elements for a person to qualify as a refugee. Firstly, one must have a well-founded fear of persecution, being unable or unwilling to receive protection from their State of origin due to such fear. Secondly, the feared persecution must be for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

The first element, namely persecution, seems to be the one most evidently lacking in cases of migration motivated by environmental factors. Nevertheless, as neither the Convention nor its preparatory works provide a concrete definition of persecution, this criterion must be carefully analysed before reaching a conclusion on whether it is met by persons claiming the status of environmental refugees.

Two main approaches are currently identified to define persecution under the Refugee Convention:<sup>10</sup> the human rights approach, which equates persecution to serious violations of human rights,<sup>11</sup> and the circumstantial approach, under which the existence of persecution depends on the circumstances of each case and does not necessarily correspond to human rights violations.<sup>12</sup> Both approaches seem to have been supported by the UNHCR in its Handbook on Procedures and Criteria for Determining Refugee Status, which establishes that serious violations of human rights due to the Convention's grounds constitute persecution as well as that "[w]hether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case".<sup>13</sup>

<sup>10</sup> STOREY, "What Constitutes Persecution? Towards a Working Definition", *International Journal of Refugee Law*, 2014, p. 272 ff., pp. 276-277.

<sup>11</sup> HATHAWAY, *The Law of Refugee Status*, 2nd ed., Cambridge, 2014, pp. 193-208; GOODWIN-GILL, "The International Law of Refugee Protection", in FIDDIAN-QASMIYEH et al. (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, 2014, p. 37 ff., p. 39.

<sup>12</sup> UNHCR, "Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, SCIFA (Brussels, 6 November 2002)", 6 November 2002, available at: <<http://www.unhcr.org/admin/dipstatements/42bab1b52/statement-ms-erika-feller-director-department-international-protection.html>>; EDWARDS, "Age and Gender Dimensions in International Refugee Law", in FELLER, TÜRK and NICHOLSON (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, New York, 2003, p. 46 ff., p. 50.

<sup>13</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, 1979, paras. 51-52.

Given this initial ambiguity, some argue that the UNHCR's position accepts persecution as an absence of State protection, no matter what caused this absence.<sup>14</sup> However, in later attempts to define this concept, the UNHCR referred only to serious violations of human rights or the cumulative effects of less serious violations, such as discrimination, as a basis for persecution.<sup>15</sup> Analyses of national case law also identify a tendency to refer to disproportionate or discriminatory human rights abuses when assessing persecution,<sup>16</sup> causing the human rights approach to be the dominant view on such definition.<sup>17</sup> Accordingly, this will be the approach used in this article to evaluate the claims of environmental refugees.

In human rights law, a violation only occurs when there is an act or omission by the State regarding a specific right. This same logic is used when assessing the existence of persecution. Indeed, as the study conducted by Jacques Vernant in 1951 at request of the UNHCR concluded, persecution derives "from the relations between the State and its nationals".<sup>18</sup> Even considering that persecution performed by non-State agents has been increasingly accepted under the Refugee Convention, proof that the State was unwilling or unable to provide protection is still necessary in these cases<sup>19</sup> – that is, a causal link is still required between the harm suffered and some sort of human conduct, specifically a lack of protection by the State.

<sup>14</sup> HONG, "Refugees of the 21st Century: Environmental Injustice", *Cornell Journal of Law and Public Policy*, 2001, p. 323 ff., p. 339.

<sup>15</sup> UNHCR, *La Protection internationale des réfugiés: Interprétation de l'Art. 1 de la Convention relative au Statut des Réfugiés*, 2001, para. 17; UNHCR, *Advisory Opinion by UNHCR on the Interpretation of the Refugee Definition*, 2004, para. 8.

<sup>16</sup> For analyses evincing the application of the human rights approach in domestic courts, see: VANHEULE, "A Comparison of the Judicial Interpretations of the Notion of Refugee", in CARLIER and VANHEULE (eds.), *Europe and Refugees: A Challenge?*, Den Haag, 1997, p. 91 ff., p. 99. See also FOSTER, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, New York, 2007, pp. 28-31.

<sup>17</sup> FOSTER, *cit. supra* note 16, p. 31.

<sup>18</sup> VERNANT, *The Refugee in the Postwar World*, New Haven, 1953, pp. 4-5.

<sup>19</sup> Supreme Court (Canada), *Ward v Canada*, Judgement of 30 June 1993, pp. 711-712, available at: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do>>; House of Lords (United Kingdom), *Horvath v Secretary of State for the Home Department*, Judgement of 6 July 2000, available at: <<http://www.refworld.org/docid/3ae6b6e04.html>>; High Court (Australia), *Minister for Immigration and Multicultural Affairs v Khawar*, Judgement of 11 April 2002, S128/2001, paras. 114-115, available at: <[http://www.refworld.org/cases,AUS\\_HC,3deb326b8.html](http://www.refworld.org/cases,AUS_HC,3deb326b8.html)>; Refugee Status Appeals Authority (New Zealand), *Refugee Appeal No. 71427/99*, 71427/99, Judgement of 16 August 2000, paras. 60-61, available at: <[http://www.refworld.org/cases,NZL\\_RSAA,3ae6b7400.html](http://www.refworld.org/cases,NZL_RSAA,3ae6b7400.html)>.

Although natural disasters and degradation often bring about harsh living conditions that could well reach the level of harm necessary for persecution, they do not necessarily imply violations of human rights. In these situations, there is no act or omission evincing a lack of State protection. Persons who are forced to move in the face of an environmental disaster can generally rely on the help and support of their State, even if such support is limited.<sup>20</sup> In this sense, environmental degradation does not constitute persecution *per se*,<sup>21</sup> although nothing prevents it from being used as an *instrument* for persecution by either States or private actors.<sup>22</sup> Nevertheless, it may be difficult to establish this link between the violation and the State<sup>23</sup> and, even if persecution is proven in a given situation, the second criterion of the refugee definition must also be satisfied for an asylum claim to succeed.

Indeed, the element requiring that persecution be perpetrated by reasons of one of the Refugee Convention's grounds is not fulfilled either in most cases concerning "environmental refugees". Natural disasters make no distinction between nationalities, religions, political opinions, or races, rendering these grounds manifestly inapplicable. At first glance, the ground that seems to best support a status of environmental refugees is that of membership of a particular social group; however, the interpretations of what constitutes such a group reject this possibility as well.

State practice evinces two main approaches for defining a particular social group.<sup>24</sup> The first one is the protected characteristics approach. According to it, a particular social group is one whose members are linked by either an immutable trait, a past status that has become immutable due to its historical permanence, or a char-

<sup>20</sup> JUBILUT and APOLINÁRIO, "A Necessidade de Proteção Internacional no Âmbito da Migração", *Revista Direito GV*, 2010, p. 275 ff., p. 288.

<sup>21</sup> VERNANT, *cit. supra* note 18, p. 5.

<sup>22</sup> RAMOS, *Refugiados Ambientais: Em Busca de Reconhecimento pelo Direito Internacional*, São Paulo, 2011, p. 105. In this sense, some authors have explored cases of man-made environmental harm and the possibility of qualifying them as persecution. See: HONG, *cit. supra* note 14, pp. 332-338; COOPER, "Environmental Refugees: Meeting the Requirements of the Refugee Definition", *New York University Environmental Law Journal*, 1998, p. 480 ff., pp. 519-521.

<sup>23</sup> MOBERG, "Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection", *Iowa Law Review*, 2009, p. 1107 ff., p. 1121.

<sup>24</sup> UNHCR, *Principes directeurs sur la protection internationale: L'appartenance à un certain groupe social dans le cadre de l' Art. 1A(2) de la Convention de 1951 et/ou son Protocole de 1967 relatifs au Statut des réfugiés*, HCR/GIP/02/02 Rev.1, 2008, paras. 6-7.

acteristic or association that is so fundamental to their identity that the members cannot be required to change it.<sup>25</sup> In turn, the social perception approach defines particular social groups as those whose members, due to a shared characteristic or element, are perceived as separate from society in general.<sup>26</sup>

Since environmental harm is not an immutable characteristic or one inherent to human dignity, the very formulation of the protected characteristics approach excludes environmental factors as the basis of a particular social group. Although it could be argued that persons affected by natural disasters or degradation are seen as separate from society and thus qualify as a group under the social perception approach, this contention cannot be accepted due to one important rule applicable to both approaches: the circumstance linking the members of the group cannot be the fear of persecution itself.<sup>27</sup> Although persecution is helpful to identify a particular social group, the latter must exist as such even when persecution is absent. As explained by McHugh J from the High Court of Australia:

“[...] while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a

<sup>25</sup> *Ward v Canada*, *cit. supra* note 19, p. 739; Board of Immigration Appeals (United States), Matter of Acosta, Judgement of 1 March 1985, available at: <[http://www.refworld.org/cases,USA\\_BIA,3ae6b6b910.html](http://www.refworld.org/cases,USA_BIA,3ae6b6b910.html)>; Immigration and Protection Tribunal (New Zealand), AC (Egypt), Judgement of 25 November 2011, 800015, para. 101, available at: <[http://www.refworld.org/cases,NZ\\_IPT,4f424a232.html](http://www.refworld.org/cases,NZ_IPT,4f424a232.html)>; Transvaal Provincial Division (South Africa), *Jian-Qiang Fang v. Refugee Appeal Board et al*, Judgment of 15 November 2006, Case No. 40771/05, available at: <[http://www.refugeerights.uct.ac.za/usr/refugee/Case\\_Law\\_Reader/Fang\\_v\\_RAB.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Case_Law_Reader/Fang_v_RAB.pdf)>; House Lords (United Kingdom), *Islam v. Secretary of State for the Home Department/Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, Judgement of 25 March 1999, available at: <<http://www.refworld.org/docid/3dec8abe4.html>>; Board of Immigration Appeals (United States), *In Re C-A-*, Judgement of 15 June 2006, available at: <[http://www.refworld.org/cases,USA\\_BIA,46979ea02.html](http://www.refworld.org/cases,USA_BIA,46979ea02.html)>.

<sup>26</sup> High Court (Australia), *A v Minister for Immigration & Ethnic Affairs*, Judgment of 24 February 1997, available at: <[http://www.refworld.org/cases,AUS\\_HC,3ae6b7180.html](http://www.refworld.org/cases,AUS_HC,3ae6b7180.html)>; Conseil d'État (France), *Ourbih*, Judgement of 23 June 1997, 171858, available at: <<http://www.refworld.org/docid/3ae6b67c14.html>>.

<sup>27</sup> AC (Egypt), *cit. supra* note 25, para. 101; *Islam v. Secretary of State for the Home Department*, *cit. supra* note 25; *A v Minister for Immigration & Ethnic Affairs*, *cit. supra* note 26; Court of Appeals for the Third Circuit (United States), *Bernard Lukwago v. John Ashcroft*, Judgment of 14 May 2003, p. 173, available at: <<http://www.uio.no/studier/emner/jus/jus/JUR5530/v07/undervisningsmateriale/Lukwago.pdf>>.

particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group”.<sup>28</sup>

Following this rationale, even if an environmental factor is argued to constitute persecution, the social group to which this persecution refers cannot be construed as “the people affected by the environmental disaster/degradation” or, as suggested by Jessica Cooper, “persons who lack the political power to protect their own environment”.<sup>29</sup> Another trait common to these people has to be proven as well as the fact that the persecution is feared *because* of this trait. Since naturally occurring degradation and disasters are, as mentioned, indiscriminate, the second element of the refugee definition cannot be met on this basis.

Given the absence of both elements of the refugee definition, people affected by harmful events related to the environment do not enjoy refugee status for the sole reason of having suffered this harm. As expressed by the New Zealand Immigration and Protection Tribunal, these people still have to independently meet the criteria set out in Article 1(A)(2) of the Refugee Convention.<sup>30</sup> Accordingly, one could qualify as a refugee if environmental degradation were used as a means of persecution linked to one of the Convention’s grounds, or if, after a natural disaster, the State deliberately committed – by either an act or omission – human rights abuses against the people affected so as to amount to persecution due to such grounds.<sup>31</sup> For instance, a New Zealand tribunal once concluded that people aiding in humanitarian relief work in the aftermath of the Cyclone Nargis in Burma were viewed by the State as holding a political opinion against the regime and that the arrest of these people amounted to persecution, thus qualifying them for refugee status.<sup>32</sup>

In light of these considerations, migration due to environmental conditions has never been recognized as a possible basis for refugee status under the Convention. In New Zealand, several judicial decisions have reiterated this understanding and

<sup>28</sup> *A v Minister for Immigration & Ethnic Affairs*, *cit. supra* note 26.

<sup>29</sup> COOPER, *cit. supra* note 22, p. 522.

<sup>30</sup> Immigration and Protection Tribunal (New Zealand), AF (Kiribati), Judgement of 25 June 2013, para. 65, available at: <<http://www.nzlii.org/nz/cases/NZIPT/2013/800413.html>>.

<sup>31</sup> This last possibility was expressly mentioned by the UNHCR: United Nations High Commissioner for Refugees, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 2008, p. 7.

<sup>32</sup> Refugee Status Appeals Authority (New Zealand), Refugee Appeal No 76374, Judgement of 28 October 2009, paras. 40-45, available at: <[http://www.refworld.org/cases,NZL\\_RSAA,4afc31da2.html](http://www.refworld.org/cases,NZL_RSAA,4afc31da2.html)>.

denied refugee status to people fleeing the environmental degradation resulting from rising ocean levels in Kiribati<sup>33</sup> and Tuvalu<sup>34</sup> and from impacts of the 2004 tsunami in Sri Lanka.<sup>35</sup> Australian authorities have also reached this conclusion regarding applicants from Kiribati,<sup>36</sup> Tuvalu,<sup>37</sup> and Tonga.<sup>38</sup> In one decision, the High Court of Australia even stated that “[n]o matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention”,<sup>39</sup> a formula repeated by the United Kingdom’s House of Lords.<sup>40</sup> The

<sup>33</sup> AF (Kiribati), *cit. supra* note 33, paras. 56, 72-75; High Court (New Zealand), *Ioane Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment*, Judgment of 26 November 2013, CIV-2013-404-3528, paras. 10-11, 54-55, available at: <<https://forms.justice.govt.nz/search/Documents/pdf/jdo/56/alfresco/service/api/node/content/workspace/SpacesStore/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0.pdf>>; Court of Appeal (New Zealand), *Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment*, Judgment of 8 May 2014, CA50/2014, paras. 21-25, available at: <<http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZCA/2014/173.html>>.

<sup>34</sup> Refugee Status Appeals Authority (New Zealand), Refugee Appeal No 72189/2000, 72190/2000, 72191/2000, 72192/2000, 72193/2000, 72194/2000, 72195/200013-15, Judgment of 17 August 2000, paras. 13-15, available at: <[http://www.refworld.org/cases,NZL\\_RSAA,4d08cf7f2.html](http://www.refworld.org/cases,NZL_RSAA,4d08cf7f2.html)>; Refugee Status Appeals Authority (New Zealand), Refugee Appeal No. 72314/2000, Judgment of 19 October 2000, paras. 13-14, available at: <[https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20001019\\_72314.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20001019_72314.pdf)>; Refugee Status Appeals Authority (New Zealand), Refugee Appeal No. 72315/2000, Judgment of 19 October 2000, paras. 13-14, available at: <[https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20001019\\_72315.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20001019_72315.pdf)>; Immigration and Protection Tribunal (New Zealand), AC (Tuvalu), Judgment of 4 June 2014, paras. 45-46, available at: <[https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20140604\\_800517.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20140604_800517.pdf)>; Immigration and Protection Tribunal (New Zealand), AF (Tuvalu), Judgment of 20 October 2015, paras. 68-71, available at: <[https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20151020\\_800859.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20151020_800859.pdf)>.

<sup>35</sup> Refugee Status Appeals Authority (New Zealand), Refugee Appeal No 75766, Judgment of 3 March 2006, paras. 27-29, available at: <[https://forms.justice.govt.nz/search/Documents/IPTV2/RefugeeProtection/ref\\_20060303\\_75766.pdf](https://forms.justice.govt.nz/search/Documents/IPTV2/RefugeeProtection/ref_20060303_75766.pdf)>.

<sup>36</sup> Refugee Review Tribunal (Australia), 0907346, Judgment of 10 December 2009, paras. 51-55, available at: <<http://www.austlii.edu.au/au/cases/cth/RRTA/2009/1168.html>>.

<sup>37</sup> Refugee Review Tribunal (Australia), N99/30231, Judgment of 10 January 2000, available at: <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/RRTA/2000/17>>.

<sup>38</sup> Refugee Review Tribunal (Australia), 1004726, Judgment of 30 September 2010, paras. 45-48, available at: <<http://www.austlii.edu.au/au/cases/cth/RRTA/2010/845.html>>.

<sup>39</sup> *A v. Minister for Immigration & Ethnic Affairs*, *cit. supra* note 26.

<sup>40</sup> House of Lords (United Kingdom), *Secretary of State for the Home Department v. AH (Sudan) and others*, Judgment of 14 November 2007, para. 33, available at: <<http://www.bailii.org/uk/cases/UKHL/2007/49.html>>.

Court of Appeals of the Sixth Circuit in the United States also dismissed an applicant's fear of environmental problems by expressing that they were not relevant to the fear of future persecution.<sup>41</sup> In Brazil, refugee authorities issued an official position holding that natural disasters were not a basis for refugee status after multiple applications were lodged by Haitian migrants who had left their country after the 2010 earthquake.<sup>42</sup>

Therefore, neither the current framework of the Refugee Convention nor its interpretation and application by States recognize protection to people who left their countries of origin exclusively due to environmental factors. Even if one could prove that human rights abuses were committed against one of the protected groups under the Convention in link with some natural harm, strictly speaking, the people affected would still be traditional political refugees, since the environmental event would not be the determinative cause of this status.

### *3. – Proposals to Include Environmental Factors in the Refugee Definition*

Notwithstanding the legal inaccuracy of the term, mentions of “environmental refugees” continue to be employed as a means to draw attention to the precarious situation of people who are displaced due to environmental degradation and disasters. The latter often deal with extreme poverty conditions, lack of drinking water, and insufficient health care, but do not benefit from any special status under International Law. A number of proposals seek to address this problem through the creation of international instruments establishing such a status, including an expansion of the refugee definition under the Refugee Convention.

One of the most complete proposals in this regard was presented by the Maldives in 2006.<sup>43</sup> The project focused on the creation of a protocol to the Refugee Convention introducing environmental factors, both disasters and deterioration, as causes of persecution, regardless of human interference. It is important to note, however, that

<sup>41</sup> Court of Appeals, Sixth Circuit (United States), *Koliada v. I.N.S.*, Judgement of 1 August 2001, available at: <<https://www.ravellaw.com/opinions/09133a1c1b3aaace817246327a6ac6e4>>.

<sup>42</sup> Comitê Nacional para os Refugiados, Ofício nº 042/CONARE/2012, available at: <<http://www.conectas.org/arquivos-site/multimedia/PDF/65.pdf>>.

<sup>43</sup> Republic of Maldives (Ministry of Environment, Energy and Water), First Meeting on Protocol on Environmental Refugees: recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol relating to the Status of Refugees, Male, 14-15 August 2006, as cited by RAMOS, *cit. supra* note 22, pp. 113-116.



the proposal did not seek to alter the level of harm required for a given situation to amount to persecution. As such, not every natural hazard would entitle a person to refugee status, only those that generate grave impacts. In this sense, the Maldives' proposal provides some examples of what would constitute persecution under the expanded definition, including the fear of destruction, damages or loss of one's life as a result of severe environmental hazards or the fear deriving from decisions of States, private entities, or both, responsible for the displacement.<sup>44</sup> Lastly, the proposed protocol also provided for an extension of the Refugee Convention's protection to persons internally displaced by these factors.

Less specific proposals of creating a category of environmental refugees have been advanced by other States as well. Particularly, the Belgium Senate adopted a resolution in 2006 requesting the government to promote and support within the United Nations the recognition of the status of environmental refugees under the Refugee Convention,<sup>45</sup> which was reiterated in a resolution of the Chamber of Representatives in 2008.<sup>46</sup> In 2009, the Bangladeshi finance minister also called for a revision of the Refugee Convention so as to encompass people displaced by climate change.<sup>47</sup>

Among scholars, some support this expansion by suggesting that the Refugee Convention's regime is outdated in view of the emergence of new causes for displacement and of new groups in need of international protection.<sup>48</sup> The argument is that, just as there was no justification for persons in similar situations of persecution outside of Europe and after the Second World War to be excluded from the original refugee protection, resulting in the removal of these restrictions through the

<sup>44</sup> *Ibid.*, p. 116.

<sup>45</sup> Sénat de Belgique, Proposition de résolution visant à la reconnaissance dans les conventions internationales du statut de réfugié environnemental (Déposée par M. Philippe Mahoux), 3-1556/1 - 2005/2006, p. 5.

<sup>46</sup> Chambre des représentants de Belgique, Proposition de résolution relative à la prise en considération et à la création d'un statut de réfugié environnemental par les Nations-Unies et l'Union européenne (déposée par M. Jean Cornil et consorts), Doc 52 1451/001, 2008, p. 11.

<sup>47</sup> GRANT, RANDERSON, and VIDAL, "UK Should Open Borders to Climate Refugees, says Bangladeshi minister", *The Guardian*, 4 December 2009, available at: <<https://www.theguardian.com/environment/2009/nov/30/rich-west-climate-change>>.

<sup>48</sup> HAVARD, "Seeking Protection: Recognition of Environmentally Displaced Persons under International Human Rights Law", *Villanova Environmental Law Journal*, 2007, p. 65 ff., pp. 78-79; CONISBEE and SIMMS, *Environmental Refugees: The Case for Recognition*, London, 2003, pp. 32-33; BOON and TRA, "Are Environmental Refugees Refused?", *Stud. Tribes Tribals*, 2007, p. 85 ff., p. 92. HONG, *cit. supra* note 14, pp. 340-343.

1967 Protocol, nothing justifies the contemporary exclusion of environmental refugees, seeing as the harm they face may well reach the same level as that suffered by a traditional refugee.<sup>49</sup>

Furthermore, it is argued that governments in the context of environmental harm often have no resources or political will to protect the population, or are directly responsible for the harm, evincing a need of international protection to environmentally displaced persons.<sup>50</sup> A new protocol would thus be called for, formalizing environmental factors as persecution and persons affected by these factors as a ground for persecution. Hong notes, however, that, in order not to overburden the international community, the expansion of refugee status would have to be accompanied by specific requirements for environmental refugees, “such as the occurrence of certain threshold levels of environmental destruction in the country of origin, and the existence of specific circumstances rendering the applicants unable to avail themselves of their government's protection within a designated period of time”.<sup>51</sup>

#### 4. – *Is the Extension of the Refugee Convention the Best Solution?*

The Refugee Convention contains one of the most overarching regimes for the protection of individuals in International Law. It guarantees in several instances that the treatment of refugees may not be less favourable to the one accorded to aliens in general<sup>52</sup> or even to nationals of the receiving State<sup>53</sup> as well as provides refugees with the issuance of identity papers, travel documents, and other sorts of administrative assistance. Moreover, it establishes the principle of *non-refoulement*,<sup>54</sup> arguably the most important guarantee of the Convention, under which a refugee cannot – save

<sup>49</sup> CONISBEE and SIMMS, *cit. supra* note 48, pp. 30-33; HONG, *cit. supra* note 14, pp. 340-341.

<sup>50</sup> CONISBEE and SIMMS, *cit. supra* note 48, p. 33; HONG, *cit. supra* note 14, p. 339.

<sup>51</sup> HONG, *cit. supra* note 14, p. 340.

<sup>52</sup> This right finds a general formulation in Art. 7(1) of the Refugee Convention and is specified in relation to: rights pertaining to contracts on movable and immovable property (Art. 13); the right of association (Art. 15); the right to engage in wage-earning employment (Art. 17), to self-employment (Art. 18), and to engage in liberal professions (Art. 19); the right to housing (Art. 21); education other than elementary education (Art. 22(2)) and; freedom of movement (Art. 26).

<sup>53</sup> This is provided in relation to: the right to religion (Art. 4); the protection of artistic rights and industrial property (Article 14); access to courts (Art. 16(2)); distribution of products in a rationing system (Art. 20); elementary education (Art. 22(1)); public relief and assistance (Art. 23); labour legislation and social security (Art. 24) and; fiscal charges (Art. 29).

<sup>54</sup> Convention relating to the Status of Refugees, *cit. supra* note 9, Art. 33.

for strict exceptions laid down in the Refugee Convention itself – be returned to a State where they will be subjected to persecution.

In light of all of these benefits, it is understandable why some would seek to extend this status to as many groups in need of international protection as possible. Nevertheless, the fact that the Refugee Convention provides a nearly comprehensive system of protection does not necessarily mean that this system will be appropriate to every situation or even that it will work efficiently if extended.

Particularly, the potential extension of refugee status to environmentally displaced persons poses some serious problems that would render their protection under the Refugee Convention largely inefficient and risk undermining the refugee protection system as a whole. This is mainly due to the overburden this inclusion would cause to host States and the UNHCR, the difficulties in establishing a causal link between the harm suffered and cases of slow-onset degradation, and the fact that persons who are internally displaced by environmental factors would not benefit from the protection. Each of these factors will be analysed ahead.

#### *4.1. – Overburdening Host States and the UNHCR*

One frequently noted feature of the Refugee Convention is its individualistic approach to the definition of refugee,<sup>55</sup> meaning that the criteria of this definition were designed for individual procedures of refugee status determination, and not collective evaluations. It is true, though, that this does not prevent the Convention from being applied to large groups, for instance, when there is a mass influx of asylum-seekers. In these cases, the UNHCR recommends that States apply the notion of *prima facie* refugees<sup>56</sup> – that is, granting refugee status to all people in similar situations relating to objective circumstances in the country of origin, so that any potential individual procedures will either confirm this status or exclude specific persons from it. Once refugee status is granted through this approach, the affected individuals are entitled to the rights provided in the applicable refugee law norms.<sup>57</sup>

<sup>55</sup> CARLIER, “Droit d’asile et des réfugiés: de la protection aux droits”, Recueil des cours de l’Académie de la Haie, 2007, p. 9 ff., pp. 189-190; MAYER, “Pour en finir avec la notion de «réfugiés environnementaux»: critique d’une approche individualiste et universaliste des déplacements causés par des changements environnementaux”, Revue internationale de droit et politique du développement durable de McGill, 2011, p. 33 ff., pp. 54-55.

<sup>56</sup> UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/11, 2015.

<sup>57</sup> *Ibid.*, para. 7.

Were a category of environmental refugees created, *prima facie* refugee status would play an important role in enabling their protection, since people displaced by environmental factors – especially environmental disasters – usually migrate in large groups. Nevertheless, the notion of *prima facie* refugees has shown to be insufficient to guarantee the full protection to large groups of asylum-seekers even today, when there has been no expansion of the Refugee Convention yet.

Despite its endorsement by the UNHCR, the granting of *prima facie* refugee status is not unanimous among the Refugee Convention's States-Parties. As noted by the High Commissioner, its main application occurs in States in Latin America, South Asia, and Africa (although, in the latter case, generally within the framework of the Convention of the African Union, which contains specific provisions for collective assessment of refugee status).<sup>58</sup> For States that do not apply this method of refugee status determination or an equivalent one, asylum-seekers who arrive in a mass influx have to wait lengthy periods for the traditional individual assessment procedures, during which they face uncertainty regarding their status and cannot rely on the substantive protection of the Refugee Convention.

Moreover, even in States that do apply the *prima facie* refugee status method or a similar form of protection – such as temporary protection, in the European Union –, the burden of dealing with mass influxes is often so great that States do not have the resources to guarantee the full immediate protection of the Convention.<sup>59</sup> With the current “refugee crisis”, mainly related to the ongoing armed conflicts in the Middle East, this problem has become more evident. Only in Europe, a number of 1,255,600 first-time asylum-seekers arrived in 2015<sup>60</sup> and another 1,204,300 in 2016.<sup>61</sup> In turn, a study published in 2017 by the Organisation for Economic Cooperation and Development has estimated the cost of processing and accommodating asylum-seekers during their

<sup>58</sup> UNHCR, Protection des réfugiés lors d'afflux massifs: cadre général de la protection, EC/GC/01/4, 2001, para. 7.

<sup>59</sup> *Ibid.*, para. 8.

<sup>60</sup> Eurostat, “Record number of over 1.2 million first time asylum seekers registered in 2015”, 4 March 2016, available at: <<http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6>>.

<sup>61</sup> Eurostat, “1.2 million first time asylum seekers registered in 2016”, 16 March 2017, p. 1 ff., pp. 1-2, available at: <<http://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1>>.

first year in the host country around €10,000 *per application*.<sup>62</sup> In Germany, this amounted to a total of €16 billion (0,5% of its GDP) spent with refugees in 2015, whereas Sweden spent €6 billion (1,35% of its GDP) in the same year.<sup>63</sup> In 2016, it is reported that German expenditures with refugees increased to €20 billion.<sup>64</sup>

This strain on States' resources and difficulties in providing their efficient allocation have resulted in situations of refugees living in conditions well below the standard of protection of the Refugee Convention in host States,<sup>65</sup> some of which have even been recognized by the European Court of Human Rights.<sup>66</sup> Outside of Europe, there have also been reports about the poor conditions in which refugees are received,<sup>67</sup> showing that this is not merely a local problem.

The growing number of refugees and the protracted character of their situation<sup>68</sup> has compromised not only the capacity but also the political will of States, causing the latter to harden refugee policies. In the past years, States have increasingly resorted to push-back policies, extraterritorial immigration control, and agreements with other States in order to prevent potential asylum-seekers from entering their

<sup>62</sup> Organisation for Economic Cooperation and Development, "Who Bears the Cost of Integrating Refugees?", Migration Policy Debates, 2017, available at: <<https://www.oecd.org/els/mig/migration-policy-debates-13.pdf>>.

<sup>63</sup> *Ibid.*, p. 2.

<sup>64</sup> DEARDEN, "Germany 'Spent More than €20bn on Refugees in 2016' as crisis outstrips state budgets", The Independent, 10 March 2017, available at: <<http://www.independent.co.uk/news/world/europe/germany-refugees-spend-20-billion-euros-2016-angela-merkel-crisis-budgets-middle-east-north-africa-a7623466.html>>.

<sup>65</sup> TOPPING, "Calais Refugee Camp Conditions Diabolical, Says Report", The Guardian, 2 October 2015, available at: <<https://www.theguardian.com/world/2015/oct/02/calais-refugee-camp-conditions-diabolical-report-jungle-bacteria-hygiene>>; PATERSON, "Refugee Crisis: Thousands Are Living in Cramped Conditions in a Former German Airport waiting to Be Granted Asylum", The Independent, 24 March 2016, available at: <<http://www.independent.co.uk/news/world/europe/refugee-crisis-thousands-are-living-in-cramped-conditions-in-a-former-german-airport-waiting-to-be-a6950896.html>>.

<sup>66</sup> See, for instance, *Tarakhel v. Switzerland*, Application No. 29217/12, Judgement of 4 November 2014, about the conditions of reception centers in Italy, and *M.S.S. v. Greece and Belgium*, Application No. 30696/09, Judgement of 21 January 2011, about living conditions of asylum-seekers in Greece.

<sup>67</sup> Human Rights Watch, "Australia: Appalling Abuse, Neglect of Refugees on Nauru", 2 August 2016, available at: <<https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>>; PRANDI, "Eritrean refugees in Ethiopia", Aljazeera, 10 March 2016, available at: <<http://www.aljazeera.com/indepth/inpictures/2016/03/eritrean-refugees-ethiopia-160306065928790.html>>.

<sup>68</sup> UNHCR, World at War: UNHCR Global Trends Forced Displacement in 2014, 2015, p. 8, available at: <<http://www.unhcr.org/556725e69.pdf>>.

territories and thus triggering the application of the Refugee Convention and other human rights instruments.<sup>69</sup>

In this scenario, it is clear that the international community already has trouble guaranteeing protection to refugees as it is. It would therefore be highly unlikely that States would agree to undertake new obligations through an expansion of the Refugee Convention.<sup>70</sup> The fact that the damage caused by environmental disasters may take a long time to be reversed and that environmental degradation is often irreversible contributes to this unwillingness, as it would create more protracted refugee situations and increase the host States' burden to comply with the Convention's obligations.

Moreover, even if the creation of a category of environmental refugees were successful, the problem is a matter of efficiency: environmental refugees would be subjected to the same problems traditional refugees currently face, as described, and there would be no guarantee that the protection associated with this new status would be effectively ensured. The weight of this problem is highlighted when we consider that concerns about overburdening States, and, above all, the UNHCR with an expansion of refugee status have been expressed well before today's "refugee crisis".<sup>71</sup>

Another issue with the expansion of refugee status is the concern espoused by the UNHCR that, "in the current political environment, [the inclusion of environmental refugees] could result in a lowering of protection standards for refugees and even undermine the international refugee protection regime altogether".<sup>72</sup> As Kara Moberg developed in 2009, the sudden increase in the number of asylum-seekers derived from the inclusion of a status of environmental refugees would result in the creation by States of obstacles to accessing refugee programs overall,<sup>73</sup> including arbitrary

<sup>69</sup> For an assessment of the responsibility of States regarding such policies, see GAMMELTOFT-HANSEN and HATHAWAY, "Non-Refoulement in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law*, 2015, p. 235 ff., pp. 235-284.

<sup>70</sup> BIERMANN and BOAS, "Protecting Climate Refugees: The Case for a Global Protocol", *Environment*, 2008, p. 8 ff., p. 11; MCADAM, "Swimming against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer", *International Journal of Refugee Law*, 2011, p. 2 ff., pp. 16-17. As argued by McAdam, "Given the legal obligations that states already have towards Convention refugees, and the fact that some 10 million refugees today, not to mention other displaced people numbering some 43.3 million in total, have no durable solution in sight, why would states be willing to commit to, and realize protection for, people displaced by climate change?".

<sup>71</sup> BIERMANN and BOAS, *cit. supra* note 70, p. 11.

<sup>72</sup> Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective, *cit. supra* note 31, p. 9.

<sup>73</sup> MOBERG, *cit. supra* note 23, p. 1128.

barriers to the concession of refugee status,<sup>74</sup> long delays for assessing asylum applications, and more refugee camps.<sup>75</sup> All of which, as described, happened with the surge in numbers of asylum-seekers in recent years.

The current refugee situation demonstrates not only a certain precariousness in the Refugee Convention's system, but also that the UNHCR's fears in allowing more people to qualify for refugee status were justified. Expanding the definition of "refugee" means nothing if in practice it does not provide the beneficiaries with a higher level of international protection or harms the protection of already established refugee categories. Accordingly, until there are durable solutions in place, proposals of according refugee status to environmentally displaced persons remain highly theoretical.

#### *4.2. – The Causal Link between the Fear of Persecution and Slow-Onset Degradation*

According to Article 1(A)(2) of the Refugee Convention, a refugee must be unable or unwilling to avail themselves of the protection of their country of nationality owing to a fear of persecution. Under such phrasing, it seems clear that there must be a causal link between the fear of persecution and the alleged lack of protection in the home State. As such, although the existence of past persecution may strengthen one's claim,<sup>76</sup> the assessment of the fear of persecution concerns the possibility of future harm, of a risk that the refugee will suffer persecution if they are returned to their country.<sup>77</sup>

On the matter of how probable the risk of persecution should be, there is no uniform approach between States. Whereas some domestic decisions have required a very low standard of less than 50% chance of risk,<sup>78</sup> others have referred to a balance

<sup>74</sup> *Ibid.*, pp. 1129-1130.

<sup>75</sup> *Ibid.*

<sup>76</sup> High Court (Australia), *Minister for Immigration & Ethnic Affairs v. Guo Wei Rong*, Judgment of 13 June 1997, available at: <<http://www.austlii.edu.au/au/cases/cth/HCA/1997/22.html>>; Supreme Court (United States), *INS v. Cardoza-Fonseca*, Judgment of 9 March 1987, available at: <<https://supreme.justia.com/cases/federal/us/480/421/case.html>>.

<sup>77</sup> *CARLIER*, *cit. supra* note 55, para. 125.

<sup>78</sup> High Court (Australia), *Chan Yee Kin v. Minister for Immigration & Ethnic Affairs*, Judgment of 9 December 1989, para. 12, available at: <<http://www.austlii.edu.au/au/cases/cth/HCA/1989/62.html>>.

of probabilities test (whether it is more likely than not that there exists a risk of persecution),<sup>79</sup> or even to the need of a real risk.<sup>80</sup>

The question of which standard of risk is used will be an important factor when dealing with slow-onset environmental degradation, for, even if the latter and its resulting harm are included as persecution, the associated risk may not be so evident as the cause of displacement. The effects of environmental degradation may take a long time to manifest and be confused with other socioeconomic problems, such as poverty, overcrowding, and lack of proper housing, which do not necessarily amount to persecution under the Refugee Convention. As noted by professors such as Jane McAdam and Benoît Mayer, socioeconomic conditions often contribute to environmental degradation and vice-versa, so that it is difficult to point one or the other as the decisive factor for the need of protection.<sup>81</sup> Even in States that adopt a more lenient approach on the risk of persecution, one would have to verify with a minimum degree of certainty that the environmental factor is responsible for the harm and not simply, for instance, poor State planning on infrastructure.

Moreover, even if it can be shown that harm caused by slow-onset degradation is taking place, the asylum-seeker must demonstrate that it is the degradation, and not other more general socioeconomic problems, that produces the level of harm grave enough to be qualified as persecution. Given the overlap between these two conditions, authorities may well conclude that it is not clear that the significant harm derives from the environmental factor, but rather from a lack of infrastructure in the country, and that the degradation alone does not sufficiently aggravate the socioeconomic conditions so as to amount to persecution.

Although this problem may seem easier to circumvent, given that, as mentioned, some States are more flexible when assessing the risk of persecution, one must bear in mind the political unwillingness of States that derives from an increase in the number of asylum-seekers, described in the last section, and which may result in stricter standards for assessing refugee status. Therefore, especially when coupled

<sup>79</sup> Supreme Court (Canada), *Kwiatkowsky v. Minister of Employment and Immigration*, Judgment of 21 December 1982, p. 864, available at: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/5532/1/document.do>>.

<sup>80</sup> Supreme Court (United Kingdom), *HJ (Iran) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) and one other action*, Judgment of 7 July 2010, para. 89, available at: <[http://www.refworld.org/cases,UK\\_SC,4c3456752.html](http://www.refworld.org/cases,UK_SC,4c3456752.html)>.

<sup>81</sup> MCADAM, *cit. supra* note 70, p. 13; MAYER, “The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework”, *Colorado Journal of International Environmental Law and Policy*, 2011, p. 357 ff., p. 366.



with the previous considerations on the expansion of refugee status, the recognition of environmental factors as causes of persecution may not ensure effective protection in cases of slow-onset degradation.

#### 4.3. – *The Impossibility of Including Internally Displaced Persons under the Protection of the Refugee Convention*

When addressing the plight of environmentally displaced persons, greater attention is usually given to those who move across borders to seek protection. Nevertheless, a 2009 study published by the International Organisation for Migration indicated that, in most situations of both natural disasters and slow-onset degradation, displacement usually occurs *within* the State's borders, not internationally.<sup>82</sup> This is true even in States constantly impacted by environmental factors. Particularly, the study found that in Bangladesh, where a myriad of environment-related hazards occur every year – including floods, cyclones, droughts, tidal waves, and others<sup>83</sup> –, the affected individuals tend to move to areas close to their previous residence.<sup>84</sup>

Accordingly, even if environmental factors are included as a cause of persecution and the persons affected by them as an individual category of refugees, Article 1(A)(2) of the Refugee Convention still requires the person to be outside their State of nationality in order to qualify as a refugee. Although some States, such as Canada, with its Refugee Abroad Class,<sup>85</sup> have established overseas programs in order to facilitate access to asylum to persons who could not yet leave their country of origin, this is merely an *ex gratia* act. States-Parties are not under the obligation to establish similar programs and most of them indeed do not. Thus, the recognition of environmental refugees would still exclude the vast majority of those adversely affected by environmental factors.

It could be argued that this issue would be solved by the removal of the cross-border condition in relation to environmental refugees, as expressed in the Maldives'

<sup>82</sup> LACZKO and AGHAZARM, *Migration, Environment, and Climate Change: assessing the evidence*, Geneva, 2009, pp. 23, 74.

<sup>83</sup> Bangladesh Bureau of Statistics, *Bangladesh Disaster-related Statistics 2015: Climate change and natural disaster perspectives*, Dhaka, 2016, p. 3.

<sup>84</sup> LACZKO and AGHAZARM, *cit. supra* note 82, p. 74.

<sup>85</sup> Asylum-seekers outside of Canada who meet the conditions on Art. 1(A)(2) of the Refugee Convention and who have “no reasonable prospect, within a reasonable period, of another durable solution” may apply for the Convention Refugee Abroad Class under the Immigration and Refugee Protection Regulations, SOR/2002-227, Sections 139, 144-145, available at: <<http://laws-lois.justice.gc.ca/PDF/SOR-2002-227.pdf>>.

proposal. However, the problem then becomes one of effectiveness.

Even though the Refugee Convention does not contain a specific provision limiting its application to the territory or jurisdiction of States-Parties – unlike other human rights instruments<sup>86</sup> –, the entire framework of the Convention is based on the assumption that the refugee is in the host State's territory. After all, in order to ensure that the refugee is granted a favourable treatment in regards to employment, education, housing, social security, and any other rights under the Convention, the State must be able to at least control how authorities enforce these guarantees, if not the very laws on the matter. If the people in need of protection still find themselves in the territory of their State of nationality, how could other States enforce the Refugee Convention? Even the principle of *non-refoulement*, one of the most important guarantees of the Convention, would be rendered useless if the refugee is on the same territory as the feared persecution.

As long as the person remains in their State of nationality, only the latter has the power to apply the Refugee Convention. However, requiring the home State to do so would be illogical, as this State already has a duty to protect its nationals under international human rights law, international humanitarian law,<sup>87</sup> and, in most cases, under its own domestic legislation. Furthermore, applying the Refugee Convention in this situation would actually result in a lower standard of protection, since, as mentioned, several of its provisions establish that the refugee shall be given a treatment as favourable as the one accorded to aliens in general – which, it is safe to say, will not be as favourable as the treatment accorded to nationals.

In fact, the hardships faced by persons internally displaced by environmental factors do not derive from the absence of international norms granting them protection – since this is already done by various human rights treaties –, but rather by a lack of structure, resources, or even political will to apply these norms. Accordingly, an effective mechanism of protection should involve more of a technical and financial assistance to countries affected by environmental disasters and degradation.<sup>88</sup> Not only is this sort of assistance outside of the scope of the Refugee Convention, but

<sup>86</sup> To name a few, the International Covenant on Civil and Political Rights, American Convention on Human Rights, the European Convention of Human Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Racial Discrimination all limit their applicability to the State's territory and/or jurisdiction.

<sup>87</sup> UNHCR, "Internally Displaced People | On the Run in Their Own Land", 14 December 2016, available at: <<http://www.unhcr.org/ceu/80-enwho-we-helpinternally-displaced-people-html.html>>.

<sup>88</sup> MAYER, *cit. supra* note 81, p. 46.

adding such provisions and others for the inclusion of internally displaced environmental refugees would create so many exceptions and specific rules for this category that it would be easier to simply create an entire new instrument.

It could be argued, though, that internally displaced persons could be effectively recognized as refugees through programs such as Canada's Convention Refugee Abroad Class. Nevertheless, this method only provides a certainty that the refugee will receive protection *once* they arrive in the host State, not before that. If one cannot find a way to reach this State, the status is useless. Besides, it is not reasonable to suppose that States would have a duty to ensure all potential environmental refugees abroad the complete means to enter their territory. This would result in long delays for evaluating the claims of refugees abroad and considerable costs for funding the refugees' displacement, which States would be unable and unwilling to afford in the long term. In the end, it would bring about the same problems of overburdening host States as previously discussed, compromising the effectiveness of the refugee protection.

## 5. – *Conclusions*

The persistent use of the term “environmental refugees”, despite being grounded in good intentions, has not been helpful to attempts of increasing the international protection of environmentally displaced persons.

Firstly, because current interpretations of the Refugee Convention do not support the existence of such a category. As exposed, the criterion of persecution requires that serious human rights violations be committed by a State's action or omission, whereas the criterion of membership of one of the five protected categories does not include persons linked solely by the fact they were impacted by natural disasters or degradation. Accordingly, the expression “environmental refugees” has no legal basis and may be even misleading to both jurists and the very people advocates for this term seek to protect.

Secondly, because talks of “environmental refugees” as a means to raise awareness to their situation and to promote amendments to the Refugee Convention ignores the fact that the Convention, as well as other instruments for the protection of human rights, cannot be seen as dissociated from the concrete situations it aims to address. They must be construed in a way that gives their provisions the greatest possible practical effect. After all, subjecting these treaties to modifications that seem desirable in theory, but ineffective and inefficient in practice, would be incoherent in relation to their very object and purpose of protecting the human person.

Whereas, in theory, the more expansive the refugee definition is the better, there are several obstacles that render such an expansion realistically unfeasible. As demonstrated, the recent surge in numbers of asylum-seekers and the massive character of their arrivals have generated considerable costs to host States and the UNHCR, who have often been unable to provide the appropriate infrastructure to accommodate these persons. Furthermore, this situation has led to a political unwillingness of States in accepting to receiving refugees, despite the former's obligations under the Convention. In light of these events, not only is it improbable that States would accept an expansion of the Refugee Convention, but also that any environmental refugees would not benefit from higher standards of protection in practice, rendering the expansion a dead letter.

In addition, introducing environmental factors as a cause of persecution is not an effective guarantee for the protection of people affected by slow-onset degradation. Since the impact of this kind of event may be difficult to establish or even confused with more general problems of infrastructure that adversely influence socioeconomic conditions, an asylum-seeker may not be able to satisfy the host State's authorities with proof of that the risk or level of harm that motivated the displacement originated from the environmental conditions.

Finally, the creation of an environmental refugees category would still exclude the majority of those affected by natural hazards, since they are displaced within the borders of their country of origin. Since other States cannot effectively exercise power over persons who are not in their territory or under their jurisdiction, these internally displaced persons could only rely on the protection of their home State, which is already bound by other more protective instruments in relation to its nationals.

When weighed against practical considerations, it seems thus unjustifiable to defend an expansion of the Refugee Convention as a solution for the lack of international protection regarding environmentally displaced persons. Any proposals to ensure this group's rights should not be restricted to theoretical discussions on how to adapt existing regimes of protection, but rather take into account its particular characteristics, such as the collective nature of displacement and the existence of both internally and internationally displaced persons, as well as the costs a new protection system would bring States. Only when these practical obstacles are addressed can the protection of environmentally displaced persons truly be achieved.

## 2.

# STATE RESPONSIBILITY FOR CLIMATE CHANGE UNDER THE UNFCCC REGIME: CHALLENGES AND OPPORTUNITIES FOR PREVENTION AND REDRESS

*Fulvia Staiano\**

SUMMARY: 1. Introduction. – 2. Climate Change-Related Displacement in Contemporary International Law. – 3. State Responsibility for Climate Change under the International Regime on Responsibility. – 4. Common but Differentiated Responsibilities under the UNFCCC Regime. – 5. Climate Change Litigation in Domestic Jurisdictions. – 6. Climate Justice in a Human Rights Context: Examples from the Inter-American Court of Human Rights. – 7. The Potential of Contentious and Advisory Jurisdiction of the ICJ in the Field of Climate Justice. – 8. Concluding Remarks.

### *1 – Introduction*

On 2 November 2016, a briefing paper by the Internal Displacement Monitoring Centre highlighted that between 2008 and 2015 an average of 21.5 million people per year have been forced to leave their homes due to “disasters brought on by rapid-

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onset weather-related hazards – primarily floods and storms.”<sup>1</sup> While the report highlighted that the majority of these fluxes resulted in internal displacement, cross-border movements of displaced individuals are also on the rise. This fact was acknowledged by the Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC)<sup>2</sup> in the context of the adoption of the 2016 Paris Agreement. In Decision 1/CP.21, the COP envisaged the creation of a Task Force on Displacement “to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change”.<sup>3</sup> Two years before, Working Group II of the Intergovernmental Panel on Climate Change had highlighted that “climate change over the 21<sup>st</sup> century is projected to increase displacement of people”, especially in low-income developing countries exposed to “serious weather events”.<sup>4</sup>

Identifying climate change as a driver of temporary or permanent displacement is not always easy. First, environmental degradation caused by climate change can be one among many push factors for human mobility, together with social, economic and cultural reasons. Second, the boundaries between voluntary migration and displacement in the strict sense of the word can be blurred when such movements are caused by climate change. Often, environmental degradation may encourage the relocation of individuals or groups without reaching a sufficient degree of seriousness to identify such movements as entirely inevitable and forced. Notwithstanding these difficulties, the UNHCR has drawn clear links between climate change and an increased risk of displacement. In 2015, it noted that the majority of people of concern for UNHCR live in “climate change hotspots” and risk displacement due to the effects of climate change.<sup>5</sup>

<sup>1</sup> Internal Displacement Monitoring Centre, *Seizing the momentum: Displacement on the global climate change agenda*, 2 November 2016, p. 3, available at: <<http://www.internal-displacement.org/assets/publications/2016/20161102-climate-change.pdf>>

<sup>2</sup> United Nations Framework Convention on Climate Change, signed on 9 May 1992, entered into force on 21 March 1994, UNTS 1771, p. 107.

<sup>3</sup> Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, 29 January 2016, FCCC/CP/2015/10/Add.1, para 49.

<sup>4</sup> Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation and Vulnerability*, Working Group II Summary for Policymakers, 2014, p. 20, available at: <<http://www.ipcc.ch/report/ar5/wg2/>>

<sup>5</sup> UN High Commissioner for Refugees (“UNHCR”), *UNHCR, The Environment & Climate Change*, October 2015, p. 4, available at: <http://www.refworld.org/docid/561f670a4.html>.

The establishment of the Task Force on Displacement included actions concerning displacement related to the adverse impacts of climate change among the mechanisms to reduce the risk of loss and damage, entrusting this matter to the Executive Committee of the Warsaw International Mechanism for Loss and Damage. This development constitutes a remarkable step forward in a path anticipated by Decision 3/CP.18, adopted by the COP in Doha on 8 December 2012.<sup>6</sup> The Decision marked a shift of perspective from adaptation to loss and damage in relation to climate change-induced migration and displacement. Before then, state action in the field of climate change-induced migration and displacement had been framed as adaptation efforts within the UNFCCC regime. Under the Cancun Adaptation Framework, for instance, the COP invited all States Parties to adopt measures aimed at enhancing “understanding, coordination and cooperation with regard to climate change induced displacement, migration, and planned relocation, where appropriate, at the national, regional and international levels”.<sup>7</sup> In Decision 3/CP.18, on the other hand, the understanding of “how impacts of climate change are affecting patterns of migration, displacement and human mobility” was included within expertise on loss and damage.<sup>8</sup>

The adoption of the Paris Agreement further reinforced this significant change of perspective on human mobility caused by climate change. First, by referring to loss and damage rather than adaptation, the COP has acknowledged not only the link between displacement and climate change, but also that human displacement as a result of climate change cannot be avoided or prevented through mitigation or adaptation efforts. It is also significant that rather than focusing on human mobility in general, the creation of the Task Force has addressed forced movements of people as a result of environmental degradation. Second, and most importantly, the framing of climate change-induced displacement as loss and damage raises the question of state responsibility and liability under the UNFCCC regime. Decision 1/CP.21 explicitly states that Art. 8 of the Paris Agreement “does not involve or provide a basis for any liability or compensation”. This provision is the result of negotiations for the Paris Agreement between developing countries on the one hand and the Umbrella

<sup>6</sup> Decision 3/CP.18, *Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity*, 8 December 2012, FCCC/CP/2012/8/Add.1.

<sup>7</sup> Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2011, 15 March 2011, para 14(f).

<sup>8</sup> *Ibid.*, para. 7.

Group (generally including the United States, Australia, Canada and the Russian Federation among other countries) on the other. While the former requested the inclusion of liability and compensation for loss and damage, the Umbrella Group led by the United States aimed to remove all references to these matters from the text of the Paris Agreement.<sup>9</sup>

As a non-binding source clarifying the meaning of the Paris Agreement provisions, Decision 1/CP.21 has not settled the issue of state responsibility (and liability) for climate-change related events such as population displacement. Over the last fifteen years, both States and groups of individuals particularly affected by climate change have raised claims of violations of international law against States with high rates of greenhouse gases (GHG) emissions. Others have publicly contemplated to do so. So far, such claims have been unsuccessful. However, they raise crucial questions of state accountability and responsibility for causing environmental damage in breach of the UNFCCC regime and other sources of international environmental law.

The first part of this paper will explore state responsibility in relation to GHG emissions, on the grounds of the correlation between such emissions, climate change and human displacement. The countries currently most affected by climate change-related environmental disasters or degradation are not among the biggest contributors to anthropogenic GHG emissions.<sup>10</sup> In fact, as in the case of small island States, their contribution to this global issue is often minimal. The allocation of responsibility for a global problem such as climate change raises questions of distributive justice. It, then, will enquire on which type of state responsibility – if any – can be constructed in relation to climate change-related events (including displacement). It will examine the notions of shared responsibility and of common but differentiated responsibilities in the light of state obligations under the UNFCCC regime, reflecting on their meaning for the purpose of both prevention and reparation.

A second part of this paper will analyse meaningful attempts at international climate change litigation by States or groups of individuals. It will enquire on the rea-

<sup>9</sup> KREIENKAMP and VANHALA, *Climate Change Loss and Damage*, Global Governance Institute Briefing Paper, March 2017, p. 7, available at: <<https://www.ucl.ac.uk/global-governance/downloads/policybriefs/policy-brief-loss-and-damage>> see also SIEGELE, “Loss and Damage (Article 8)”, in KLEIN et al. (eds.), *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford, 2017, p. 224 ff.

<sup>10</sup> Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change*, Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, 2014, available at: <<http://www.ipcc.ch/report/ar5/wg2/>>



sons for their lack of success, focusing in particular on proof of causation and allocation of responsibility. In this context, a specific attention will also be devoted to international law principles that have been often recalled in this context, such as the prohibition of transboundary harm, the polluter pays principle and the precautionary principle. This section of the paper will analyse their meaning in the realm of climate change litigation and their potential to indirectly provide protection and redress to displaced individuals as a result of environmental degradation or disasters.

The described analysis will focus on cross border displacement (permanent or temporary) caused by climate change, setting aside internal displacement as well as forms of voluntary migration prompted by reasons that include to a greater or lesser extent climate change. This paper will not delve into questions of availability and quality of scientific evidence of correlation between GHG emissions, climate change and events such as environmental degradation and natural disasters which in turn generate human displacement. Rather, it rests on the assumption that such a correlation exists and has been sufficiently proven from a scientific point of view, at the very least to the point of reaching the threshold required by the precautionary principle enshrined in Art. 3(3) UNFCCC.<sup>11</sup> A last preliminary remark concerns this paper's choice of terminology. In particular, the controversial term "environmental refugees" will be avoided in favour of broader expressions such as "persons displaced by climate change-related events" and "climate change-related displacement".

## *2. – Climate Change-Related Displacement in Contemporary International Law*

Under contemporary international law, persons displaced due to events related to climate change do not enjoy sufficient protection. On the one hand, their inclusion under the scope of the Geneva Convention on the Status of Refugees (Refugee Convention) is virtually absent in state practice. Beyond international refugee law, most sources of international human rights law (and the related jurisprudence) also fail to trace a link between displacement and climate change in ways that could offer alternative avenues of protection to affected individuals.

<sup>11</sup> As will be further discussed in the course of this paper, Art. 3(3) UNFCCC establishes that in presence of "threats of serious or irreversible damage", States Parties should not use "lack of full scientific certainty" as a reason to postpone "precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects".

On the other hand, the Paris Agreement has failed to establish stringent state obligations in relation to climate change-related displacement. In fact, this source is completely void of any reference to such a phenomenon. The only provision that explicitly addresses displacement is the abovementioned paragraph 49 of Decision 1/CP.21, which grounded the establishment of the Task Force on Displacement.

The limitations of international human rights law in relation to climate change-related displacement, as thoroughly discussed by Mariana Ferolla Vallandro do Valle in her contribution to this volume, mainly rest on the difficulties of including the so-called “environmental refugees” under the scope of Art. 1(A) of the Refugee Convention. Such difficulties mainly stem from the fact that States of origin may hardly be qualified as persecutors themselves in relation to climate change-related events,<sup>12</sup> and from the strict reliance of Art. 1(A) of the Refugee Convention on specific grounds of persecution.<sup>13</sup> Such difficulties have also emerged in the context of domestic judgments concerning the recognition of refugee status to persons displaced due to climate change – most notably, in New Zealand jurisprudence.<sup>14</sup>

The lacunae of international refugee law have prompted the view that international human rights law might offer better protections to persons displaced by climate

<sup>12</sup> Climate change-related displacement is often suffered rather than caused by the States of origin of displaced individuals. As noted in the introduction to this paper, the States that are currently most affected by this phenomenon are not among the major contributors to worldwide GHG emissions. For a worldwide picture of climate-change related displacement, see the Nansen Initiative’s Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, Annex I, December 2015, available at: <<https://www.nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf>>.

<sup>13</sup> Persons displaced by climate change-related events could then be qualified as refugees under the Convention only when they would be able to show an unwillingness of their state of origin to protect them due to their belonging to one of the protected groups under Art. 1(A). On this matter, see UN High Commissioner for Refugees (UNHCR), *UNHCR, The Environment & Climate Change, cit., supra* note 5, p. 9.

<sup>14</sup> See for instance Immigration and Protection Tribunal New Zealand, *AC (Tuvalu)*, Judgment of 4 June 2014, [2014] NZIPT 800517-520; Immigration and Protection Tribunal New Zealand, *AF (Kiribati)*, Judgment of 25 June 2013, [2013] NZIPT 800413; Immigration and Protection Tribunal New Zealand, *AD (Tuvalu)*, Judgment of 4 June 2014, [2014] NZIPT 501370-371 (here, the Tribunal granted the appellants with a visa on humanitarian grounds); High Court of New Zealand, *Ioane Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment*, Judgment of 26 November 2013, [2013] NZHC 3125; Supreme Court of New Zealand, *Ioane Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment*, Judgment of 20 July 2015, [2015] NZSC 107. For a thorough analysis of this jurisprudence, see the paper by FEROLLA VALLANDRO DO VALLE in this volume, at p. 1 ff., and MCADAM, “Building International Approaches to Climate Change, Disasters, and Displacement”, *Windsor Yearbook of Access to Justice*, 2016, p. 1 ff., p. 5.

change-related events. The European Court of Human Rights (ECtHR) jurisprudence has been seen as a particularly promising source of alternative protection in this context. The ECtHR has indeed recognised breaches of the right to life (Art. 2 ECHR) and the right to the peaceful enjoyment of one's possessions (Art. 1 Protocol no. 1) in connection with State Parties' due diligence obligations to prevent environmental disasters.<sup>15</sup> It has also been argued that under certain circumstances the ECtHR jurisprudence on Arts. 3 and 8 ECHR (respectively establishing a prohibition of torture and inhuman or degrading treatment and the right to respect of private and family life) might be built upon to argue against expulsion orders towards States where individual applicants would suffer harm due to climate change-related events.<sup>16</sup> Regardless of the potential of protection stemming from the ECtHR jurisprudence and more broadly by international human rights law, such argumentations concern the relationship between individuals (citizens or non-citizens) and States. A possibly fruitful cross-fertilisation might arise between this realm and the interpretation of the UNFCCC regime by domestic and supranational courts. However, it must not be overlooked that the latter source concerns inter-State relationships and that parallels might be traced up to a certain extent.

The next paragraphs, then, will analyse the issue of state responsibility towards other States in relation to GHG emissions causing climate change-related events such as displacement. This analysis will first focus on the broader international law regime of state responsibility, and will then move on to the more specific matter of state responsibility for GHG emissions in the UNFCCC regime.

<sup>15</sup> MCADAM, "Building International Approaches to Climate Change", *cit. supra* note 14, p. 2016. See also MCADAM and FERRIS, "Planned Relocations in the Context of Climate change: Unpacking the Legal and Conceptual Issues", *Cambridge Journal of International and Comparative Law*, 2015, p. 166 ff., p. 158, and case law cited therein; WEWERINKE-SINGH, "State Responsibility for Human Rights Violations Associated with Climate Change", in DUYCK, JODOIN and JOHL, *Routledge Handbook of Human Rights and Climate Governance*, Abingdon (forthcoming).

<sup>16</sup> SCOTT, "Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?", *International Journal of Refugee Law*, 2014, p. 404 ff.

### *3. – State Responsibility for Climate Change under the International Regime on Responsibility*

The general international law regime on state responsibility constitutes an important lens of analysis of climate-change related displacement. The traditional understanding of state responsibility under international law rests on the concept of individual responsibility for internationally wrongful acts. As is well known, the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA)<sup>17</sup> state at Art. 1 that “every internationally wrongful act of a State entails the international responsibility of that State”. For the purpose of identifying an internationally wrongful act, Art. 2 requires that an action or omission is attributable to the State under international law, and that such a conduct breaches an international obligation of the State. While individual state responsibility is the general rule established by DARSIWA, Art. 47 dictates a specific rule for cases where “several States are responsible for the same internationally wrongful act”. In this instance, “the responsibility of each State may be invoked in relation to that act”. The accompanying commentary to DARSIWA clarifies that, in this case, the injured State can hold each responsible State accountable for the entire wrongful act.<sup>18</sup> However, Art. 47 does not include within its scope situations where more than one State carry out separate wrongful conducts that contribute to the same damage. In this case, indeed, the general rule of individual responsibility applies.<sup>19</sup>

In this light, the identification of state responsibility with respect to climate change poses several problems. First, the objective element of state responsibility requires the commission of an internationally wrongful act. Identifying breaches of specific provisions of the Paris Agreement in relation to GHG emissions of States Parties is not an easy task. Many of its provisions establish obligations of result that need further interpretation and clarification. Art. 4(1), for instance, states that Parties “aim to reach” global peaking of GHG emissions “as soon as possible”, and to undertake “rapid reductions thereafter in accordance with best available science”. Similarly, Art. 4(3) requires NDCs to reflect States Parties’ “highest possible ambition”. Furthermore, some scholars have cast doubts over the possibility to speak of state

<sup>17</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2011.

<sup>18</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 124.

<sup>19</sup> *Ibid.*, p. 125.

responsibility at all for sources assisted by compliance mechanisms of a quasi-judicial nature.<sup>20</sup> Both the Kyoto Protocol and the Paris Agreement have been cited as paradigmatic in this sense, where it would be best to refer to “shared accountability”.<sup>21</sup> This notion would apply to cases where “a multiplicity of actors is held to account for conduct in contravention of international norms, but where this does not necessarily involve international responsibility for internationally wrongful acts in its formal meaning”.<sup>22</sup>

Regardless of such a distinction, shared responsibility or accountability are not necessarily more appropriate concepts than independent responsibility in the context of climate change. The effects of GHG emissions are felt globally. Climate change is the result of a combination of all States’ emissions, and thus the related environmental damage (such as floods, droughts, sea-level rise and so forth) are not directly attributable to any State in particular. Rather, all States contribute to this global issue through their respective GHG emissions - although to different degrees. This poses the question of whether a State Party’s emission of GHG in breach of the Paris Agreement<sup>23</sup> may give rise to its liability vis-à-vis affected States even if damages caused by climate change (including human displacement) are not entirely attributable to the former. As shown above, Art. 47 of DARSIIWA only admits this possibility when the action of multiple States can be identified as a single internationally wrongful act. However, this definition is ill-fitted for GHG emissions, which are more appropriately framed as separate acts than generate the same damage (i.e., climate change). In such situations, framed as instances of “cumulative responsibility”, recourse to parallel individual attribution has been deemed as the best approach in judicial realms. Indeed, this avoid incurring in inadmissibility of claims due to the failure to raise claims against all responsible or accountable States.<sup>24</sup>

<sup>20</sup> NOLLKAEMPER and JACOBS, “Shared Responsibility in International Law: A Conceptual Framework”, *Michigan Journal of International Law*, 2013, p. 359 ff., p. 369. On the compliance mechanism established by Art. 15 of the Paris Agreement, see also VOIGT, “The Compliance and Implementation Mechanism of the Paris Agreement”, *Review of European Community and International Environmental Law*, 2016, p. 161 ff.

<sup>21</sup> PEEL, “Climate Change”, in NOLLKAEMPER and PLAKOKEFALOS (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge, 2017, p. 1009 ff., pp. 1038-1039.

<sup>22</sup> NOLLKAEMPER and JACOBS, “Shared Responsibility”, *cit. supra* note 20, p. 369.

<sup>23</sup> Such breaches may consist, for instance, in the adoption of nationally determined contributions (NDCs) that are inadequate to the albeit generic standards set by the Agreement, or in a failure of the State Party to respect its own NDCs, or even in a failure to set NDCs altogether.

<sup>24</sup> NOLLKAEMPER and JACOBS, “Shared Responsibility”, *cit. supra* note 20, pp. 388 – 389 and p. 425.

Against this background, the concept of common but differentiated responsibilities embraced by the UNFCCC regime might offer a middle ground between individual and shared responsibility. The next paragraph will explore the meaning of this founding principle of the UNFCCC regime for the construction of state liability for environmental damages and displacement caused by climate change.

#### *4. – Common but Differentiated Responsibilities under the UNFCCC Regime*

The UNFCCC regime, and the notion of common but differentiated responsibilities on which it is based, have been a source of particular interest among scholarly studies on the potential of international environmental law to offer protection to persons displaced by climate change-related events.

The concept of common but differentiated responsibilities already grounded the UNFCCC, whose Art. 3(1) prompts all States Parties to “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”. Its Art. 4 enumerates various obligations for States Parties under this general principle. These include, among other things, the implementation of regional mitigation programmes for anthropogenic emissions, promotion and cooperation with respect of technologies and practise aimed at reducing GHG emissions, cooperation in preparing for adaptation to climate change, and so forth. In the light of common but differentiated responsibilities, the UNFCCC also sets aside developed country Parties and other Parties in its Annex I. Only for such countries, Art. 4(2) envisages an obligation to adopt national policies and measures aimed at limiting their GHG emissions and thus mitigate climate change.

While not a new concept in international treaty law, common but differentiated responsibilities were explicitly mentioned for the first time in a multilateral environmental treaty on the occasion of the adoption of the UNFCCC.<sup>25</sup> Thus, one of its founding principles is that while the responsibility for the protection of the climate system is shared among all States, their respective contribution to solving the issue of climate change should be differentiated depending on their capabilities.<sup>26</sup> The Kyoto Protocol

<sup>25</sup> STONE, “Common but Differentiated Responsibilities in International Law”, *The American Journal of International Law*, 2004, p. 276 ff., p. 279.

<sup>26</sup> CARLANE, GRAY, and TARASOFSKY, “International Climate Change Law: Mapping the Field”, in

to the UNFCCC<sup>27</sup> further specified this concept by referring it to GHG emission targets. Despite a single explicit mention of common but differentiated responsibilities (under Art. 10), the Kyoto Protocol is entirely permeated by this principle.<sup>28</sup> Indeed, many of the obligations established under this source are exclusively referred to State Parties included in Annex I. Most notably, Art. 3 binds these States to keep their GHG emissions below their assigned amounts pursuant Annex B to the Protocol.

The principle of common but differentiated responsibilities was further reinstated by the Paris Agreement. Pursuant its Art. 2(a), one of the objectives of this source is to “hold the increase in the global average temperature to well below 2°C above pre-industrial levels” to reduce the impact of climate change. To pursue this aim, the Paris Agreement established much less stringent obligations than the Kyoto Protocol, leaving States Parties with greater discretion with respect to GHG emission targets. Under the Agreement, all Parties are required to communicate nationally determined contributions (NDCs) to the global response to climate change. Although such contributions are defined by Art. 3 as “ambitious efforts” representing a “progression over time”, the Agreement essentially leaves States Parties free to determine their respective contribution with respect to reduction of GHG emissions, adaptation efforts, financial contributions to developing countries, technology sharing, capacity-building and so forth. In addition to a frequent use of non-binding expressions such as “should” or “may”, it is possible to observe that many of the binding obligations included in the Agreement are clear obligations of conduct. Art. 4, for instance, requires States Parties to “aim to reach” global peaking of GHG emissions “as soon as possible” and “to undertake rapid reductions thereafter in accordance with best available science”.

With specific reference to NDCs, Art. 4 of the Paris Agreement establishes several procedural obligations. State Parties shall prepare successive NDCs that represent a progression over their previous ones (para 3), communicate them every five years (para 9) and account for them (para 13). It has been argued that these procedural rules are not matched by any specific obligation for State Parties to implement or achieve their own NDCs.<sup>29</sup> This view is essentially based on the fact that Art. 4(2)

CARLANE, K. GRAY and TARASOFSKY (eds.), *The Oxford Handbook of International Climate Change Law*, Oxford, 2016, p. 3 ff., p. 14 ff.

<sup>27</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed on 11 December 1997, entered into force on 16 February 2005, UNTS 2303, p. 162.

<sup>28</sup> On this point, see BODANSKY, BRUNNÉE, RAJAMANI, *International Climate Change Law*, Oxford, 2017, p. 165 ff.

<sup>29</sup> BODANSKY, “The Legal Character of the Paris Agreement”, 25 *Review of European Community and International Environmental Law*, 2016, p. 142 ff., pp. 145-146.

of the Paris Agreement requires State Parties to “pursue domestic mitigation measures, with the aim of achieving the objectives of [NDCs]”, rather than explicitly including a state obligation to implement NDCs and achieve their specific content. However, the language of Art. 4(2) should not necessarily lead to the conclusion that State Parties are entirely free to disregard their own NDCs. Art. 4(2) establishes a clear obligation of conduct that can be breached by actions or omissions of States Parties that are incompatible with the goals they themselves have set in their NDCs.

The concept of common but differentiated responsibilities in the context of the UNFCCC regime has attracted the interest of international law scholars as a potential source of state liability for environmental damage caused by climate change. The main proposition in this context concerns the development of a form of responsibility of States with the highest levels of GHG emissions towards those States most affected by phenomena linked to climate change, including human displacement.<sup>30</sup>

This principle also inspired proposals for an international treaty law instrument (in the form of a Protocol to the UNFCCC<sup>31</sup> or as a self-standing treaty<sup>32</sup>) that would specifically address the issue of climate-change related displacement, also by regulating compensation for costs related to the management of this phenomenon. In these theoretical constructions, the principle of common but differentiated responsibilities has been understood as a burden-sharing criterion whereby developed countries would bear a higher proportion of costs due to their significant contribution to climate change.<sup>33</sup> However, using the principle of common but differentiated responsibilities to construe responsibility for dealing with climate-change related displacement appears a quite far-fetched interpretation. It has been rightly noted that “although it is tempting to allocate responsibility based on the UNFCCC principle of ‘common but differentiated responsibilities’, that principle was developed to clarify

<sup>30</sup> MAYER, “Climate Change, Migration, and International Law in Southeast Asia”, in KOH et al. (eds.), *Adaptation to Climate Change: ASEAN and Comparative Perspectives*, Singapore, 2016, p. 337 ff., pp. 346-347.

<sup>31</sup> BIERMANN and BOAS, “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees”, *Global Environmental Politics*, 2010, p. 60 ff.

<sup>32</sup> DOCHERTY and GIANNINI, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees”, *Harvard Environmental Law Review*, 2009, p. 349 ff.; HODGKINSON and YOUNG, “‘In the Face of Looming Catastrophe’: A Convention for Climate-Change-Displaced Persons”, in GERRARD and WANNIER (eds.), *Legal Implications of Rising Seas and a Changing Climate*, Cambridge, 2013, p. 299 ff.

<sup>33</sup> BIERMANN and BOAS, “Preparing for a Warmer World”, *cit. supra* note 31, p. 76; DOCHERTY and GIANNINI, “Confronting a Rising Tide”, *cit. supra* note 32, pp. 346-347; HODGKINSON and YOUNG, “‘In the Face of Looming Catastrophe’”, *cit. supra* note 32, p. 318.



who needed to reduce emissions causing the overall problem”<sup>34</sup> and that “using that principle to assign responsibility to one country for the effects experienced by specific individuals strains traditional notions of causation”.<sup>35</sup>

This criticism holds true even after the adoption of the Paris Agreement. In fact, the shift marked by Decision 1/CP.21 in the framing of climate-change related displacement – from adaptation to loss and damage – made the construction of common but differentiated responsibilities under comment even more unlikely. In this light, the optimism generated by the obligation under Art. 4(4) UNFCCC for developed country Parties to “assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects” no longer appears justifiable.<sup>36</sup> After Decision 1/CP.21, any state action aimed at facing the consequences of climate change-related displacement (and the associated costs) may no longer be framed as adaptation efforts, but rather as efforts to address loss and damage. Therefore, it appears that such activities may no longer be included within the scope of Art. 4(4) UNFCCC.

The principle of common but differentiated responsibilities, then, does not provide a sufficiently stable ground to construe a common state responsibility or liability for climate-change related damage. Even extensive interpretations of the Paris Agreement and more broadly of the UNFCCC may hardly generate an obligation for developing country Parties to compensate or cover the cost of human displacement incurred by States disproportionately affected by climate change.

Nonetheless, efforts to obtain redress for climate-change related displacement and damage have multiplied in the last fifteen years at domestic and international level. Such efforts reflect a broad unease with the current lack of provisions on state responsibility and liability for events caused to GHG emissions. In this light, claims for redress have relied on different principles of international environmental law in an effort to expand the scope of existing provisions on state responsibility. The next

<sup>34</sup> MCANANEY, “Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement”, *New York University Law Review*, 2012, p. 1172 ff., p. 1193.

<sup>35</sup> *Id.*

<sup>36</sup> On this point, see KUUSIPALO, “Exiled by Emissions: Climate Change Related Displacement and Migration in International Law: Gaps in Global Governance and the Role of the UN Climate Convention”, *Vermont Journal of Environmental Law*, 2017, p. 614 ff., pp. 637-639, who argues that Art. 4(4) UNFCCC may be interpreted as generating obligations for developed country Parties to provide financial assistance to countries most affected by “climate-induced migration”, or at least suggest a “soft-law liability” in this field.

paragraphs will examine significant examples of climate change litigation (or attempts thereof), reflecting on their significance, their pitfalls and their perspectives of success in the near future.

### 5. – *Climate Change Litigation in Domestic Jurisdictions*

On 24 June 2015, the Hague District Court issued a landmark judgement that has attracted great attention among international and environmental law scholars. In *Urgenda v. the Netherlands*,<sup>37</sup> the Court upheld the claim of a citizens' platform (Urgenda) that the Netherlands had failed to meet its duty of care towards its citizens by establishing reduction targets for GHG emissions that were insufficient in the light of its domestic and international obligations. The latter included, among other sources, the UNFCCC and the Kyoto Protocol as well as the "no harm" principle. The Court observed that while these norms did not directly grant rights to Urgenda, they "still [held] meaning" for the purpose of defining the scope of the States' duty of care and the discretionary power to which it was entitled to.<sup>38</sup>

The UNFCCC, while not considered as having a direct effect, was used by the Court as a key interpretative tool to determine the scope of such duty of care in relation to the State's obligation to take precautionary measures for its citizens to face climate change.<sup>39</sup> First, the Court observed that by becoming a Party to the UNFCCC and the Kyoto Protocol, the State had "accepted its responsibility for the national emission level" as well as "the obligation to reduce this emission level as much as needed to prevent dangerous climate change".<sup>40</sup> Second, it rejected the State's view whereby its contribution to global emissions was minor and a reduction in national emission would not contribute significantly to the 2° target set by the Cancun Agreements in the context of the 2010 Climate Conference.<sup>41</sup> Indeed, the Court held that "climate change is a global problem and therefore requires global accountability".<sup>42</sup>

<sup>37</sup> *Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, judgment of 24 June 2015, ILDC 2456 (NL 2015).

<sup>38</sup> *Ibid.*, para 4.52.

<sup>39</sup> *Ibid.*, paras 4.63 – 4.64. A specific mention was made in the judgment of the principle of fairness, the precautionary principle and the sustainability principle underlying Arts. 2 and 3 UNFCCC.

<sup>40</sup> 4.66

<sup>41</sup> Decision 1/CP.16

<sup>42</sup> *Urgenda v. the Netherlands*, *cit. supra* note 37, para 4.79. please verify cross-reference rules

This interpretation recalled the concept of common but differentiated responsibilities. The state obligation to adopt precautionary measures in application of the duty of care was established regardless of its actual contribution to global GHG emissions, recalling “both a joint and an individual responsibility of the signatories of the [UNFCCC]”.<sup>43</sup>

The *Urgenda* judgment drew significant criticism. The discussed conclusions seem in contradiction with the fact that, by admission of the Court itself, the UNFCCC and the Kyoto Protocol only bound the Netherlands in its relationship with other States and do not entail any rights for private individuals or legal persons.<sup>44</sup> Nonetheless, the *Urgenda* judgment constitutes an interesting example of judicial interpretation of otherwise generic concepts – such as in this case the duty of care – in the light of international environmental law. It is also noteworthy that the Court’s implicit reliance on common but differentiated responsibilities in relation to reduction of GHG emissions allowed it to set aside issue of causation. Thus, the claimant was not required to prove a minimum level of contribution by the Netherlands to the global issue of climate change. A similar reasoning had been carried out by the U.S. Supreme Court in *Massachusetts v. Environmental Protection Agency (EPA)*.<sup>45</sup> Here, the UNFCCC did not play such an important role as in *Urgenda*. The Supreme Court deemed it a non-binding treaty, and remarked the lack of participation of the U.S. to the Kyoto Protocol. However, it briefly cited UNFCCC standards in support of its rebuttal of the EPA’s view that GHG emissions caused by motor vehicles contributed minimally to global warming. The Supreme Court also ruled that regardless of the entity of the U.S. contribution to GHG concentrations, federal courts have jurisdiction over determine whether the EPA’s refusal to take steps to slow or reduce global warming by regulating GHG emissions.

While certainly significant, the discussed domestic judgments contribute only in part to the enquiry on the potential for success of claims for redress and reparation

<sup>43</sup> *Id.*

<sup>44</sup> *Ibid* 4.42. On this point, see DE GRAAF and JANS, “The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change”, *Journal of Environmental Law*, 2015, p. 517 ff., pp. 525-526, who argue that the *Urgenda* judgment is at odds with Arts. 93 and 94 of the Dutch Constitution. The authors highlight that, according to these constitutional norms, only provisions of international treaties which may be binding on all persons by virtue of their content may generate rights for individuals.

<sup>45</sup> Supreme Court of the United States, *Massachusetts, et al. v. Environmental Protection Agency et al.*, Judgment of 2 April 2007, 549 U.S. 497 (2007). For a commentary on this judgment, see also GALVÃO FERREIRA, “‘Common But Differentiated Responsibilities’ in the National Courts: Lessons from *Urgenda v. The Netherlands*”, *Transnational Environmental Law*, 2016, p. 329 ff.

for harm caused by climate change (including human displacement). First, the matter of damages was not discussed at all, because both *Urgenda* and *Massachusetts v. EPA* concerned requests of judicial orders either directly or indirectly imposing a reduction of GHG emissions as mitigation measures.

Second, both cases lack a transboundary dimension. In *Urgenda*, the considerations of the Hague High Court were limited to the relationship between the Netherlands and its own citizens. The Court held that there was no need to rule on *Urgenda*'s claims concerning the rights of current and future generations in countries other than the Netherlands, deeming sufficient to analyse the question of the State's duty of care within the Dutch territory.<sup>46</sup> In *Massachusetts v. EPA*, standing was only recognised to the State of Massachusetts and not to the other petitioners, which included other U.S. States as well as local governments and private organisations.<sup>47</sup> On the other hand, an interesting yet isolated case concerning the transboundary harm caused by emissions in a certain State has concerned the opposition of the Federated States of Micronesia to the expansion of a coal-fired power plant in the Czech Republic. Micronesia requested the Czech Ministry of Environment to initiate a transboundary environmental impact assessment, arguing that an expansion would negatively affect their territory. Such a request was never brought before domestic courts, but this case is nonetheless a telling example of recognition of the interest of a State in the matter of the transboundary effects of emission levels which significantly contribute to environmental damage on its territory. Indeed, while it ultimately authorised the planned extension, the Ministry recognised Micronesia as an affected State and required the company in charge of this operation to adopt compensation measures for the increase in emissions implied in the project.<sup>48</sup>

<sup>46</sup> *Urgenda v. the Netherlands*, cit., paras 4.91 and 4.92.

<sup>47</sup> The Supreme Court considered that the State of Massachusetts had a special position and interest in the petition, and focused on the risk of harm to the State due to the EPA's refusal to regulate GHG emissions (*Massachusetts v. EPA*, cit., pp. 15-18).

<sup>48</sup> On this case, see BODANSKY, BRUNNÉE and RAJAMANI, *International Climate Change Law*, cit. *supra* note 28, pp. 47-49; THORNTON, "Compensatory Justice for Climate Change Displacees under International Law: Fault-Based and No-Fault Approaches", *Irish Yearbook of International Law*, 2011, p. 25 ff., pp. 34-35.

## 6. – *Climate Justice in a Human Rights Context: Examples from the Inter-American Court of Human Rights*

At supranational level, the most significant attempts to ground climate justice claims on environmental law principles or general principles of international law have been made before the Inter-American Commission on Human Rights. This paragraph will focus on two petitions respectively submitted by the Inuit against the United States and the Athabaskan people against Canada. Such populations are already heavily affected by climate change. As emphasized in both petitions, temperature increase is particularly fast in the Arctic, causing changes in the weather, snow quantity and quality, ice conditions and the integrity of the landscape. These phenomena have already generated forced relocations and are likely to further impact Arctic populations in the near future.

On 7 December 2005, a petition on behalf of all Inuit of the Arctic regions of the United States and Canada was submitted to the Commission (Inuit Petition), seeking relief from a series of violations resulting from global warming.<sup>49</sup> The petition for relief claimed that several human rights of the Inuit had been breached. Most notably for our purposes, the petitioners lamented a violation of their right to residence, movement and inviolability of the home. They submitted that climate change-related events such as storms, permafrost melt, coastal erosion, and landslides were destroying their areas of settlement, causing damages to homes, infrastructure and communities.<sup>50</sup>

For obvious reasons, the petition was mostly based on international human rights law. Several sources in this realm were cited as standards for the purpose of the interpretation of relevant provisions of the American Declaration of the Rights and Duties of Man<sup>51</sup> and the American Convention on Human Rights.<sup>52</sup> For instance, the petition referred to the European Court of Human Rights jurisprudence on environmental pollution to argue that international human rights law draws a connection between the right to the inviolability of the home, the right to private life and the right to a clean and safe environment. Such cases, however, did not analyse the issue

<sup>49</sup> Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global

Warming Caused by Acts and Omissions of the United States, 7 December 2005.

<sup>50</sup> *Ibid.*, pp. 94-95.

<sup>51</sup> American Declaration of the Rights and Duties of Man, adopted on 2 May 1948.

<sup>52</sup> American Convention on Human Rights, adopted on 22 November 1969.

of state responsibility in relation to the transboundary effects of its polluting activities. Rather, the ECtHR had recognised breaches of citizens' rights to private and family life under Art. 8 of the European Convention on Human Rights (ECHR) due to State Parties' failure to protect them from polluting activities carried out on the national territory.

Despite this focus on international human rights law, the UNFCCC also constituted an important reference in the petition. The UNFCCC was included among the international treaties that the Commission should take into account when interpreting the American Declaration and the American Convention. More specifically, the UNFCCC was cited as the international standard against which the Commission would have to assess the United States' respect of their due diligence obligations in relation to climate change and mitigation of GHG emissions. In the petitioners' view, the fact that the United States had breached its international obligations in relation to climate change "further [reinforced] the conclusion that the United States is violating rights protected by the American Declaration".<sup>53</sup> The petitioners argued that the United States was breaching its obligation under Art. 4(2)(b) UNFCCC to return its GHG emissions to 1990 levels. In their view, the United States' failure to take any steps in this direction amounted to a violation of its obligation to implement the UNFCCC in good faith and in the light of its objectives.

In addition to the UNFCCC, the petitioners referred to the United States' breach of the customary international law norm consisting in the obligation to avoid transboundary harm. To this end, they cited landmark judgments of the International Court of Justice<sup>54</sup> as well as several international treaty law sources – including the Preamble of the UNFCCC itself, where it recalls that "States have (...) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". The United States' failure to minimise the transboundary environmental impact of climate change on the Arctic contributed in the petitioners' view to the claimed human rights violations.

Lastly, the petitioners lamented a breach of the precautionary principle as enshrined in Art. 3(3) UNFCCC. The latter provides that a lack of full scientific certainty should not constitute a valid reason for postponing precautionary measures to

<sup>53</sup> *Ibid.*, p. 97.

<sup>54</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 25 March 1948; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

anticipate, prevent and minimize the causes of climate change or mitigate its effects. The petitioners observed that even accepting the U.S. governments' allegations of scientific uncertainty in climate science, an obligation to take precautionary measures would still stand.

Differently than the domestic judgments analysed in the previous section, the Inuit petition also faced the question of reparations. The request to provide an appropriate remedy and redress included both the limitation of GHG emissions and the payment of reparations for the harm caused by them. These requests rested on the polluter pays principle (whereby those responsible for polluting activities must bear the cost of the related environmental harm)<sup>55</sup> and on the general principle whereby States' breaches of international law generate a duty to make reparations.<sup>56</sup> The Inter-American Commission ultimately refused to process the petition, holding that the information provided in the Rules did not allow a determination of "whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration".<sup>57</sup>

The Inuit Petition, while unsuccessful, raised interesting points concerning the application of the prohibition of transboundary harm to the issue of state responsibility for climate change-related events. Together with the precautionary principle, this prohibition may constitute an important reference in support of the identification of state responsibility for failure to curb GHG emissions and for the related breaches of human rights caused by climate change. This would also apply to provisions of the American Convention that have a specific relevance for the issue of climate change-related displacement, such as the right to reside in one's State under Art. 22 or the right to respect of one's home under Art. 11(2). Such an interpretation would indirectly allow a judicial implementation of key principles grounding the UNFCCC regime by the Inter-American Court of Human Rights – a process which may be replicated in other regional human rights law contexts as well.

<sup>55</sup> On this point, see CHRISTIANSEN, *Climate Conflicts: A Case of International Environmental and Humanitarian Law*, Lüneburg, 2015, who emphasizes that the polluter pays principle was purposefully not included in the UNFCCC nor in the Kyoto Protocol, in favour of the principle of common but differentiated responsibilities (p. 64 ff. and p. 93 ff.)

<sup>56</sup> *Corfu Channel*, *cit. supra* note 54; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1977.

<sup>57</sup> On this point, see DE LA ROSA JAIMES, "Climate Change and Human Rights Litigation in Europe and the Americas", *Seattle Journal of Environmental Law*, 2015, p. 198 ff., pp. 191-193.

In this sense, the more recent petition submitted by the Arctic Athabaskan Council (Athabaskan petition)<sup>58</sup> before the Inter-American Commission could bear some fruitful results. The petition, currently under consideration before the Commission, claimed that Canada had breached several human rights recognised by the American Declaration, namely the right to culture, property, means of subsistence and health. In support of this view, it also relied on the precautionary principle as well as the obligation to avoid transboundary harm, specifically citing the UNFCCC in relation to the latter. The petitioners argued that Canada, despite agreeing to the language of the UNFCCC, had failed to ensure that its black carbon emissions would not cause environmental harm outside of its borders and jurisdiction. These violations, in turn, had caused the lamented human rights violations.

The focus of the Athabaskan petition on black carbon emissions might raise the chances of obtaining at least an admissibility review by the Inter-American Commission in comparison to the Inuit petition.

Differently than GHG emissions, which cause damages at global level regardless where they originate, black carbon emissions produce a stronger impact on nearby areas. Therefore, establishing causation is easier for the latter form of pollution. Canada was identified as the state responsible for environmental damage in the Arctic because black carbon emissions near this area have a greater chance of depositing on Arctic ice and snow. At the same time, an eventual decision of admissibility or even a judgment by the IACtHR on the petition under review would provide important insights on the meaning and scope of the prohibition of transboundary harm for the broader matter of climate change. However, whether and to what extent this principle might be interpreted so as to construe a form of state responsibility in relation to GHG emissions causing climate change is a complex matter. The next paragraph will carry out a closer examination of this question, also with specific reference to climate change-related displacement.

<sup>58</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, 23 April 2013. For a more in-depth analysis of the petition, see DE LA ROSA JAIMES, “Climate Change and Human Rights Litigation”, *cit. supra* note 57, pp. 193-195; DE LA ROSA JAIMES, “The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights”, *California Western International Law Journal*, 2015, p. 213 ff.



## 7. – *The Potential of Contentious and Advisory Jurisdiction of the ICJ in the Field of Climate Justice*

The prohibition of transboundary harm is a widely recognised principle of international environmental law. While its status of customary international law is still debated,<sup>59</sup> it has been widely established and developed in international law and jurisprudence. Principle 21 of the 1972 Stockholm Declaration,<sup>60</sup> Principle 2 of the Rio Declaration<sup>61</sup> and the Preamble to the UNFCCC reproduce verbatim the same principle, whereby States have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. This principle was also reinstated by the International Law Association’s Declaration of Legal Principles Relating to Climate Change<sup>62</sup>, also in connection with GHG emissions. Draft Article 7A(2) envisages a state obligation to exercise due diligence also by taking appropriate measures to “anticipate, prevent or minimise the causes of climate change, especially through effective measures to reduce greenhouse gas emissions”.

The prohibition of transboundary harm has been consistently established in the context of international arbitration (starting from the landmark *Trail Smelter* case)<sup>63</sup> as well as of the ICJ jurisprudence. In its Advisory Opinion *on Legality of the Threat or Use of Nuclear Weapons*<sup>64</sup>, the ICJ identified a general state obligation “to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control” as “part of the corpus of international law

<sup>59</sup> GLICKENHAUS, “Potential ICJ Advisory Opinion: Duties to Prevent Transboundary Harm from GHG Emission”, *New York University Environmental Law Journal*, 2015, p. 117 ff., pp. 137-139.

<sup>60</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973). According to Principle 21, States have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

<sup>61</sup> Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, U.N. Doc. A/CONF.151/26 (Vol. I). Principle 2 of the Declaration reproduces verbatim Principle 21 of the Stockholm Declaration.

<sup>62</sup> International Law Association, Committee on Legal Principles Relating to Climate Change, Declaration of Legal Principles Relating to Climate Change, Resolution 2/2014.

<sup>63</sup> *Trail Smelter case (United States v. Canada)*, decision of 6 April 1938 and 11 March 1941, UN Report of International Arbitral Awards, Vol. III, pp. 1905-1982. See also *Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, UN Report of International Arbitral Awards Vol. XXVII, pp. 35-125.

<sup>64</sup> *Legality of the Threat or Use of Nuclear Weapons*, *cit. supra* note 54.

relating to environment”.<sup>65</sup> In its *Pulp Mills* judgment,<sup>66</sup> moreover, the ICJ further refined a principle previously established in the *Corfu Channel* case,<sup>67</sup> stating that the state obligation not to knowingly allow the use of its territory for acts contrary to the rights of other States also included an obligation to “use all the means of its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.<sup>68</sup>

The difficulty of applying the prohibition of transboundary harm in the realm of GHG emissions and climate change stems from the context in which such a principle has been conceived and applied. In particular, all the cited contentious cases on transboundary pollution examined by the ICJ and in the context of international arbitration concerned polluting activities carried out in one State and affecting a neighbouring State. On the other hand, as clarified in this paper, the harm caused by such emissions (i.e., climate change and the related environmental events, also leading to human displacement) is not attributable to an individual State but is rather the result of the behaviour of a plurality of States. The nature of the damage, then, is global rather than strictly transboundary.<sup>69</sup>

Despite such difficulties, there is potential for a fruitful application of the prohibition of transboundary harm to the issue of climate-change related harm, including human displacement. There is little question that the forced relocation of population within or outside of national borders is a form of harm not only for involved individuals but for their affected States as well. The case of small State islands is a fitting illustration of this argument. Here, coastal erosion, sea level rise and inundations are displacing communities, affecting livelihoods and producing socio-economic costs that aggravate the vulnerability of such States.<sup>70</sup>

In 2002, the Prime Minister of Tuvalu announced its intention to raise claims

<sup>65</sup> *Ibid.*, para 29.

<sup>66</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, judgment of 20 April 2010.

<sup>67</sup> *Corfu Channel*, *cit. supra* note 54.

<sup>68</sup> *Pulp Mills*, *cit. supra* note 66, para 101.

<sup>69</sup> On this point, see PEEL, “Climate Change”, *cit.*, p. 1031; SCHWARTE and FRANK, ‘The International Law Association’s Legal Principles on Climate Change and Climate Liability under Public International Law’, *Climate Law*, 2014, p. 201 ff., pp. 207-208

<sup>70</sup> NURSE et al., “Small Islands”, in Barros et al. (eds.), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects*, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate, Cambridge University Press (2014), available at: <[https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29\\_FINAL.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29_FINAL.pdf)>

before the ICJ against Australia and the United States for their refusal to sign the Kyoto Protocol.<sup>71</sup> This intention was not pursued further, but the declarations of the Prime Minister did raise the question of whether and to what extent the ICJ might be the appropriate realm to address claims raised by States that risk to be entirely submerged due to sea-level caused by climate change.

In 2011, this question was taken up by Palau. Addressing the UN General Assembly, President Johnson Toribiong explicitly invoked the prohibition of transboundary harm (characterising it as a norm of customary international law) in relation to the impacts of climate change on the population of Palau.<sup>72</sup> President Toribiong highlighted that this “existential threat (...) exemplifies the issue of transboundary harm”,<sup>73</sup> citing Security Council Resolution 63/281<sup>74</sup> in support. Against this background, it anticipated that Palau and the Republic of the Marshall Islands would seek an Advisory Opinion from the ICJ “on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States”.<sup>75</sup>

It is regrettable that an actual request for an Advisory Opinion did not follow the cited statement. The exercise of the advisory jurisdiction of the ICJ would have offered important clarifications as to the possibility to define GHG emissions as transboundary harm for the purpose of construing state responsibility in this realm. At the same time, pursuing an Advisory Opinion rather than a contentious claim would have allowed to set aside complex questions discussed in this paper, such as the issue of allocating responsibility to a single State for a global problem and the need to ground and define claims of reparation for the suffered environmental loss and damage.<sup>76</sup> This paper’s analysis of previous attempts at climate justice also suggests that relevant sources within the UNFCCC regime (including the Paris Agreement) might play

<sup>71</sup> JACOBS, “Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice”, *Pacific Rim Law & Policy Journal*, 2005, p. 103 ff.; BODANSKY, BRUNNÉE and RAJAMANI, *International Climate Change Law*, cit. supra note 48, p. 47.

<sup>72</sup> Statement by the Honorable Johnson Toribiong, President of the Republic of Palau, to the 66<sup>th</sup> Regular Session of the United Nations General Assembly, 22 September 2011, available at: <[https://gadebate.un.org/sites/default/files/gastatements/66/PW\\_en.pdf](https://gadebate.un.org/sites/default/files/gastatements/66/PW_en.pdf)>

<sup>73</sup> *Id.*

<sup>74</sup> Resolution adopted by the General Assembly on 3 June 2009, *Climate Change and its Possible Security Implications*, A/RES/63/281.

<sup>75</sup> Statement by the Honorable Johnson Toribiong, cit.

<sup>76</sup> In this sense, see also GLICKENHAUS, “Potential ICJ Advisory Opinion”, cit.; BECK and BURLISON, “Inside the System, Outside the Box: Palau’s Pursuit of Climate Justice and Security at the United Nations”, *Transnational Environmental Law*, 2014, p. 17 ff.

an important role in this context. At the very least, this regime serves as a crucial indication of the existence of links between the principle of transboundary harm and state obligations to curb their GHG emissions in international treaty law.

### 8. – *Concluding Remarks*

Climate change-related displacement challenges the traditional understanding of state responsibility in international treaty and customary law. As other types of environmental damage caused by GHG emissions, climate change-related displacement raises questions of allocation of accountability and responsibility that cannot be entirely answered by the current regime of state responsibility. This paper has shown that even extensive interpretations of the founding principles of such a regime, such as the concept of shared responsibility, are capable at the moment to meet the need for redress that is clearly emerging in domestic and supranational jurisprudence. At the same time, the UNFCCC regime, which is specifically targeted at establishing state obligations in relation to climate change caused by GHG emissions, does not provide for definitive solutions with this respect. The principle of common but differentiated responsibilities appears to be too linked to adaptation efforts to be used as a criterion of the allocation of state responsibility for climate change-related harm.

Yet, the examined judicial efforts to raise claims against States who are strong emitters of GHG for the purpose of obtaining reparations and redress suggest that it is only a matter of time before constructions of state responsibility for climate change-related damage start are proposed by supranational and domestic courts. In fact, the *Urgenda* judgment by the Hague District Court already initiated this process. While a judicial dialogue between domestic courts might offer interesting cues, an Advisory Opinion by the ICJ is the most desirable development in this realm. From the point of view of climate change-related displacement, there is no doubt that an Advisory Opinion would provide invaluable cues for international environmental law and jurisprudence on how to address claims raised by individuals against States as well as inter-State climate change litigation. The shift of climate change-related displacement from the framework of adaptation to that of loss and damage in the Paris Agreement suggests an awareness that this phenomenon may no longer be prevented, but must be dealt with as an adverse effect of climate change. This change in perspective makes it even more urgent for international law and jurisprudence to create a legal framework on state responsibility that is capable to respond to calls for climate justice coming from States and populations that are particularly vulnerable to the adverse effects of climate change.

# 3. ENVIRONMENTAL MIGRANTS AND THE EU IMMIGRATION AND ASYLUM LAW: IS THERE ANY CHANCE FOR PROTECTION?

*Giuseppe Morgese\**

SOMMARIO: 1. Introduction. – 2. Protection under EU Asylum Law. – 3. Protection on Humanitarian Grounds. – 4. Protection from Removal According to Relevant Human Rights Law. – 5. Protection under Resettlement Programmes, Humanitarian Admission Schemes and Private Sponsorship. – 6. Protection within Regional Development and Protection Programmes. – 7. Conclusions.

## *1. – Introduction*

It is known that environmental change may affect migration both directly and indirectly. Directly, because natural disasters, drought, famines, and rising sea levels are able to force people to relocate from their home territories; indirectly, due to the fact that even slow environmental events may affect migration in combination with other factors (wars, conflicts over natural resources, etc.). Although environmental change-induced migrations (ECIMs) are not a new phenomenon, in the recent years it has been experienced an increasing deterioration of environment that is likely to

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play an important role on worldwide cross-border migration flows<sup>1</sup>.

Nonetheless, the notion of “migration due to environmental factors” is a controversial one due to existing uncertainties about the real impact of these factors on migration flows. From the one hand, there are little doubts that an earthquake (or any rapid-onset climate events) is likely to force people to move from the place they live in. From the other hand, however, it seems more difficult to assess movements in case of slow-onset climate events (i.e. drought, desertification, rising sea level), that often are not the only reason to migration decisions. Such an uncertainty has two main consequences: firstly, it is difficult to reach an international definition of “migrant due to environmental factors”; secondly, it is equally difficult to find appropriate and shared legislative responses.

At international level, there is still not a common legal definition of environmental migrants owing to two main problems: on the one side, most persons moving in the context of environmental events are likely to stay in their country or region of origin; on the other side, even when crossing borders, they usually are strictly speaking neither refugees nor economic migrants. Several documents refer them to *environmental* or *climate refugees*, pointing out their fear of suffering a physical danger in the home territory<sup>2</sup>; others refer to *environmental induced population movements*, to *environmentally displaced persons*, to *forced environmental migrants* and to *environmentally induced migrants*, each of them highlighting a specific part of the phenomenon<sup>3</sup>. International Organisation for Migrants (IOM) refers to *environmental migrants* as “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>4</sup>. The

<sup>1</sup> See in general LACZKO and AGHAZARM (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, Geneva, 2009; GUBBIOTTI et al., *Profughi Ambientali. Cambiamento climatico e migrazioni forzate*, Dossier Legambiente, 2013, available at: <www.legambiente.it>.

<sup>2</sup> See NESPOR, “I rifugiati ambientali”, *Federalismi.it*, 21 February 2007; CARUSO and VENDITTO, “Il futuro del Mediterraneo. Studio preliminare sui rifugiati ambientali”, in VALLERI, PACE and GIRONE (eds.), *Il Mediterraneo: uno studio e una passione*, Bari, 2012, p. 251 ff.; BUSH, “Redefining Environmental Refugees”, *Georgetown Immigration Law Journal*, 2013, p. 553 ff.

<sup>3</sup> See KRALER, CERNEI and NOACK, *Climate Refugees” - Legal and Policy Responses to Environmentally Induced Migration*, Brussels, 2011, pp. 28-31; and PICCHI, “Climate Change and the Protection of Human Rights: The Issue of Climate Refugees”, *US-China Law Review*, 2016, p. 576 ff., pp. 579-581.

<sup>4</sup> KNIVETON et al., *Climate Change and Migration: Improving Methodologies to Estimate Flows*, Geneva, 2008, p. 31.

latter definition seems to be broad enough to include a vast majority of those affected by ECIMs and would better fit our purposes: this is the reason why, in this contribution, we will refer to “environmental migrants” (EMs).

The lack of a worldwide legal definition of EM is reflected in the absence of a common legal answer to ECIMs at both international and national level<sup>5</sup>. While some commentators stress the need of the extension of the scope of the 1951 Geneva Convention Relating to the Status of Refugee (“Refugee Convention” or “RC”)<sup>6</sup>, others call for broadening the scope of the non-binding 1998 Guiding Principles on Internal Displacement<sup>7</sup>. Further options refer to the need for a new international treaty on the status of environmental migrants, the addition of an *ad hoc* protocol to the 1992 United Nations Framework Convention on Climate Changes (UNFCCC)<sup>8</sup>, the broadening of a human rights approach, or the use of temporary protection and resettlement schemes at national level<sup>9</sup>.

So, it is not surprising that even in the European Union (EU) there is not a legal instrument explicitly allowing EMs to stay temporarily or permanently in the EU territory. It is true that, since the entry into force of the Treaty of Lisbon (1<sup>st</sup> December 2009), “Union policy on the environment shall contribute to pursuit of [the objective of, among others,] combating climate change” (Article 191(1) TFEU) and that the European Commission has repeatedly stressed the relevance of the climate

<sup>5</sup> See PERRINI, “Migrazione circolare e tutela internazionale ed europea dei migranti ambientali”, *Federalismi.it*, 21 July 2017, p. 2.

<sup>6</sup> Convention Relating to the Status of Refugees, 28 July 1951, in 189 U.N.T.S., p. 137 ff. See also the Protocol Relating to the Status of Refugees, 31 January 1967, in 606 U.N.T.S., p. 267 ff.

<sup>7</sup> Available at: <<http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx>>.

<sup>8</sup> Available at: <[http://unfccc.int/essential\\_background/convention/items/6036.php](http://unfccc.int/essential_background/convention/items/6036.php)>.

<sup>9</sup> In literature see MCCUE, “Environmental Refugees: Applying International Environmental Law to Involuntary Migration”, *The Georgetown International Environmental Law Review*, 1993, p. 151 ff.; WILLIAMS, “Turning the Tide: Recognizing Climate Change Refugees in International Law”, *Law & Policy*, 2008, p. 502 ff.; DOCHERTY and GIANNINI, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees”, *Harvard Environmental Law Review*, 2009, p. 349 ff.; ZETTER, “The role of legal and normative frameworks for the protection of environmentally displaced people”, in LACZKO and AGHAZARM (eds.), *cit. supra* note 1, p. 385 ff.; DEWITTE, “At the Water’s Edge: Legal Protections and Funding for a New Generation of Climate Change Refugees”, *Ocean and Coastal Law Journal*, 2010, p. 211 ff.; DUONG, “When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law”, *University of Pennsylvania Journal of International Law*, 2010, p. 1239 ff.; LANGE, “Climate Refugees Require Relocation Assistance: Guaranteeing Adequate Land Assets through Treaties Based on the National Adaptation Programmes of Action”, *Pacific Rim Law & Policy Journal*, 2010, p. 613 ff.; LOMBARDO and TOVO, “Il problema dei “rifugiati climatici” nel diritto dell’Unione Europea”, *Diario europeo*, 2012, p. 34 ff.; KRALER, CERNEI and NOACK, *cit. supra* note 3, pp. 36-49.

change-migration connection<sup>10</sup>, the EU itself being involved in the “Nansen initiative”<sup>11</sup>, in the Steering Group of the Platform on Disaster Displacement<sup>12</sup> and also being party to the UNFCCC. But, for the time being, due to the reluctant approach of the Member States (“MS”), EU migration law regulates neither the definition and acquisition of the status of EM nor the content of protection, notwithstanding Articles 77 to 80 of the Treaty on the Functioning of European Union (TFEU) are designed in a broad enough manner to handle with it.

This contribution aims at examining legal options to fill the protection gap affecting environmental migrants in the EU. Starting from a discussion about the (limited) scope of application of EU harmonised protection statuses, options based on humanitarian grounds and on EU human rights obligations will be evaluated. We will thus take a closer look to further means of protection within (resettlement programmes, humanitarian admission schemes, private sponsorship) and outside (Regional Development and Protection Programmes) the EU territory. Eventually, it will be clear that existing means of protection in the EU are very limited in scope and not designed to fill in a satisfactory way the protection gap of EMs.

## 2. – *Protection under EU Asylum Law*

International law only acknowledges small groups of forced migrants suitable to be formally protected in States other than their own, namely refugees (and stateless persons) in accordance to the RC and people eligible for some kind of complementary protection. In the EU, there are three harmonised protection statuses (i.e. statuses granted in each MS on the basis of EU standards), namely refugee status, subsidiary protection status and temporary protection status. Thus, the question is whether or not EMs are suitable to be protected in the EU according to these statuses.

<sup>10</sup> Communication, The Global Approach to Migration and Mobility, 18 November 2011, COM(2011) 743 final, p. 7; Communication, An EU Strategy on Adaptation to Climate Change, 16 April 2013, COM(2013) 216 final, and its accompanying Staff Working Document, Climate Change, Environmental Degradation, and Migration, 16 April 2013, SWD(2013) 138 final; Communication, A European Agenda on Migration, 13 May 2015, COM(2015) 240 final, p. 7. See MAYRHOFER and AMMER, “People Moving in the Context of Environmental Change: The Cautious Approach of the European Union”, *European Journal of Migration and Law*, 2014, p. 389 ff., pp. 393-429.

<sup>11</sup> The Nansen Initiative, launched in 2012, aims at building an international consensus on a Protection Agenda addressing the needs of people displaced across borders in the context of disasters and the effects of climate change. Available at: <<https://www.nanseninitiative.org>>.

<sup>12</sup> Launched in May 2016 to follow up on the work of the Nansen Initiative and its Protection Agenda.



To begin with, Directive 2011/95/EU (“Qualification Directive” or “QD”)<sup>13</sup>, that have been implemented by MS in their domestic jurisdiction, draws a distinction between refugees and beneficiaries of subsidiary protection in the EU.

The conditions for granting the *refugee status* largely correspond to the definition of Article 1A(2) RC<sup>14</sup>. Article 2(d) QD stresses that

“‘refugee’ means a third-country national [or a stateless person] who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality [or the country of former habitual residence] and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country”.

It does seem hard to bring EMs onto the definition of refugee<sup>15</sup>. Like the RC, the QD does require an identifiable human prosecutor that must be a government actor or a non-State actor that the government is unwilling or unable to control (Article 6). It also needs a causal link between environmental event and action or omission directly imputable to the State of origin suitable to cause a well-founded (individual) fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group (Article 10). Unfortunately, the key point is that environmental events are indiscriminate by nature, are usually not of (direct) human origin and do not differentiate on the above five reasons. Maybe it could be possible, under specific conditions, to include EMs into the notion of “particular social group”, but it would happen in very few cases, namely where environmental

<sup>13</sup> Directive 2011/95/EU, of 13 December 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, in OJ L 337, 20 December 2011, pp. 9-26.

<sup>14</sup> According to Article 1A(2): “the term ‘refugee’ shall apply to any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]”. See ALEXANDER and SIMON, “Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change”, *Florida Journal of International Law*, 2014, p. 531 ff.

<sup>15</sup> According to NI, “A Nation Going under: Legal Protection for Climate Change Refugees”, *Boston College International and Comparative Law Review*, 2015, p. 329 ff., p. 343 in note 115, the drafters of the RC knowingly declined to extend refugee status to the victims of natural calamities. *Contra* COOPER, “Environmental Refugees: Meeting the Requirements of the Refugee Definition”, *N.Y.U. Environmental Law Journal*, 1998, p. 480 ff.

disasters are linked to some extent to governmental actions or omissions. For instance, in *Teitiota* the High Court of New Zealand refused to recognize the refugee status to the applicant, a forced migrant from the low-lying Kiribati Islands, due to the lack of an identifiable actor and a proper persecution according to the RC<sup>16</sup>. On the contrary, if one can prove that a governmental action or omission has caused the environmental harmful event, at least the above causal link should be recognized: in *Budayeva*, the European Court of Human Rights (ECtHR) held that there had been a violation of Article 2 (right to life) of the European Convention on Human Rights (ECHR) owing to the Russia's failure to protect the life of the applicants, residents of the town of Tyrnauz, from mudslides which destroyed their homes<sup>17</sup>.

Although apparently EMs may be qualified as refugees only under strict conditions, we cannot say that it is not possible at all: in order to achieve it, an asylum-seeker does need to fulfil all the eligibility conditions required by Articles 1A(2) RC and 2(d) QD, not being enough the mere environmental disaster-related migration.

Similarly, it would be hard to qualify EMs under the other protection status set out in the QD, namely *subsidiary protection* status applicable to individuals who, despite not qualifying as refugees, can nevertheless claim the protection<sup>18</sup>. Although an EM claiming subsidiary protection should prove a more favourable "real risk of suffering serious harm" as defined in Article 15 QD<sup>19</sup>, it must be stressed anyway that the three

<sup>16</sup> High Court (New Zealand), *Teitiota v. Chief Executive of Ministry of Business, Innovation and Employment*, Judgement of 26 November 2013, available at: <<http://www.nzlii.org/nz/cases/NZHC/2013/3125.html>>. It is worth nothing that both Court of Appeal and Supreme Court have declined to grant leave to appeal. See NI, *cit. supra* note 15, pp. 336-344.

<sup>17</sup> *Budayeva and Others v. Russia*, Applications Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgement of 20 March 2008. See MCADAM, *Climate Change, Forced Migration, and International Law*, Oxford-New York, 2012, pp. 59-60; CIERVO, "I rifugiati invisibili. Brevi note sul riconoscimento giuridico di una nuova categoria di richiedenti asilo", in ALTIERO and MARANO (eds.), *Crisi ambientale e migrazioni forzate*, Roma, 2016, p. 255 ff., pp. 261-263.

<sup>18</sup> According to Article 2(f) QD, "'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country". See BATTJES, "Subsidiary Protection and Other Alternative Forms of Protection", in CHETAIL and BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham-Northampton, 2014, p. 541 ff., pp. 550-556.

<sup>19</sup> Under which "[s]erious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or

situations enumerated in the above-mentioned provision are hardly applicable to EMs.

To begin with, Articles 15(a) QD deals with the risk of suffering a death penalty or execution, thus imposing upon MS a specific obligation to grant subsidiary protection to individuals facing a risk of being subject to death penalty in the receiving State: as such, this provision seems not to be applicable to environmental disaster in the absence of a death sentence. Nor the actual or potential adverse effects of natural disasters could be easily considered as “indiscriminate violence in situations of international or internal armed conflict” according to Article 15(c) QD, except in cases where environmental factors induce or worsen such conflicts<sup>20</sup>.

Talking about the risk of “torture or inhuman or degrading treatment or punishment” according to Article 15(b) QD, the European Court of Justice (ECJ) held that this provision corresponds in essence to Article 3 ECHR and the ECtHR case-law is of relevance in interpreting the scope of the provision<sup>21</sup>. The Court has so far identified three situations in which removal bans applies to third-country individuals<sup>22</sup>. The first and more frequent one is linked to the risk of serious harm due to *direct and intentional infliction* by State or non-State actors in the receiving country<sup>23</sup>. The second category is resulting from *naturally occurring damages*<sup>24</sup>, but the ECtHR set a high threshold for these types of cases, having the situation to be very exceptional and humanitarian considerations be compelling<sup>25</sup>. Under the third category, the Court held that Contracting States of the ECHR must not issue a removal order where direct

internal armed conflict”.

<sup>20</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, p. 409.

<sup>21</sup> See case C-465/07, *Elgafaji*, ECR, 200,9 I-921, para. 28.

<sup>22</sup> According to which “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. See MAYRHOFER and AMMER, *cit. supra* note 10, pp. 413-418, and SCOTT, “Natural Disasters, Climate Change and *Non-Refoulement*: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?”, *International Journal of Refugee Law*, 2014, p. 404 ff., pp. 412-416.

<sup>23</sup> In *Soering v. The United Kingdom*, Application No. 14038/88, Judgement of 7 July 1989, the Court held that an absolute prohibition of *non-refoulement* applied owing to the mere extradition of the applicant from a Contracting State of the ECHR to a receiving country where he would have faced a real risk of torture or inhuman or degrading treatment or punishment: see also *Chahal v. The United Kingdom*, Application No. 22414/93, Judgement of 15 November 1996, and *Saadi v. Italy*, Application no. 37201/06, Judgement of 28 February 2008.

<sup>24</sup> In *D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997, the applicant, a terminally-ill man, if expelled would not have received palliative care as adequate as in the Contracting State.

<sup>25</sup> *N. v. The United Kingdom*, Application No. 26565/05, Judgement of 27 May 2008, para. 42.

and indirect actions of State or non-State actors in the receiving territory are seen as the *predominant cause* of a natural disaster that the removing individual would face<sup>26</sup>.

In view of the above, it would be quite hard for EMs to seek subsidiary protection under Article 15(b) QD. The first category of Article 3 ECHR situations is very unlikely to apply owing to the lack of a direct and intentional harm by State or non-State actors in the majority of environmental events. Nor the provision is likely to play a role under the second category, absent those very exceptional and individual circumstances required to establish a claim in most environmental disaster cases, that are indiscriminate in nature. Even the third category is unlikely to apply, unless there can be alleged substantial evidence of human predominant cause: otherwise, the environmental event is likely to be seen as a purely natural occurring one<sup>27</sup>. To sum up, ECtHR case-law shows little room for claims where socioeconomic or environmental conditions in the receiving country would suffice *per se* to integrate an inhuman or degrading treatment<sup>28</sup>. Perhaps, the only possibility for protecting EMs according to Articles 15(b) QD and 3 ECHR, under specific conditions, could stem from situations of complete lack of food, water and housing if they are returned to countries affected by huge environmental disasters<sup>29</sup>.

If that is not enough, chances to apply refugee or subsidiary protection status to EMs are further complicated by two circumstances. On the one hand, under the optional provision of Article 8(1) QD,

“[...] MS may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she: (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or (b) has access to protection against persecution or serious harm; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there”. So, in the case of such an “internal alternative”

<sup>26</sup> *Sufi and Elmi v. The United Kingdom*, Application No. 8319/07, Judgement of 28 June 2011, para. 282.

<sup>27</sup> In *Sufi and Elmi*, the ECtHR noted that the humanitarian situation was not solely due to naturally occurring phenomena, such as drought, but also a result of the actions or inactions of state parties to the conflict in Somalia.

<sup>28</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, p. 417.

<sup>29</sup> *Ibid.*, p. 418. See also MCADAM, *cit. supra* note 17, p. 76.

(i.e. another part of the country of origin not affected by the alleged climate event), EMs are reasonably expected to relocate within their home country and thus not allowed to claim international protection elsewhere. Such a provision seems to play an important role in protection status determination within those MS that have opted-in on it, owing to the fact that there are very few cases where a State of origin has been entirely concerned by an environmental harmful event<sup>30</sup>. On the other hand, it must be recalled that asylum-seekers could anyway be excluded from refugee or subsidiary protection status according to Articles 12 and 17 QD.

Given the substantial limitations of the QD, one should pay attention to another kind of protection, namely *temporary protection* set out in Council Directive 2001/55/EC, of 20 July 2001 (“Temporary Protection Directive” or “TPD”)<sup>31</sup>.

At first sight, such a protection seems to be more promising when dealing with EMs. Indeed, the whole procedure aims at providing “immediate and temporary protection” regardless of any international protection status determination (Article 2(a)). Furthermore, TPD does not refer to the narrow definitions of refugees or persons eligible for subsidiary protection, but to “displaced persons”, namely “third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, [...] and are unable to return in safe and durable conditions because of the situation prevailing in that country” (Article 2(b)). Finally, unlike the QD, the TPD does contain only a non-exhaustive list of cases for temporary protection, thus giving room to a broader implementation of the Directive.

Notwithstanding these positive elements, however, there are others that run counter an application in the case of EMs<sup>32</sup>. First of all, we are dealing with a “procedure of exceptional character” applicable only “in the event of a mass influx or imminent mass influx” (Article 2(a)), inapplicable as such to persons moving individually or in small groups. Secondly, the temporary protection can be acknowledged by a MS

<sup>30</sup> See KRALER, CERNEI and NOACK, *cit. supra* note 3, p. 52. On the internal alternative see EATON, “The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive”, *International Journal of Refugee Law*, 2012, p. 765 ff., and NÍ GHRÁINNE, “The Internal Protection Alternative Inquiry and Human Rights Considerations - Irrelevant or Indispensable?”, *International Journal of Refugee Law*, 2015, p. 29 ff.

<sup>31</sup> 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, 7 August 2001, pp. 12-23. See BATTJES, *cit. supra* note 18, pp. 557-558. In this volume, see SCIACCALUGA, *infra* p. 77 ff.

<sup>32</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, pp. 406-407.

only on the outcome of a complex procedure involving an EU Council Decision establishing the existence of a mass influx, based on a proposal from the Commission. But the major obstacle is represented by the long-lasting absence of MS political will to resort to such a procedure (mainly because of the resulting distribution of temporarily protected persons among MS themselves), which is the reason why the TPD mechanism has never been used so far.

The same holds true for those “provisional measures” set out in Article 78(3) TFEU, insofar as the Council could adopt them “in the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries”, thus excluding EMs moving on individual or in small group basis. As explained in *Slovak and Hungary v Council* (the so called “relocation case”), indeed, such non-legislative measures could be adopted on a temporary basis in case of “an inflow of nationals of third countries (...), even though it takes place in the context of a migration crisis spanning a number of years, [that] makes the normal functioning of the EU common asylum system impossible”<sup>33</sup> and are mainly inspired by an intra-EU solidarity rationale.

### 3. – *Protection on Humanitarian Grounds*

Owing to the difficulties in relying on the above-mentioned provisions in order to protect EMs, attention should be paid to further provision related to EU immigration law, namely those concerning the entry, stay on and protection from removal of third-country nationals from the MS territory for humanitarian reasons. According to Recital 15 of the QD, “[t]hose third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope” of the QD itself. Moreover, as explained below and unlike EU harmonised protection statuses, these humanitarian provisions are non-mandatory, thus allowing Member States to deal with different national humanitarian practices.

Starting with entry provisions, it should be recalled that nationals from countries listed in the Annex 1 to the Regulation No. 539/2001 are subject to a visa requirement

<sup>33</sup> Case C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union* (Judgement), ECLI:EU:C:2017:631, para. 114.

prior to enter the EU territory<sup>34</sup>. Short-stay visas are subject to the Regulation No. 810/2009 (“Visa Code” or “VC”)<sup>35</sup>; by contrast, long-stay visas are issued by Member States under their domestic immigration law. As a general rule, a short-stay visa may be issued by MS consulates or representations in third States in specific cases and subject to a positive decision on admissibility criteria set out in the VC<sup>36</sup>, including the fact that the applicant does not present a risk of illegal immigration and must prove his intention to leave the territory of the MS before the expiry of the visa. Thus, short-stay visas do not allow third-country nationals to enter in any case and stay indefinitely on the territory of MS.

The Visa Code does not contain special provisions concerning the entry and stay of EMs. However, some key articles dealing with humanitarian-related situations<sup>37</sup> could be interpreted in order to meet their needs. On the one hand, Article 19(4) VC states that, by way of derogation, a visa application that does not meet the above-mentioned admissibility criteria “may be considered admissible on humanitarian grounds”. On the other hand, Article 25(1)(a) VC recalls that a MS, even when another MS is objecting to a third-country national visa application<sup>38</sup>, may exceptionally issue a so-called “visa with limited territorial validity”<sup>39</sup> when necessary “on humanitarian grounds”. Furthermore, an issued short-stay visa shall be prolonged “where the competent authority of a Member State considers that a visa holder has provided proof of [...] humanitarian reasons preventing him from leaving the territory of the Member States before the expiry of the period of validity of or the duration of stay authorised

<sup>34</sup> Regulation (EC) No 539/2001, of 15 March 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, in OJ L 81, 21 March 2001, pp. 1-7. On the contrary, nationals from countries on the list in Annex II of the Regulation are exempt from that requirement. EU nationals and nationals from countries that are part of the Schengen Area (and their family members) have the right to enter without prior authorisation.

<sup>35</sup> Regulation (EC) No. 810/2009, of 13 July 2009, establishing a Community Code on Visas, in OJ L 243, 15 September 2009, pp. 1-58. A “short stay” is intended as not exceeding 90 days in any 180-day period.

<sup>36</sup> For instance, possession of a valid travel document, justification of the purpose and conditions of the visit, non-listing of the applicant in the Schengen Information System, not posing a threat to public policy, internal security, public health or the international relations of the MS, possession of a travel insurance.

<sup>37</sup> See HEIN and DE DONATO, *Exploring Avenues for Protected Entry in Europe*, Abbiategrosso (MI), 2012, available at: <<https://cir-onlus.org/images/pdf/ET%20VOLUME%20FINALE%20OK.pdf>>; NEVILLE and RIGON, *Towards an EU humanitarian visa scheme?*, EP Policy Department C: Citizens’ Rights and Constitutional Affairs, PE 556.950, Brussels, 2016.

<sup>38</sup> The Visa Code sets out a system of “prior consultation” of all EU Member States before issuing a visa for nationals from particular third countries or in particular cases.

<sup>39</sup> Such visas are valid for one or more (but less than all) of the Schengen States.

by the visa” (Article 33(1) VC). Finally, in the case of a visa application at the external border, under Article 35(2) VC “the requirement that the applicant be in possession of travel medical insurance may be waived [...] for humanitarian reasons”.

Apart from such “protected entry” provisions, to which most of the MS resorts on an exceptional basis<sup>40</sup>, it should therefore be noted that Regulation 2016/399 (“Schengen Borders Code” or “SBC”)<sup>41</sup> provides in a manner consistent to VC. Under Article 6(5)(c) SBC, third-country nationals who do not meet all the conditions to enter the Schengen Area may be allowed by a MS to enter its territory “on humanitarian grounds, on grounds of national interest or because of international obligations”.

EU immigration law allows MS to resort to humanitarian grounds also against the removal of illegally staying third-country nationals. Following Article 6(4) of the Directive 2008/115/EC (“Return Directive”)<sup>42</sup>, “Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory”.

The question thus is whether or not these humanitarian grounds are ample enough to deal with environmental disasters and to let EMs to enter, stay on and not be removed from the territory of the EU Member States. Unfortunately, the VC does not go further in defining such grounds and, until now, no further measure has been adopted by the EU legislature with regard to uniform short-stay or, even more, long-stay visas on these reasons. Similarly, neither the Schengen Borders Code nor the Return Directive go into details of the humanitarian grounds according to their provisions. In *X and X v. Belgium*, a humanitarian visa case, Advocate General Mengozzi in its Opinion held that humanitarian grounds as referred to in Article 25(1) VC should be a concept of EU law and must not be exclusive to a Member State<sup>43</sup>, but the European Court of Justice has taken a different view stating that “the applications [for such visas] fall solely within the scope of national law”<sup>44</sup>.

<sup>40</sup> With reference to the Italian situation, see HEIN and DE DONATO, *cit. supra* note 36, pp. 44-45.

<sup>41</sup> Regulation (EU) 2016/399, of 9 March 2016, on a Union Code on the rules governing the movement of persons across borders, in OJ L 77, 23 March 2016, pp. 1-52.

<sup>42</sup> Directive 2008/115/EC, of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals, in OJ L 348, 24 December 2008, pp. 98-107

<sup>43</sup> Case C-638/16 PPU, *X and X v. Belgium* (Opinion), ECLI:EU:C:2017:93, para. 130.

<sup>44</sup> Case C-638/16 PPU, *X and X v. Belgium* (Judgement), ECLI:EU:C:2017:173, para. 44. See BROUWER, “The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportun-



Should that prove to be the case, then we shall conclude that the exact scope of application of these humanitarian grounds – eventually including environmental ones – lies within the competence of the MS. Similarly, decisions whether to let third-country nationals to enter, stay on and not be removed on such humanitarian grounds are also a matter of the competent national authorities, because of the fact that all the aforementioned provision in the VC, the SBC and the RD are non-mandatory.

The lack of EU mandatory provisions does not mean that MS themselves cannot introduce specific provisions in their domestic legal order<sup>45</sup>. It has to be recalled that the majority of EU States have not a legislation in place applicable, at least in part, to EMs. Some exceptions are, for instance, Sections 88a(1) and 109(1) of the Finnish Aliens Act, that provide for humanitarian protection in case of environmental catastrophe and temporary protection for environmental disaster; moreover, Section 2(3) of Chapter 4 of the Swedish Aliens Act provides residence permits for persons unable to return to the country of origin because of an environmental disaster.

In Italy, under Article 5(6) of the Legislative Decree No. 286/1998, a residence permit can be granted to third-country nationals or stateless persons that do not satisfy the conditions of stay on national territory according to international agreements but to whom there are serious reasons of humanitarian nature or resulting from constitutional or international obligations of the Italian State. Such a humanitarian permit may be granted also to third-country nationals whose requests for refugee or subsidiary protection status have been denied but to whom the same serious reasons arise. Article 5(6) has been implemented, for instance, in the occasion of a major natural disasters in Bangladesh, namely the Sidr cyclone<sup>46</sup>.

Moreover, Article 20 of the Italian Legislative Decree No. 286/1998 provides for

ism?”, 16 March 2017, available at: <<https://www.ceps.eu/publications/european-court-justice-humanitarian-visas-legal-integrity-vs-political-opportunism>>; CAGGIANO, “Are You Syrious? Il diritto europeo delle migrazioni dopo la fine dell’emergenza alla frontiera orientale dell’Unione”, *Freedom, Security & Justice: European Legal Studies*, 2017, p. 7 ff., pp. 14-16; FAVILLI, “Visti umanitari e protezione internazionale: così vicini così lontani”, *Diritti umani e diritto internazionale*, 2017, p. 553 ff.

<sup>45</sup> See EUROPEAN MIGRATION NETWORK, *The different national practices concerning granting of non-EU harmonised protection statuses*, December 2010, available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0\\_emn\\_synthesis\\_report\\_noneuharmonised\\_finalversion\\_january2011\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0_emn_synthesis_report_noneuharmonised_finalversion_january2011_en.pdf)>.

<sup>46</sup> See BRAMBILLA, “Migrazioni indotte da cause ambientali: quale tutela nell’ambito dell’ordinamento giuridico europeo e nazionale?”, *Diritto Immigrazione e Cittadinanza*, 2017, pp. 15-16.

collective reception measures in the case of exceptional events, establishing temporary protection for relevant humanitarian needs for, among others, natural disasters. The latter provision has been implemented, for instance, in 2011 leading to the issue of residence permits to nationals of North Africa States during the events of the so-called “Arab Spring”<sup>47</sup>.

#### 4. – *Protection from Removal According to Relevant Human Rights Law*

Now we should pay attention to another kind of protection of EMs, namely that against removal orders from the territory of the MS according to relevant human rights law applicable in the EU (and MS themselves). Human rights law is of paramount importance to EMs in view of the fact that it sets out minimum standards of protection to every individual within the State jurisdiction, leading in some cases to an absolute protection against the *refoulement* beyond the refugee category<sup>48</sup>.

As widely known, the principle of *non-refoulement* incorporated in Article 33(1) RC, under which refugees must not be returned to a country where their life or freedom would be threatened due to their race, religion, nationality, membership of a particular social group or political opinion, is a key element of EU asylum law<sup>49</sup>. Under Article 78 TFEU, the EU must ensure “compliance with the principle of *non-refoulement*” according to the RC and other relevant treaties<sup>50</sup>. Article 21 QD stipulates that “Member States shall respect the principle of *non-refoulement* in accordance with their international obligations”. Unfortunately, both Article 33 RC and Article 21 QD are not of absolute nature, allowing for the removal of a refugee when he poses a threat to the security of the host State or when, after the commission of a serious crime, he is a danger to the host community.

<sup>47</sup> See COSSA, “Rifugiati climatici: le politiche e la normativa internazionale e dell’Unione Europea”, in ALTIERO and MARANO (eds.), *cit. supra* note 17, p. 269 ff., p. 276.

<sup>48</sup> See MCADAM, *cit. supra* note 17, pp. 52-53.

<sup>49</sup> See in general WALLACE, “The Principle of *Non-Refoulement* in International Refugee Law”, in CHETAIL and BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham-Northampton, 2014, p. 417 ff.

<sup>50</sup> Including the ECHR, the International Covenant on Civil and Political Rights of 16 December 1966 (whose Article 7 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (the Article 3 of which stresses that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”).

In turn, Article 19(2) of the Charter of Fundamental Rights of the EU (“Charter”), which has the same legal value as the Treaties, stipulates that Member States are bound by an absolute prohibition of any return of an individual “to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”. Article 19(2) Charter stems from the ECtHR case-law related to Articles 2 and 3 of the ECHR<sup>51</sup> and, according to Article 52(3) Charter, “the meaning and scope of those rights shall be the same as those laid down by the [ECHR itself]”. Moreover, according to Article 6(3) of the Treaty on European Union (“TUE”), “[f]undamental rights, as guaranteed by the [ECHR] shall constitute general principles of the Union’s law”.

So, the question is to assess whether, and to what extent, fundamental rights as enshrined in the ECHR and according to the ECtHR case-law, together with Charter provisions, prohibit decisions to remove EMs from the territory of the MS because of environmental events in the returning countries.

In Section 2, we have already examined the prohibition set out in Article 3 ECHR and its role in assessing the existence of a “serious harm” according to Article 15(b) QD: as a consequence, EU Member States are required to grant subsidiary protection status to EMs only under specific circumstances, according to the ECtHR case-law. But Article 3 ECHR does play a much wider role due to its applicability not only to beneficiaries of international protection but to any third-country national, irrespective of his personal status, the existence of persecution or any other condition. In this respect, under the same conditions set out in the aforementioned ECtHR case-law, MS would anyway be denied the possibility of issuing removal orders against every EMs facing a risk to be subject to inhuman or degrading treatment or punishment due to environmental harmful events.

The same reasoning does apply to removal bans owing to the duty of the Member States to safeguard the lives of third-country individuals, according to Article 2

<sup>51</sup> It must be stressed that the ECHR does not explicitly provide for *non-refoulement*. However, the ECtHR has recognised this principle through its case-law, by deriving from Article 1 ECHR an implicit obligation of Contracting States to protect migrants against *refoulement*.

ECHR (right to life)<sup>52</sup> and Articles 2<sup>53</sup> and 3(1)<sup>54</sup> of the Charter. It has to be recalled that the absolute right to life enshrined in Article 2 ECHR is wider than the mere prohibition of death penalty or execution – leading as such to subsidiarity protection status according to Article 15(a) QD – and includes other forbidden conducts as, for instance, the use of lethal force or the disappearance of persons by the State. Notwithstanding the ECtHR tends to examine relevant cases either under Article 2 or 3 ECHR, a removal from the territory of a Contracting State is absolutely prohibited *par ricochet* where it would expose an individual to a real risk of loss of life<sup>55</sup>. A key difference between Articles 2 and 3 lies in the fact that, under the former provision, the prospect of death as a consequence of return decision must be quite a certain one, unlike Article 3 where “substantial grounds” are enough. Should that prove to be the case, it seems that, at least in Article 2 stand-alone cases, EMs would face a higher threshold to prove the causal link between environmental harmful event and risk of death, especially in the case of a viable internal relocation alternative.

Finally, one should pay attention to Article 8(1) ECHR (right to respect for private and family life), according to which “[e]veryone has the right to respect for his private and family life, his home and his correspondence”. The right referred to in this provision has often been invoked as a protection against *refoulement* of migrants in cases not involving the risk of treatment contrary to Article 3 ECHR. The ECtHR provided a broad interpretation of Article 8, for instance covering situations where third-country nationals are threatened with removal (or are removed) and that could have serious repercussions for their existing family life, or where, absent such a family, the circumstances of applicants’ private life alone may justify the protection from *refoulement*.

<sup>52</sup> According to which “(1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection”. Nowadays, the prohibition of death penalty is of absolute character in most European States according to Protocols No. 6 (abolition of the death penalty) and No. 13 (abolition of the death penalty in all circumstances) to the ECHR.

<sup>53</sup> Under which “1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed”.

<sup>54</sup> According to which “[e]veryone has the right to respect for his or her physical and mental integrity”.

<sup>55</sup> *Z and T v. The United Kingdom*, Application No. 27034/05, Judgement of 28 February 2006, para. 6: “[the Article 3 analysis from *Soering*] applies equally to the risk of violations of Article 2”.

It must be recalled that, unlike Articles 2 and 3, Article 8 ECHR is not of an absolute character, interferences by public authorities being possible “in accordance with the law and [when] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (para 2). It means that removal orders will be possible but only where they would result in a justified interference with third-country nationals’ right to respect for private or family life. In particular, removals will be allowed in situations of emergency under the conditions of legality, proportionality and necessity established by the ECtHR case-law. In order to strike a fair balance between the interests of the State and the rights of the individual, the Court has taken into consideration many aspects including the individual’s family situation, the best interest of children, the time spent in the removing State, the seriousness of the offence, the level of social and cultural ties in the latter State, etc.

So far, the ECtHR held that there had been numbers of violations of Article 8 ECHR in environmental cases, none of which however has implied a removal ban in a third country affected by a climate disaster. Nor it could be easy for EMs to rely on Article 8 case-law in the future, owing to the less weight the ECtHR usually places on the seriousness of the difficulties that a third-country national is likely to face in the receiving State, compared for instance with difficulties faced by his family in the same receiving State<sup>56</sup>. Thus, even if EMs could hypothetically rely on the argument related to the impact of removal according to Article 8 ECHR, it seems that stand-alone claims based on the fact that their right to “physical and moral integrity” would be adversely affected by environmental events in the receiving State are likely to have little prospect of success, in particular where dealing with a proper internal alternative.

Anyway, it must be pointed out that any removal bans applicable to EMs, according to human rights provisions, would be a “narrow” kind of protection. This is the reason why MS would only be precluded from removing concerned individuals from their home territory, but not bound to automatically grant them an international protection status. Article 9(1)(a) of the Return Directive stresses that “Member States shall postpone removal [...] when it would violate the principle of non-refoulement”

<sup>56</sup> For relevant case-law, see SCOTT, *cit. supra* note 22, p. 418.

but does not go further in putting on MS an obligation to grant international protection. At least, there could be issued residence permits on humanitarian reasons<sup>57</sup>, generally on a non-mandatory basis according to Article 6(4) of the Return Directive. For instance, in the Sidr cyclone case, Italian authorities only approved removal bans of Bengali nationals according to “justified reasons” under Article 14(5-ter) of the Legislative Decree No. 286/1998<sup>58</sup>, but they did not grant those nationals humanitarian permits for a long time<sup>59</sup>.

### 5. – *Protection under Resettlement Programmes, Humanitarian Admission Schemes and Private Sponsorship*

While EU provision on international protection, humanitarian statuses and protection from *refoulement* according to human rights law, where applicable to EMs, assume that third-country nationals have previously entered legally or illegally the territory of the Member States, or are going to enter it, there are further options applicable to EMs not already present in the EU, namely resettlement programs, humanitarian admission schemes, private sponsorship and local integration under Regional Development and Protection Programmes (RDPP).

First of all, we need to assess the opportunities of *resettlement* to fill the protection gap of EMs. According to the United Nations High Commissioner for Refugees (UNHCR), “[r]esettlement is the transfer of refugees from the country in which they have sought asylum to another State that has agreed to admit them as refugees and to grant them permanent settlement and the opportunity for eventual citizenship”<sup>60</sup>. Resettlement is one of the three durable solutions – together with voluntary repatriation and local integration – identified by UNHCR as adequate means to end the cycle of displacement by resolving refugees’ plight so that they can lead normal lives<sup>61</sup>.

<sup>57</sup> See for instance Article 28(d) of the Italian Decree of the President of the Republic No. 394/1999.

<sup>58</sup> According to which “[t]he infringement of the [removal order] is punished, *unless there is a justified reason*, with a fine from 10,000 to 20,000 Euros [...]” (emphasis added).

<sup>59</sup> See BRAMBILLA, *cit. supra* note 45, p. 15.

<sup>60</sup> See UNHCR, *Resettlement Handbook*, Geneva, 2011, p. 36. See also PERRIN-McNAMARA, *Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames*, San Domenico di Fiesole (FI), 2013, available at: <<http://cadmus.eui.eu/handle/1814/29400>>.

<sup>61</sup> *Ibid.*, p. 28. See also MORGESE, “Solidarietà e ripartizione degli oneri in materia di asilo nell’Unione europea”, in CAGGIANO (a cura di), *I percorsi giuridici per l’integrazione. Migranti e titolari di protezione internazionale tra diritto dell’Unione e ordinamento italiano*, Torino, 2014, p. 365 ff., pp. 396-400; and ZIECK, “The Limitations of Voluntary Repatriation and Resettlement of Refugees”, in CHETAIL and

The European Commission has begun to discuss resettlement quite recently, stressing since 2000 the need for an EU-wide scheme as a way to ensure more orderly and managed entry in the EU for persons in need of international protection<sup>62</sup>. In 2012, the EU issued a Decision on a Joint EU Resettlement Programme, consisting in setting common priorities instead of different MS national priorities and including financial support (under ERF Regulation) to MS willing to resettle targeted individuals from third countries<sup>63</sup>. Under the 2012 Decision, targeted individuals are persons from countries/regions identified for Regional (Development and) Protection Programmes, persons belonging to a vulnerable group falling within the UNHCR resettlement criteria<sup>64</sup>, and persons from a geographical location on the list of common EU priorities for 2013.

In 2014, the EU approved the AMIF Regulation, repealing the ERF Regulation<sup>65</sup>. Under Article 2(a) of the AMIF Regulation, “‘resettlement’ means the process whereby, on a request from the [UNHCR] based on a person’s need for international protection, third-country nationals are transferred from a third country and established in a Member State where they are permitted to reside with” an international protection status or any other status which offers similar rights and benefits. According to Article 17, “Member States shall [...] receive every two years an additional amount [...] based on a lump sum [...] for each resettled person”. Targeted persons

BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham-Northampton, 2014, p. 562 ff., pp. 574-580.

<sup>62</sup> Communication, Towards More Accessible, Equitable and Managed Asylum Systems, 3 June 2003, COM(2003) 315 final; Communication, On the managed entry in the EU of persons in need of International Protection and the enhancement of the protection capacity of the regions of origin “Improving Access to Durable Solutions”, 4 June 2004, COM(2004) 410 final. See PAPADOPOULOU et al., *Comparative Study on the Best Practices for the Integration of Resettled Refugees in the EU Member States*, requested by the EP Committee on Civil Liberties, Justice and Home Affairs, PE 474.393, Brussels, 2013, pp. 12-20, available at: < [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474393/IPOL-LIBE\\_ET\(2013\)474393\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474393/IPOL-LIBE_ET(2013)474393_EN.pdf)>.

<sup>63</sup> Decision No. 281/2012/EU, of 29 March 2012, amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme “Solidarity and Management of Migration Flows”, in OJ L 92, 30 March 2012, pp. 1-3.

<sup>64</sup> For instance, women and children at risk, unaccompanied minors, survivors of violence and torture, persons having serious medical needs, persons in need of emergency or urgent resettlement for legal or physical protection needs.

<sup>65</sup> Regulation (EU) No. 516/2014, of 16 April 2014, establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No. 573/2007/EC and No. 575/2007/EC and Decision 2007/435/EC, in OJ L 150, 20 May 2014, pp. 168-194.

are those from a country or region designated for the implementation of a R(D)PP, those from a country or region which has been identified in the UNHCR resettlement forecast and where Union common action would have a significant impact on addressing the protection needs, and those belonging to a specific category falling within the UNHCR resettlement criteria.

In 2015, as part of the EU response to the so-called “refugee crisis” according to the European Agenda on Migration that *inter alia* called the EU to step up its resettlement efforts<sup>66</sup>, the Commission adopted Recommendation No. 2015/914 on a European resettlement scheme<sup>67</sup>. According to its Paragraph 2, the term “resettlement” refers to the transfer of “individual displaced persons in clear need of international protection”, on request of the UNHCR, from a third country to a Member State, in agreement with the latter, with the objective of protecting against *refoulement* and admitting and granting the right to stay and any other rights similar to those granted to a beneficiary of international protection. The Recommendation called on Member States to resettle 20.000 persons over a two-year period, but JHA Council had adopted conclusions on resettling 22.504 displaced persons<sup>68</sup>. MS agreed that they would have taken account of priority regions including North Africa, the Middle East, and the Horn of Africa.

To date, several Member States have implemented permanent or *ad hoc* national resettlement programmes<sup>69</sup>. As to Italy, the first national resettlement project, the *Oltremare I* project (2007-2008) resulted in the resettlement of 39 Eritrean refugees from Libya; as to the *Oltremare II* project (2008- 2009), it resettled further 30 Eritrean refugees from Libya. During the period 2009-2011, it has been implemented an *ad hoc* resettlement programme, the *Reinsediamento a sud*, aimed at resettling

<sup>66</sup> See COM(2015) 240 final, p. 5.

<sup>67</sup> Recommendation (EU) 2015/914, of 8 June 2015, on a European resettlement scheme, in OJ L 148, 13 June 2015, p. 32-37.

<sup>68</sup> JHA Council, Conclusions of 20 July 2015. See MORGESE, “Recenti iniziative dell’Unione europea per affrontare la crisi dei rifugiati”, *Diritto Immigrazione e Cittadinanza*, 2015, p. 15 ff., pp. 28-31.

<sup>69</sup> See EUROPEAN MIGRATION NETWORK, *Resettlement and Humanitarian Admission Programmes in Europe - what works?*, 9 November 2016, available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn-studies-00\\_resettlement\\_synthesis\\_report\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_resettlement_synthesis_report_final_en.pdf)>.



179 Palestinian recognized refugees living in a camp situated at the Syrian-Iraqi border<sup>70</sup>. In 2011-2015, Italy has resettled a number of 766 individuals within resettlement (and humanitarian admission) schemes.

In the light of the above, it seems that resettlement schemes could hardly fill the protection gap of persons displaced by environmental events. Indeed, they could not be considered “targeted persons” both under Article 17 of the AMIF Regulation or Paragraph 2 of the Recommendation No. 2015/914 as long as they are not suitable to international protection (i.e. refugees according to the RC and beneficiaries of subsidiary protection under the QD), no matter if at national level they do not obtain a proper refugee or subsidiary protection status but any other status which offers similar rights and benefits under national and Union law<sup>71</sup>. Partially different seemed to be the Preparatory Action on Emergency Resettlement (PAER)<sup>72</sup>, that had complemented in 2012 the former ERF with the aim of quickly targeting persons recognised by the UNHCR as being in need of urgent international protection for the reasons of having fallen victims of a natural disaster, armed conflict, or being otherwise in extremely vulnerable situations threatening their life, and that are resettled in MS with a permanent residence status: the reference to different situations as natural disaster seemed to expand the scope of that emergency resettlement scheme beyond persons in need of international protection as such. Notwithstanding that, the PAER financial tool has only allowed for the first wave of resettlement from Syria in 2012 and not for environmental displaced persons.

As if that were not enough, the major obstacles of resettlement programmes lie in the facts that, for the time being, they are still under-funded and implemented on a voluntary basis only, which leaves their little practical usefulness in the “willing hands” of the Member States. Nor the proposed regulation establishing a Union Resettlement Framework<sup>73</sup>, not yet in force, is likely to change substantially this situation. It is true that this proposal aims at creating a common EU policy on resettlement with a permanent framework and common procedures, and defines resettlement as

<sup>70</sup> See PAPAPOULOU et al., *cit. supra* note 61, pp. 77-80.

<sup>71</sup> For a national review of different granted statuses see EUROPEAN MIGRATION NETWORK, *cit. supra* note 68, pp. 29-30.

<sup>72</sup> Decision No. C(2012) 7046, of 10 October 2012, concerning the adoption of the Work Programme serving as financing decision for 2012 for the Preparatory Action - Enable the resettlement of refugees during emergency situations to be financed under budget line 18 March 2017.

<sup>73</sup> 13 July 2016, COM(2016) 468 final.

“the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection”, thus including internally displaced people. However is also true that, according to the proposal, not only the scope of application of EU resettlement framework will be still unduly limited to asylum-seekers<sup>74</sup> but also Member States will remain free to decide how many persons to be resettled each year.

More promising are *humanitarian admission schemes* (“HAS”) offered by Member States and sometimes financed by the EU budget. According to Article 2(b) of the AMIF Regulation, HAS consist in a process – similar to resettlement but, for several reasons, not fully adhering to its definition – whereby “a Member State admits a number of third-country nationals to stay on its territory for a temporary period of time in order to protect them from urgent humanitarian crises due to events such as political developments or conflicts”. While some MS have in place either (permanent or *ad hoc*) resettlement programmes or HAS only, there are others (like Germany, France and the UK) with both of them.

It should be stressed that HAS could also be put in place by the EU itself. In December 2015, the European Commission presented a Recommendation for a voluntary humanitarian admission scheme with Turkey for persons displaced by the conflict in Syria<sup>75</sup>, an expedited process (compared to resettlement) where Member States would admit, on a voluntary basis, those persons in need of international protection based on a recommendation by the UNHCR following a referral by Turkey, with the aim of refocusing resettlement efforts primarily on Jordan and Lebanon<sup>76</sup>.

The key difference between resettlement programmes and HAS is that the latter have a much broader scope of application, i.e. not limited to individuals in need of international protection as such but opened to any third-country national facing urgent humanitarian crisis. Thus, HAS seems to be a better fit for the specific protec-

<sup>74</sup> According to the proposal, “[t]he possibility for resettlement is foreseen for those third-country nationals or stateless persons who have been displaced not only to another country but also within their own country due to a well-founded fear of persecution or due to substantial grounds for believing that they would face a real risk of suffering serious harm”.

<sup>75</sup> Recommendation C(2015) 9490, of 15 December 2015, for a voluntary humanitarian admission scheme with Turkey. See FERNÁNDEZ ARRIBAS, “Again in the Hands of States: A New EU Unfeasible Plan to Face Refugee Crisis? Commission Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey”, European Papers, 2016, p. 343 ff.

<sup>76</sup> See MORGESE, *cit. supra* note 67, pp. 31-34.

tion needs of EMs. By contrast, like resettlement programmes, HAS are on a voluntary basis, thus not compelling MS to put them into place.

It must be pointed out that the 2015 European Agenda on Migration has called on Member States to use to the full any other legal avenue available to individuals in need of protection, including *private/non-governmental sponsorships*. In the subsequent Communication of April 2016, the Commission sets out steps to be taken in order to ensure and enhance safe and legal migration routes, calling on MS to explore the possibility of complementing resettlement and HAS by other initiatives such as private sponsorship, that could take several forms (from scholarships for students and academics to integration support for sponsored family members)<sup>77</sup>.

Private sponsorship is likely to be a viable alternative for admitting EMs in the territory of the Member States owing to the fact that “the costs of sponsorship and settlement support for persons in need of protection can be supported by private groups or organisations”, thus both helping to raise public awareness and support for admitted individuals and allowing for a more welcoming environment as local communities are usually involved. Most of all, private sponsorship is very likely to overcome legal and political obstacles set by resettlement and, in part, HAS, thus giving EMs a realistic mean of protection. For instance, in Italy have been recently signed two protocols on “humanitarian corridors” as a result of a Memorandum of Understanding between the Ministry of Foreign Affairs and International Cooperation, the Ministry of Interior and some religious entities (the Italian Episcopal Conference, Community of Sant’Egidio, Federation of Evangelical Churches in Italy, and Tavola Valdese). These two protocols aim at the protected entry in Italy for 1.500 displaced persons from Lebanon, Ethiopia and other African States, whose selection, entry and reception are supervised by the religious entities themselves<sup>78</sup>.

<sup>77</sup> Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, 6 April 2016, COM(2016) 197 final, pp. 15-16.

<sup>78</sup> See in detail MOROZZO DELLA ROCCA, “I due Protocolli d’intesa sui ‘corridoi umanitari’ tra alcuni enti di ispirazione religiosa ed il Governo ed il loro possibile impatto sulle politiche di asilo e immigrazione”, *Diritto immigrazione e cittadinanza*, 2017, p. 1 ff.

## 6. – *Protection within Regional Development and Protection Programmes*

As stated above, most individuals moving due to environmental events are very likely to remain within their country or region of origin. For this reason, we briefly mention another way of protecting EMs that involves the EU support for regions and countries of origin (and transit) in their efforts to assist and protect displaced persons in general, namely *Regional Development and Protection Programmes* (RDPPs)<sup>79</sup>.

Such programmes, launched in 2005 as Regional Protection Programmes (RPPs)<sup>80</sup>, were designed to enhance the capacity of areas close to regions of origin or transit of refugees, in cooperation with UNHCR and host third countries. The goal was (and still is) to support refugees by developing financial, legal and technical assistance to enhance capacities of local institutions and actors, and promoting the conditions for local integration as one of the three aforementioned durable solutions<sup>81</sup>. RPPs were intended to be flexible and situation specific policy toolboxes, consistent with EU humanitarian and development policies, and including practical actions such as enhancement of national refugee determination status capacities, access to asylum, technical assistance to institutions, public awareness activities on refugee protection, promotion of resettlement, etc. The 2005 Communication launched two pilot RPPs in the Newly Independent States (Ukraine, Belarus and Moldova) and in the Great Lakes Region (mainly focused on Tanzania). In 2010, two other RPPs were launched in the Horn of Africa (as a region of origin) and in North Africa (as a region of transit).

By contrast, in more recent RDPPs the traditional “protection component” of RPP model has been supplemented by a “socioeconomic development component” aimed at fostering economic opportunities and livelihood capacity of refugees through employment generation and business development, on the one side, and strengthening local ownership and the overall social cohesion in host countries, on the other side. So far, RDPPs have been initiated in the Middle East (2014), as part of the response to the Syria crisis, and again in the Horn of Africa and in North Africa (2015).

<sup>79</sup> See PAPADOPOULOU, *Regional Protection Programmes: An Effective Policy Tool?*, Discussion Paper, DOMAID project, January 2015; CORTINOVIS, *Reshaping the External Dimension of EU Asylum Policy: the Difficult Quest for a Comprehensive Approach*, Ismu Paper, January 2017, pp.10-11; MORGESE, “I programmi di (sviluppo e) protezione regionale dell’Unione europea: uno strumento efficace per i rifugiati africani?”, *Federalismi.it*, 21 July 2017.

<sup>80</sup> Communication on regional protection programmes, 1 September 2005, COM(2005) 388 final.

<sup>81</sup> See *supra* note 60 and accompanying text.

While it seems that RDPPs could represent one of the best solution to meet the protection needs of EMs, it must be borne in mind that, unlike all other above-mentioned EU protection provisions, RDPPs suffer from some specific problems. In the first place, they are not normative but cooperative in nature: thus, as long as the existing framework remains unchanged, these programmes are only intended to “induce” third countries to grant protection and foster local integration for environmental displaced persons, but the EU cannot act in a more direct way. Furthermore, R(D)PPs encompass projects not always part of a coherent policy framework and not adequately funded<sup>82</sup>, notwithstanding some improvements in more recent African RDPP.

Moreover, protection under RDPPs cannot always be available in regions of origin or transit for all EMs and, even when available, cannot address all the challenges facing those persons and their host countries. Above all, it must be borne in mind that these programmes must not constitute a way of allocating the responsibility of processing asylum claims to third countries. Thus, hosting areas within RDPP third States must not be considered as “safe havens” from an extraterritorial processing standpoint (i.e. allowing MS to escape their obligations under refugee and asylum law).

## 7. – *Conclusions*

This contribution has discussed some legal options with the aim to protect EMs within the EU, none of which however has proven to be fully satisfactory. It depends, as seen above, on the absence of a common legal definition of environment-related migrant which, at the time being, mirrors the lack of a common understanding of such a matter within the International Community as a whole. Nor the EU and its MS, despite a number of statements stressing the need to further explore the impact of climate change on migration and displacement, had provided so far a proper solution within the European regional area.

First of all, the legal framework for international protection according to the Qualification Directive has shown to be inadequate. Neither the refugee status, based on the provisions of the 1951 Refugee Convention, nor the subsidiary protection status are fit for purposes of EMs: in the former case, due to the absence, in most environmental cases, of eligibility conditions required by Articles 1A(2) RC and 2(d) QD; in the latter, owing to the fact that conditions under Article 15 QD are unlikely to be reached according to the relevant ECtHR case-law; in both cases, provisions of

<sup>82</sup> See MAYRHOFER and AMMER, *cit. supra* note 10, p. 425.

the QD on internal alternative and exclusion from international protection are additional hindrances. By the way, the proposed replacement of the QD with a Regulation<sup>83</sup> neither expands the notion of refugee nor explicitly include environmental disaster as a “serious harm” for the purpose of subsidiary protection. Also the Temporary Directive looks like unsatisfactory, as long as the trigger mechanism remains the same, as well as temporary measures according to Article 78(3) TFUE are mainly inspired by an intra-EU solidarity rationale.

In turn, humanitarian provisions in the Visa Code, the Schengen Borders Code and the Return Directive would seem to be a viable legal instrument for EMs, if it weren't that they are non-mandatory and thus let MS free to use them in a manner consistent with their (restrictive) national immigration policies. Moreover, it has to be pointed out that, from an EM perspective, it would be sometimes hard to visit a consulate to apply for such a visa, diplomatic representations being located in States capitals not always easily accessible in case of a rapid-onset environmental disaster. Nor a EU compulsory legal instrument on humanitarian protection, whether or not including an environmental provision, has even appeared on the horizon: in this regard, Italian provisions on humanitarian permit and collective reception for natural disasters might serve as a model in the future.

Furthermore, EU provisions on protection against removal orders from the territory of the MS according to relevant human rights law applicable in the EU are not a valid solution for all cases, because of the inherent features of environmental events, the above-mentioned ECtHR case-law on Articles 2, 3 and 8 ECHR, the need of a previous entry of EMs, and the fact that those provisions are a second best solution (i.e. granting removal bans but not always residence permits).

Finally, the remaining options might be useful only in specific cases. While resettlement programmes are reserved for persons in need of international protection only (being also under-funded and implemented on a voluntary basis), humanitarian admission schemes look like more promising but still under-funded. Private sponsorships (like Italian humanitarian corridors) are proving to be a prominent solution for the future, as long as they would be allowed by MS in a manner consistent to the protection needs of EMs. By contrast, the cooperative nature of the RDPPs, along with the fact that they are under-funded, not always available in every region of

<sup>83</sup> 13 July 2016, COM(2016) 466 final. See PEERS, “The new EU law on refugees takes shape: More Harmonisation but Less Protection?”, *EU Law Analysis*, 23 July 2017, available at: <<http://eulawanalysis.blogspot.it/2017/07/the-new-eu-law-on-refugees-takes-shape.html>>.

origin and, above all, not to be considered as safe havens for MS wishing to put in place extraterritorial processing of protection claims, substantially limit the usefulness of these programmes for EMs.

As a conclusion, we stress the need for a European *ad hoc* legal instrument dealing with every aspect of the protection of environmental migrants, no matter if it take the form of an extension of the notion of subsidiarity protection, or a new temporary protection instrument, as well as a comprehensive humanitarian protection provision or a specific HAS. In other terms, the EU should lead rather than adapt to the international environmental migration debate, officially recognising EMs as vulnerable persons in need of protection<sup>84</sup>. Unfortunately, due to the refugee crisis starting from 2015 and the persistent (if not exacerbated) reluctance of MS to implement such a legislation for political reasons, it seems that such a legal instrument is unlikely to be put into place at least in the near future.

<sup>84</sup> See COUNIL and TABAU (coords.), *Human rights and climate change: European Union policy options*, requested by the EP Subcommittee on Human Rights, PE 457.066, Brussels, 2012, pp. 68-69; MAYRHOFER and AMMER, *cit. supra* note 10, p. 391.





# 4. SUDDEN-ONSET DISASTERS, HUMAN DISPLACEMENT, AND THE TEMPORARY PROTECTION DIRECTIVE: SPACE FOR A PROMISING RELATIONSHIP?

*Giovanni Sciaccaluga\**

SUMMARY: 1. Introduction. – 2. The TPD: Structure, Goals, and Attempts of Activation. – 3. The TPD: Reasons Behind the Lack of Activation. – 3.1 Endogenous Factors. – 3.2. External Factors – 4. The Way Forward: A Disaster-Oriented TPD? – 5. Conclusions.

## *1. – Introduction*

The current migration phenomenon has put under severe pressure the Common European Asylum System (“CEAS”).<sup>1</sup> Facing unprecedented challenges, the European Union’s reaction is far from univocal: it is on the contrary highly diversified,

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<sup>1</sup> 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 June 2013; Directive 2013/32/EU (Procedures Directive), in OJ L 180/60, 29.6.2013; EU Regulation 604/2013 (Dublin III Regulation), in OJ L 180/31, 29.6.2013; and EU Regulation 603/2013 (Eurodac Regulation), in OJ L 180/1, 29 June 2013. See, on the subject, DUBOLINO, “L’identificazione dello Stato competente all’esame

BRUNO, PALOMBINO, ROSSI (eds.), *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward*, Rome, CNR Edizioni, 2017, ISBN 978 88 8080 277 8, pp. 75-99.

with some Member States (“MS”) enabling reception policies for immigrants, and others trying to enshrine the possibilities of access to their territories.<sup>2</sup>

The EU is therefore 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 as a non-indifferent priority. In this context, it might appear surprising, at least at a 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 in 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 Article 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”,

di una domanda di asilo: dalla Convenzione di Dublino al nuovo regolamento”, *Diritto dell’Unione europea*, 2004, p. 811 ff.; FAHEY, “Joining the Dots: External Norms, AFSJ Directives and the EU’s Role in the Global Legal Order”, *European Law Review*, 2016, p. 105 ff.; 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 ff.; LAMBERT, MCADAM, FULLERTON (eds.), *The Global Reach of European Refugee Law*, Cambridge, 2013; DEN HEIJER, *Europe and Extraterritorial Asylum*, Cambridge, 2013.

<sup>2</sup> 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.

<sup>3</sup> 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* SAVASTANO, “Prime osservazioni sul diritto di recedere dall’Unione europea”, *Federalismi.it*, 25 November 2015, available at: <<http://federalismi.it/nv14/articolo-documento.cfm?artid=30808>>; HARVEY, “‘In the Light of the Guidelines’: Brexit and the European Council”, *European Law Blog*, 7 October 2016, available at: <<http://europeanlawblog.eu/2017/04/04/in-light-of-the-guidelines-brexit-and-the-european-council-revisited/>>.

<sup>4</sup> 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 August 2001.

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 already outlined by the relevant doctrine,<sup>7</sup> examines the reasons explaining the lack of activation of the TPD, and 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 utilization, and meet at the same time the objective of granting some sort of protection for people fleeing sudden-onset environmental disasters.

## 2. – *The TPD: Structure, Goals, and Attempts of activation*

The TPD, adopted in 2001, was the first European piece of legislation dealing with asylum policies after the entry into force of the Treaty of Amsterdam in 1997, that communitarized the subject, by imposing – with reference to temporary protection – the adoption within five years of “minimum standards for giving temporary

<sup>5</sup> 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 May 2015, COM(2015) 240 final).

<sup>6</sup> 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 April 2016, COM(2016) 197 final).

<sup>7</sup> See, generally, INELI-CIGER, “Time to Activate the Temporary Protection Directive”, *European Journal of Migration and Law*, 2016, p. 18 ff.; BEIRENS., MAAS, PETRONELLA, VAN DER VELDEN, “Study on the Temporary Protection Directive: Final Report”, European Commission Directorate-General for Migration and Home Affairs, January 2016, available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf)>; 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 BALOUZ, INELI-CIGER, SINGER, STOYANOVA (eds.), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*, Leiden, Boston, 2015; 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. 7 ff.; NOTARBARTOLO DI SCIARA, “Temporary Protection Directive, Dead Letter or Still Option for the Future? An Overview on The Reasons Behind its Lack of Implementation”, *Eurojus.it – Rivista*, 2 December 2015, available at: <<http://rivista.eurojus.it/temporary-protection-directive-dead-letter-or-still-option-for-the-future-an-overview-on-the-reasons-behind-its-lack-of-implementation/>>.

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 to 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 (Article 2) – with a temporary protection regime. The TPD’s protection system can last at most for three years (Article 4), and envisages a burden-sharing mechanism according to which all MS should host the regime’s beneficiaries “in a spirit of Community solidarity”, depending on their national reception capabilities (Articles 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 which can be activated by a qualified majority by the Council upon proposal by the Commission (Article 5). It aims at coping 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 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

<sup>8</sup> 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<sup>st</sup> 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. 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, POCAR, BARUFFI, *Commentario breve ai Trattati dell’Unione europea*, II ed., Padova, 2014, p. 480.

<sup>9</sup> See PERLUSS, HARTMAN, “Temporary Refuge: Emergence of a Customary Norm”, *Virginia Journal of International Law*, 1985-1986, pp. 551-626.

<sup>10</sup> 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*, GAUCI, GIUFFRÉ., TSOURDI (eds.), *Exploring the boundaries of refugee law: current protection challenges*, Leiden, 2015; FIDDIAN-QASMIYEH, LOESCHER, LONG, SIGONA (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, 2014; SILINGENBERG, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*, Oxford, 2014; LENZERINI, *Asilo e diritti umani: l’evoluzione del diritto d’asilo nel diritto internazionale*, Milan, 2009; GOODWIN-GILL, MCADAM, *The Refugee in International Law*, Oxford, 2007.

<sup>11</sup> In this sense, ARENAS, *The Concept of ‘Mass Influx of Displaced Persons’ in the European Directive*

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 linked to race, religion, nationality, membership of a particular social group or political opinion).<sup>12</sup> Quite the opposite, 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 historic reasons, a refugee definition anchored to the period in which it was adopted.<sup>14</sup> The classical definition of 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 EU to individuals that do not fall within the classical definition of refugee.<sup>17</sup>

Establishing the Temporary Protection System, *European Journal of Migration and Law*, 2005, p. 437. See also NOTARBARTOLO DI SCIARA, *cit. supra* note 7, p. 1.

<sup>12</sup> Art. 1(A)2 of the 1951 Geneva Convention.

<sup>13</sup> 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 SCIARA, *cit. supra* note 7, 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 MS 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.

<sup>14</sup> In this regard, FITZPATRICK, “Temporary Protection of Refugees: Elements of a Formalized Regime”, *The American Journal of International Law*, 2000, p. 280.

<sup>15</sup> 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* MARTIN (ed.), *The New Asylum-Seekers: Refugee Law in the 1980s*, Martinus Nijhoff, Leiden, 1988.

<sup>16</sup> Qualification Directive (2011/95/EU). See, in particular, Chapter V.

<sup>17</sup> 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

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 MS 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 MS' 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 disposing 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

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 SPIJKERBOER, "Subsidiarity in Asylum Law: the Personal Scope of International Protection", in BOUTILLET-PACQUET (eds.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?*, Bruxelles, 2002), p. 19 ff., 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 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.

<sup>18</sup> In similar terms see FITZPATRICK, *cit. supra* note 14, p. 280; see also INELI-CIGER, "Time to activate the Temporary Protection Directive", *European Journal of Migration and Law*, 2016, p. 32.

<sup>19</sup> In this sense see MUNARI, "The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime", *Diritti Umani e Diritto Internazionale*, 2016, p. 536 ff.

<sup>20</sup> 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. More information are available at: <[http://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.

<sup>21</sup> See Chapter III of the Directive [Please indicate which 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).

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, MS 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 Article 2(a) 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 MS 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 ECtHR 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. Moreover, it remains to be seen how asylum policies enacted in Hungary<sup>27</sup> can be conciliated with a correct application of the legal obligations to which MS and the Union have agreed. In this regard,

<sup>22</sup> TPD, Art. 4.

<sup>23</sup> Case C-411/10, *N.S. and Others*, ECR, 21 December 2011.

<sup>24</sup> *M.S.S. vs. Belgium and Greece*, Application No. 30696/09, *Judgement of 21 January 2011*.

<sup>25</sup> *B.A.C. v. Greece*, Application No. 11981/15, *Judgment of 13 October 2016*.

<sup>26</sup> *Tarakhel v. Switzerland*, Application No. 29217/12, *Judgment of 4 November 2014*, para. 115. On which see CERNA, “Introductory Note to *Tarakhel vs. Switzerland* (Eur. Ct. H.R.)”, *International Legal Materials*, 2015, p. 367 ff.; VICINI, “Regolamento Dublino e principio di ‘non-refoulement’, ‘the never-ending story’: il caso ‘Tarakhel c. Svizzera’”, *La Comunità Internazionale*, 2015, p. 203.

<sup>27</sup> In this sense, see declarations by 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”, available at: <<http://www.amnesty.it/crisi-dei-rifugiati-Unione-europea-ammonisca-formalmente-Ungheria>>. See also a Gall L., *Human Rights Watch Researcher for Eastern Europe and Western Balkans*, *Dispatches: Hungary Puts Asylum Seekers at Risk*, available at: <<https://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 10 December 2015 sent Budapest a notice of default, starting an infringement

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 Article 2(a), 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 individuals 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 protection has compromised the correct functioning of different MS 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 utilization 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 incisive attempt<sup>29</sup> to activate the TPD dates back to 2011, after the collapse of Ben Ali’s regime in Tunisia and Ghedaffi’s in Libya, which determined the structural failure of controls at the borders of the two countries, with many African inhabitants starting to reach Italian or Maltese coasts.<sup>30</sup> In May 2011, after the arrival in few months of about 26.000 individuals on the island of Lampedusa,<sup>31</sup> two members of the European Parliament 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 MS “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 Article 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”).<sup>33</sup>

procedure against Hungary (see press release, available 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.

<sup>28</sup> INELI-CIGER, Time to activate the Temporary Protection Directive, *cit. supra* note 18, p. 32.

<sup>29</sup> For an exhaustive analysis of the cases that could/should have brought to a TPD’s activation in the past, see BEIRENS, MAAS, PETRONELLA, VAN DER VELDEN, *cit. supra* note 7, Chapter 5.

<sup>30</sup> See 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”, *cit. supra* note 7, pp. 225-247.

<sup>31</sup> *Ibid*, p. 238.

<sup>32</sup> See, in particular, TPD Art. 25(1), and Art. 26(1) and 26(2).

<sup>33</sup> In this regard, see point 93 of Case C-411/10, *N.S. and Others*, ECR (above note 23): “ In addition, Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member



The Commission answered 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 MS 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>34</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 MS –<sup>35</sup> and there is still no mass influx in the current period, when the Union as a whole with all its MS 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 MS 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 MS, 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.

States. Directive 2001/55 is an example of that solidarity but, as was stated at the hearing, the solidarity mechanisms which it contains apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons”.

<sup>34</sup> MALMSTRÖM, *cit. supra* note 30, p. 238. In similar terms, see also Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, ECR, 6 September 2017, points 256 ff.

<sup>35</sup> In similar terms see again INELI-CIGER, *Time to activate the Temporary Protection Directive*, *cit. supra* note 7, 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”.

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

### 3. – *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 one 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 one 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.

#### 3.1 – *Endogenous Factors*

The TPD describes a 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 Article 2(c), results sufficiently clear (since it encompasses classical refugees, those who are entitled to subsidiary protection under the Qualification Directive,<sup>36</sup> and, more generally, all those fleeing endemic violence, armed conflict, and generalized 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>37</sup> we can nonetheless identify at least three elements characterizing the existence of such an influx:<sup>38</sup> (i) the displaced persons must come from an easily identifiable geographic area (as a State or a particular region), (ii) the arrivals' intensity must

<sup>36</sup> See generally MCADAM, "The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime", *International Journal of Refugee Law*, 2005, pp. 461-516; ZWAAN, *The Qualification Directive: central themes, problem issues, and implementation in selected member states*, Wolf Legal Publishers, Nijmegen, 2007.

<sup>37</sup> 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 \*/.

<sup>38</sup> In this sense NOTARBARTOLO DI SCIARA, *cit. supra* note 7; ARENAS, *cit. supra* note 7.

be exceptional, and (iii) the normal reception and asylum mechanisms must reveal themselves not up to the task of correctly absorbing the migratory phenomenon.<sup>39</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 in the EU *via* maritime routes from North African coasts, since these work as the point of departure for individuals of many and different nationalities, ethnicities, religions, *etc.* It seems therefore too complex to delineate with sufficient accuracy the characteristics of the particular group that should be covered by the 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 incisive 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>40</sup> And exactly because of the ambiguity surrounding a central notion of the in-

<sup>39</sup> The UNHCR has adopted a very similar point of view in this regard. See UNHCR, UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx, 15 September 2000, point 3, available at: <<http://www.refworld.org/docid/437c5ca74.html>>.

<sup>40</sup> It is relevant to specify that at the time of the creation of the TPD, the adoption of a large notion of

strument, 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>41</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>42</sup> After more than ten years, it remains difficult to contest the validity of these points.

One further and frequently underestimated element makes the potential activation of the TPD even more remote, and this is 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 period of 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 MS cannot enjoy this certainty, the specific interest standing behind the activation of the Directive disappears, since MS would risk taking a no-way-out path by granting (probable) long-lasting protection.

Crisis as those in Syria and Libya are events whose end is not easy to hypothesize, and this uncertainty does not allow European institutions to activate the TPD without disproportionate concerns relating to the duration of the protection that its MS should be granting. In this sense, Article 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 temporary protection with due respect for human rights and fundamental freedoms and MS' 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

mass influx was intended to grant flexibility, and thus more application chances of the instrument. See in this sense BEIRENS *et al.*, *cit. supra* note 7, p. 2.

<sup>41</sup> See in this sense BEIRENS, MAAS, PETRONALLA, VAN DER VELDEN, *cit. supra* note 7, 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".

<sup>42</sup> ARENAS, *cit. supra* note 7, p. 438.

categories could be repatriated (even in case of expiration of the predetermined period), in unsafe, violent, and unstable situations. In other terms, we should wonder why MS 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, MS 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*, MS have a particular interest in not activating at all the TPD.<sup>43</sup>

### 3.2. – External Factors

Moving forward, a framework comparison between the political conditions the EU is nowadays living in and the ones experienced in 2001, year of adoption of the TPD, offers some insights to understand the TPD’s lack of activation. 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 MS from 15 to 28 makes it harder to reach the consensus that is necessary to activate the Directive.<sup>44</sup> If, of course, proportions have not changed, it is equally evident how it is more difficult to reach the sufficient votes nowadays, since the number of national political interests to be taken into consideration (moreover concerning highly politicized and sensitive issues like migration and international protection) has in fact almost doubled since 2001.

Second, the impact that the economic and financial crisis that is still influencing

<sup>43</sup> 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 MS 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 MS on temporary protection grounds.

<sup>44</sup> Note that Denmark is not bound by the Directive, as stated in the perambulatory clause nr. 26: “In accordance with Arts. 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”.

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 sobering to remember that from 2008 to 2014 the GDP in Greece has decreased by 33%, in Spain and Hungary by 15%, in Italy, the UK and Czech Republic by 10%,<sup>45</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, moreover exacerbated by significant public safety concerns, renders the space for a system such as the TPD's always narrower. It appears quite evident 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.

A further (and more general) factor that may explain the lack of willingness in activating the TPD is enshrined in the notion of “pull-factor”. It is diffusely 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' conditions. Where studies on migration issues find that an increase of the pull-factors may increase immigration into a specific area,<sup>46</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 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>47</sup> “[P]ersons 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>48</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% of Syrian forced emigrants has applied for asylum within the EU. Nonetheless, if the analysis shifts

<sup>45</sup> Data source are available at: <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>>.

<sup>46</sup> 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, available at: <<https://www.nidi.nl/shared/content/output/2000/eurostat-2000-theme1-pushpull.pdf>>.

<sup>47</sup> See THIELEMANN, “How Effective are National and EU Policies in the Area of Forced Migration”, *Refugee Survey Quarterly*, 2012, pp. 21-37.

<sup>48</sup> INELI-CIGER, *cit. supra* note 7, p. 234.

on this 10%, an interesting element 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% shared between Germany (401.018) and Sweden (110.333), 25% among Hungary, Austria, Bulgaria, and the Netherlands, and less than 15% among the remaining MS.<sup>49</sup> What appears here relevant 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. So, in the particular cases in which the TPD should be acting – 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 seems possible to maintain that the TPD – as currently structured – suffers from excessive maximalism,<sup>50</sup> incompatible with the present *Zeitgeist*. The idea of granting immediate (though temporary) protection to entire categories of displaced persons to be shared among MS 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.

#### 4. – *The Way Forward: A Disaster-Oriented TPD?*

Assuming the necessity within EU law of an effective legal framework disciplining temporary protection, the final part of this paper 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 an instrument potentially able to address environmental displacement caused by sudden-onset disasters, namely events whose negative effects can arguably 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 the international community as a whole).

<sup>49</sup> For more information about data regarding migratory fluxes from Syria, visit <<http://data.unhcr.org/syrianrefugees/asylum.php>>.

<sup>50</sup> In this regard see INELI-CIGER, *cit. supra* note 7, 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.

To draw some inspirational elements from an effective temporary protection regime conceived (also) to grant protection to victims of natural disasters, a glance at the US Temporary Protection Status (TPS) seems useful.<sup>51</sup> The TPS lies like the TPD on a complementary level to the Geneva Convention,<sup>52</sup> but unlike the European instrument (which allows the admission within the EU to third-country individuals) it simply prohibits repatriation (*non-refoulement*) of subjects who are already in the USA. When activated,<sup>53</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 event occurring in their country of origin.

More precisely, the TPS can be activated in three hypothesis: (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 the activation of the regime because 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 now allow for a secure repatriation.

In such circumstances, the Secretary of Homeland Security is free to concede the TPS to determined categories of individuals for a period of 6 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>54</sup> with temporary residence and work permits. The TPS is currently valid for more than 300.000 individuals coming from 13 different countries.<sup>55</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<sup>56</sup>.

<sup>51</sup> Adopted in 1990 and part of the Immigration and Nationality Act: ACT 244 – Temporary Protected Status (Sec. 244. 1/ [8 U.S.C. 1254]).

<sup>52</sup> 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 ARGUETA and WASEM, “Temporary Protection Status: Current Immigration Policy and Issues”, Congressional Research Service, 18 February 2016, p. 1, available at: <<http://trac.syr.edu/immigration/library/P11608.pdf>>.

<sup>53</sup> By decision of the Secretary of Homeland Security.

<sup>54</sup> Possession of the passport of the designated State and evidence of physical stay in the US from the activation of the TPS regime.

<sup>55</sup> For more data regarding the TPS current application, see the following website: <<https://www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS>>; ARGUETA and WASEM, *cit. supra* note 51, p. 7.

<sup>56</sup> 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 hence be held as a valid and effective instrument: its numerous applications in the last two decades and a half show, in comparison to the lack of utilization of the European system, the latter's inadequacy. Thus, it would 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.

A first relevant element is the explicit reference to environmental disasters as events capable of determining the system's activation. A TPD's modification (or re-interpretation) should be oriented to protect categories of people displaced by events whose duration can be forecast without excessive doubts, and sudden-onset environmental disasters clearly fall within this kind of events. Since the *ratio* 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 kind 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, for instance, a major cause of displacement worldwide.

As shown, the activation of the TPD in case of mass influxes deriving from violent conflicts is highly improbable. The Directive would probably enjoy more chances of activation if it were (also) explicitly designed to face massive and temporary influxes of individuals displaced by natural disasters (similarly to what the TPS imposes).<sup>57</sup>

In this regard, Article 2(c) is to be thoroughly analyzed to understand to what extent the TPD is equipped for this kind of events. The provision underlines, when explaining the notion of "displaced persons", that their impossibility to return to the original countries depends on "the situation prevailing" there, and then offers some specifications as to the possible types of displaced that may fall within the definition (*i.e.*, refugees and, more broadly, persons fleeing armed conflicts, endemic violence or generalized 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

<sup>57</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 [...]"

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 start reconsidering 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 at all 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, this kind of 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>58</sup> In 2001, European institutions were willing to create a legal framework aimed at institutionalizing at a supranational level the humanitarian assistance that some States had exceptionally offered during the diverse phases of the Yugoslavian Wars.<sup>59</sup> The TPD is therefore (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), and this is the why a disaster-oriented modification or fundamental reinterpretation of the Directive appears nowadays crucial.

We have seen that the TDP’s chances of activation appear very limited due to numerous reasons. Although some of the very same reasons would also apply to natural disasters-related displacements of persons, these would at least avoid some. For instance, sudden-onset disasters usually hit only limited and recognizable areas, 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

<sup>58</sup> On the dawning of temporary protection frameworks in Europe, see FITZPATRICK, *cit. supra* note 14, 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, available at: <<http://www.refworld.org/docid/3ae6b3300.html>>.

<sup>59</sup> See FITZPATRICK, *cit. supra* note 14, 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.

temporary emigration towards some EU MS, a specifically disaster-oriented TPD could be activated to protect those forced to leave their country, and be used to redistribute them among different MS according to their reception capabilities. Arguably, damages and devastations caused by the earthquake could be restored in the period envisaged by the TPD (one up to three years), and, once normality is restored in the country of origin, namely rendering it capable of welcoming back its own citizens without precluding the correct enjoyment of their fundamental rights, the Union and its MS would be able to enact manageable repatriation programmes (that means without incurring in the difficulties and paradoxes that emerged through the analysis of Article 6(2) of the TPD), according to which the categories protected by the TPD may be repatriated only in safe and stable conditions.

In a longer-term perspective, a disaster-oriented evolution of the Directive would also be significant in order to provide with international protection a particular subset of the category of so-called “environmental refugees”, category that neither international nor European law is nowadays adequately covering. Extremely synthetically, so-called “environmental refugees” can be defined as those forced to migrate because of environmental degradations that make their areas of origin uninhabitable.<sup>60</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>61</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 crucial 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

<sup>60</sup> For more information see generally MCADAM (eds.), *Climate Change and Displacement, Multidisciplinary Perspectives*, Oxford, 2010. See also HUGO, “Environmental Concerns and International Migration”, *International Migration Review*, 1995, p. 105; EACH-FOR Project (Environmental Change and Forced Migration Scenarios), Synthesis Report, 14 May 2009 ([http://rosamartinez.org/wp-content/uploads/2015/11/Migraciones-y-Cambio-Climatico\\_EACHFOR.pdf](http://rosamartinez.org/wp-content/uploads/2015/11/Migraciones-y-Cambio-Climatico_EACHFOR.pdf)); Chairperson’s Summary, Nansen Conference on Climate Change and Displacement in the 21st Century, 5-7 June 2011, Oslo, para. 4, available at: <http://www.unhcr.org/4ea969729.pdf>. As regards legal studies see *ex multis* BANWITIYA NTEKANGI, *Vers un droit international des réfugiés écologiques*, Kinshasa, 2014; MCADAM, *Climate Change, Forced Migration, and International Law*, Oxford, 2012; KAELIN and SCHRPEFER, “Protecting People Crossing Borders in The Context of Climate Change: Normative Gaps and Possible Approaches”, UNHCR Legal and Protection Research Series (reference no. PPLA/2012/01), February 2012, available at: <http://www.unhcr.org/4f33f1729.pdf>; WESTRA, *Environmental Justice and the Rights of Ecological Refugees*, London, 2009.

<sup>61</sup> See in this regard MCADAM, “Climate Change Displacement and International Law: Complementary Protection Standards”, UNHCR, Division of International Protection (reference no. PPLA/2011/03), May 2011.

current historical period,<sup>62</sup> and that the phenomenon of migrations forced by environmental degradation consequently appears destined to significantly increase its humanitarian and numerical significance in the next future, as underlined by the greatest experts in the field.<sup>63</sup>

Under this perspective, the Union 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>64</sup> To 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>65</sup> remains symbolically effective) may be divided – in case of cross-border movements of people – into two different sub-categories: those pushed to migrate because of slow-onset disasters (such as sea-level rise and desertification), and those fleeing sudden-onset events. Although such a distinction surely suffers from oversimplification, it remains useful since it visibly clarifies that diverse protection regimes should be predisposed to protect the two different categories. The first one – whose epitomizing group consists in 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 therefore generally considered as voluntary and pre-emptive, not deserving immediate and incisive international protection.<sup>66</sup> Nevertheless, if we are to believe to the overwhelming majority of climate science and its predictions, we already know that such individuals need

<sup>62</sup> For an exhaustive synthesis on the relation between extreme events and climate change see Intergovernmental Panel on Climate Change, *Summary for Policymakers. In: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*, FIELD, *et al.* (eds.), Cambridge, and New York, pp. 1-19, available at: <[https://www.ipcc.ch/pdf/special-reports/srex/SREX\\_Full\\_Report.pdf](https://www.ipcc.ch/pdf/special-reports/srex/SREX_Full_Report.pdf)>.

<sup>63</sup> See for instance KAELIN, former Representative of the United Nations' Secretary-General on the Human Rights of Internally Displaced Persons, interview with Friederike Bauer, Akzente, The Giz Magazine, March 2015, available at: <<https://akzente.giz.de/en/artikel/were-talking-millions>>.

<sup>64</sup> In this sense, see also BERGOGLIO, *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for Our Common Home*, Vatican City, 2015, p. 23, para. 25.

<sup>65</sup> From an eminently 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. See, in this volume, FEROLLA VALLANDRO DO VALLE, p. 1 ff.

<sup>66</sup> See in this regard, among many others, SCIACCALUGA, “(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, pp. 465-488.

relocation programs onto other national territories,<sup>67</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 of forced migrants.

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. Excessively concentrating on the “climate change discourse”<sup>68</sup> may, indeed, lead to a hazardous reductionism, at least in the light of granting international protection to the victims of natural disasters. Since 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 only those fleeing temporarily a sudden-onset

<sup>67</sup> 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 PASCOE, “Sailing the Waves on Our Own: Climate Change Migration, Self-Determination and the Carteret Islands”, QUT Law Review, 2015, pp. 72-85; LEWIS, “Neighbourliness and Australia’s Contribution to Regional Migration Strategies for Climate Displacement in the Pacific”, QUT Law Review, 2015, pp. 86-101). Recently in the US 52.000.000\$ have 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-inhabitants 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).

<sup>68</sup> The “climate change discourse”, namely the totality of beliefs, scientific certainties and political-ideological behaviours that tend to identify 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 (KELLEYS, MOHTADIB, CANEC *et al.*, “Climate change in the Fertile Crescent and implications of the Recent Syrian Drought”, Proceedings of the National Academy of Science, January 2015, available at: <<http://www.pnas.org/content/112/11/3241>>), 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.

natural disaster – irrespective of its cause –<sup>69</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 that should be brought to the TPD’s activation procedure, thoroughly disciplined by Article 5. According to it, the Commission 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 utilization, an excessive margin of appreciation to European institutions and, especially, to MS national priorities. Procedures should therefore be stiffened to reduce this margin.

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 obviously remaining free to activate the system or not, would in this way inevitably shed some light on the scope of application of the Directive, which is currently too vague.

Second, it would also be useful to make changes with respect to the power of proposal of activation recognized to European MS. As the TPD currently stands, MS 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 States’ request (“[the Commission] shall also examine any request by a Member State”, Article 5).<sup>70</sup> This paper argues that by granting MS 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 MS were agreeing on this action (*e.g.*, one third, one quarter, or one fifth of MS). By so doing,

<sup>69</sup> By so doing, the distinction between “climate” and “environmental” refugees falls without excessive complication.

<sup>70</sup> Something that occurred in 2001 with the requests of activation of the TPD by Malta and Italy (see above, p. 82).

a minority of MS 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 (PE) should also be strengthened. Article 5 currently disposes that once the Council's decision is taken, the PE 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 (simple, absolute, or qualified) of the Parliament agrees on the activation.

Finally, an incisive 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 aforementioned 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 the simple majority of its components. However, such proposal needs to be examined through the lenses of some sincere pragmatism, since it is a matter of fact highly improbable that the Union and its MS will be willing to pursue such a path. Indeed, decisions in the Council are taken with a qualified majority (55% of MS accounting for at least 65% of the European Union's population) in the vast majority of issues. Unanimity decisions tend to cover the rest, whereas simple majority (required, according to Article 238(1) TFUE, when no explicit disposition is to be found) is in fact limited to a restricted number of issues, mainly concerning the Council's internal organization. Being the Union an organization 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.

## 5. – *Conclusions*

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 MS, suffering from negative economic fluctuations, and dealing with the greatest migration phenomenon since the end of WWII.

The lack of utilization of the TPD is in part due to inherent terminological characteristics, which, alongside the existing activation procedure, leaves broad discretionary powers to national political priorities. In a period of economic weakness and

concerns about internal political balance, this margin of appreciation makes it possible for MS to avoid the very discussion concerning the instrument's activation.

First, the ambiguity surrounding the notion of "mass influx" may represent a problem in view of activating the Directive, since such vagueness leaves EU MS and institutions free to "interpret" punctual immigration phenomena in function of the contingent existing political situation (as the recent North African and Syrian migration exoduses show). More precise identification criteria for the notion of mass influx seem necessary if the TPD is to be applied in the next future.

At the same time, it is sobering to remember that when the Directive was adopted, in 2001, the political and economic situation the EU was facing was neatly different from nowadays. In this sense, the increase of EU MS and the on-going economic difficulties that have characterized the past ten years seem to play a crucial role in the current lack of utilization of the instrument. Moreover, the existing TDP's activation procedure – requiring the qualified majority of the Council upon exclusive power of proposal of the Commission – seems to leave excessive space to national (and also nationalistic) political pressures based on the belief that a Directive's activation would increase migratory inflows to the EU, consequently worsening, rather than relieving, the situation of some national asylum systems.

It seems hence appropriate, with the aim of strengthening the CEAS, to advocate for a pragmatic reform of the TPD system. This work calls for a stiffening of the activation procedures, which should grant a more incisive role to some actors: for example, by providing a certain number of MS with the power of proposal of activation of the Directive, and/or by granting a third-Country hit by a disaster the right to ask EU institutions to activate the temporary protection regime when perceived needed. Also, the role of the European Parliament should probably be revisited and empowered, also with the aim of rendering EU decision-making in this field more democratically legitimated.

Furthermore, relying on the assumption that the Union and its MS might uniquely be prone to use the instrument in response to events whose negative effects can be restored in a relatively brief period, this work calls for a sudden-onset disaster-oriented evolution of the Directive. Sudden-onset natural disaster such as earthquakes, windstorms or floods may be considered as events whose damages are restorable in a relatively brief period, thereby allowing the would-be temporary protection to be *effectively* temporary. In this sense, the possible application of the Directive to migration flows surging from never-ending conflicts (as the Syrian one for instance) appears highly improbable, since MS fear that the would-be protection would in the end become long-lasting or permanent, consequently losing its temporary (and politically feasible) character.



Additionally, a disaster-oriented TPD would contribute to the solution (at least under EU law) of part of the problem concerning environmental displacement, a phenomenon that due to the existing and irreversible climate change patterns is expected to increase its numerical and humanitarian significance in the years to come.



# 5. THE PROTECTION OF “ENVIRONMENTAL REFUGEES” IN REGIONAL CONTEXTS

*Maria Vittoria Zecca\**

SUMMARY: 1. Notes on the Notion of “Environmental Refugees” in International Law. – 2. The Protection of “Environmental Refugees” in the Regional Contexts: the African Continent. – 3. The South-American Context: from the Cartagena Declaration to Recent Trends. – 4. The Arab Region. – 5. Conclusions.

## *1. – Notes on the Notion of “Environmental Refugees” in International Law*

Over the last few decades, an array of environmental problems have increased the phenomenon of environmentally-induced migration; of these problems, climate change poses the most severe threat. According to a recent report by the Intergovernmental Panel on Climate Change (IPCC), over the 21<sup>st</sup> century, such climatic changes are expected to increase poverty and to weaken economic growth, especially in developing countries, with a consequent rise in the number of displaced persons<sup>1</sup>.

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<sup>1</sup> IPCC, Summary for Policymakers. 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

BRUNO, PALOMBINO, ROSSI (eds.), *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward*, Rome, CNR Edizioni, 2017, ISBN 978 88 8080 277 8, pp. 101-121.

Despite this, international law has not yet recognized peoples forced to flee because of environmental causes, so-called “environmental refugees”<sup>2</sup>, as an autonomous category entitled to international protection. It can be underlined that some States, such as Italy<sup>3</sup>, have established temporary protection measures for people fleeing natural disasters, but such measures appear to be characterized by the exceptionality. This difficulty in protecting this category of people is in part due to the fact that it is difficult to prove the casual link between environmental phenomena and migration, with the latter often due to overlapping causes related to economic and social factors<sup>4</sup>. Climate change adds a new layer of complexity to the relationship between environmental degradation and migration, since it causes both environmental disasters (i.e. tropical storms or floods) as well as processes of gradual deterioration of environmental conditions, such as global warming, desertification and rising sea levels. Moreover, in the case of “environmental refugees”, it is difficult to distinguish between voluntary and forced emigration, except in a few circumstances, such as during natural disasters or in the case of small islands threatened to disappear due to the increase in sea levels<sup>5</sup>.

the Intergovernmental Panel on Climate Change, p. 20, available at [http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5\\_wgII\\_spm\\_en.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf).

<sup>2</sup> In the paper, we use the expression “environmental refugees” in order to indicate people forced to flee because of environmental causes. Even though the aforementioned expression, at the present state of international law, does not indicate an effective legal category, it is used by some authors to indicate such movements of persons, alongside other terms, such as, *inter alia*, environmental migrants or climate refugees. With respect to the difficulty of identifying an appropriate term to indicate such movements of people see CURNIL, “The Question of the Protection of “Environmental Refugees” from the Standpoint of International Law”, in PIGUET, PÉCOUD & DE GUCHTENEIRE (eds.), *Migration and Climate Change*, Cambridge, 2011, p. 359 ff., pp. 359-360, Draft copy available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1994357](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1994357)>.

<sup>3</sup> See Consolidated Text of the Provisions Concerning the Regulation of Immigration and Rules on the Condition of the Foreigner, L. 286/1998, Art. 20.

<sup>4</sup> Regarding the difficulty in distinguishing economic from environmental refugees, see MYERS, “Environmental Refugees: a Growing Phenomenon of the 21<sup>st</sup> Century”, *Philosophical Transactions of the Royal Society*, 2002, p. 609 ff., p. 610. On the overlapping causes see MAYER, “Sustainable Development Law on Environmental Migration: The Story of an Obelisk, a Bag of Marbles, and a Tapestry”, *Environmental Law Review*, 2012, p. 111 ff., p. 116.

<sup>5</sup> With regard to a new form of statelessness, see CURNIL, GEMENNE, “Les populations insulaires face au changement climatique: des migrations à anticiper”, *Vertigo – la revue électronique en sciences de l’environnement*, 2010, p. 1 ff., pp. 17 – 19, available at: <<https://vertigo.revues.org/10482>>. On the concept of ‘deterritorialised State’ in the context of the disappearing islands, see RAYFUSE, “W(h)ither Tuvalu? International Law and Disappearing States”, *University of New South Wales Faculty of Law Research Series*, Paper 9, 2009, p. 1 ff., pp. 10-13, available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1412028](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412028)>.

Regarding the protection afforded by international law, most authors agree that people fleeing for environmental reasons do not meet the criteria laid down in the Convention Relating to the Status of Refugees for the granting of refugee *status*<sup>6</sup>. Analyzing the issue more specifically, scholars have emphasized that a person, in order to be considered a refugee under the 1951 Convention, has to be outside her/his own country and unable to take advantage of protections afforded by her/his State. On the contrary, people forced to flee for environmental reasons often remain within national boundaries, and are considered internally displaced people (IDPs), and thus able to take advantage of the protection of their government. Furthermore, environmental disasters cannot be considered a persecution by one’s own State of origin, which, conversely, often cares about the accommodation of these people. Lastly, the reasons for persecution must be related to the individual characteristics of the person, while in the case of migration due to environmental factors there are groups or entire populations forced to leave their State<sup>7</sup>.

<sup>6</sup> As set out in Art. 1(a)(2) of the Convention Relating to the Status of Refugees, - signed on 28 July 1951, entered into force on 22 April 1954 and adopted by 145 States – a refugee is who

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

<sup>7</sup> On the inapplicability of the 1951 Convention, as amended by the 1967 Protocol, to the people fleeing for environmental reasons, there are many contributions. See, *inter alia*, COURNIL, “Les Réfugiés écologiques: Quelle(s) protection(s), quel(s) statut(s)?”, *Revue du droit public*, 2006, p. 1035 ff., pp. 1041-1043; COURNIL, MAZZEGA, “Réflexions prospectives sur une protection juridique des réfugiés écologiques”, *Revue européenne des migrations internationales*, 2007, p. 7 ff., pp. 11-12; MCADAM, “Environmental Migration Governance”, University of New South Wales Faculty of Law Research Series, Paper 1, 2009, p. 1 ff., pp. 11-13, available at: <<http://law.bepress.com/cgi/viewcontent.cgi?article=1143&context=unswwps-flrps09>>; ARGESE, “Threats from Sea-level Rise to Small and Low-lying Island States: Is International Law a Hope for “Environmental Refugees?””, *La Comunità internazionale*, 2010, p. 435 ff., pp. 443-446; MAYER, “The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework”, *Colorado Journal of International Environmental Law and Policy*, 2011, p. 357 ff., p. 380-382; SCIACCALUGA, “(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., pp. 468-472. For arguments that go against the dominant opinion, see ALEXANDER, SIMON, “Unable to Return” in the 1951 Refugee Convention: Stateless Refugees and Climate Change”, *Florida Journal of International Law*, 2014, p. 531 ff., draft copy available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2643925](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643925)>. According to the aforementioned authors, people unable to return as stateless are entitled to refugee *status* established in the 1951 Convention, even if they are not victims of persecution. In particular, the authors refer to the inhabitants of small island nations, such as the Maldives and Tuvalu, which, due to the rising sea levels, are likely to become uninhabitable or to disappear.

These considerations are shared by the United Nations High Commissioner for Refugees (UNHCR)<sup>8</sup> which, in a 2009 report, stated that “the terminology and notion of environmental refugees or climate refugees (...) have no basis in international refugee law”<sup>9</sup>, recalling the criteria set out in international and regional instruments. According to the UNHCR, environmental degradation can only be considered when examined within the context of the cause of events, such as armed conflicts or government policies that marginalize specific groups of people, for which people fleeing from their State can fall under the protection provided by international instruments. Furthermore, the use of such terminology, and the proposal to amend the 1951 Convention in order to include “environmental refugees”, could weaken the current protection system, considering the adverse political climate.

Therefore, as stated in a recent report regarding the correlation between climate change and displacement, the UNHCR is strongly committed to humanitarian assistance to persons displaced for environmental reasons. However, from the point of view of international law, the report reiterates that persons displaced across borders because of environmental disasters or climate change cannot be considered refugees, unless such environmental disasters are related to a situation of armed conflict or a form of persecution against a particular group<sup>10</sup>.

With regard to people forced to flee for environmental causes, but who remain within the national boundaries of their State, they are entitled to protection in light of the Guiding Principles on Internal Displacement<sup>11</sup>, which the UNHCR is also committed to promoting. These Principles have the merit of recognizing, among the causes of the internal displacement of persons, “natural or human-made disasters”<sup>12</sup>, but, while including an exhaustive review of the rights of displaced people, they are non-binding guidelines. Therefore, their contribution to the creation of a legal obligation towards internally displaced people, even for environmental reasons, appears limited.

Considered the failure on behalf of the main international global instruments, to give legal recognition to people forced to flee for environmental reasons, the article

<sup>8</sup> In this sense see MCADAM, “Climate Change Displacement and International Law: Complementary Protection Standards”, UNHCR, Legal and Protection Policy Research Series, 2011, p. 1 ff., pp. 12-14, available at: <<http://www.unhcr.org/4dff16e99.pdf>>.

<sup>9</sup> See UNHCR, “Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective”, 2009, p. 8.

<sup>10</sup> See UNHCR, “Climate Change and Disaster Displacement: An Overview of UNHCR’s Role”, 2017, p. 7.

<sup>11</sup> *Ibid.*, p. 9.

<sup>12</sup> OCHA, Guiding Principles on Internal Displacement, 2001, Introduction, par. 2. The other causes of internal displacement are “armed conflict, situations of generalized violence, violations of human rights”.

will thus focus on regional contexts, in order to analyze their instruments of protection. In particular, it will be analysed three different geographical areas, considered important, for the purposes of our analysis, as in them the movements of people due to climate change are becoming increasingly relevant. Moreover, it appears important to deepen the position of the regional organizations, to assess whether they have provided international protection instruments more advanced than those of an universal Organization such as the UN.

## *2. – The Protection of “Environmental Refugees” in Regional Contexts: the African Continent*

Climate change has had several negative consequences on the African continent. According to recent studies, West Africa and large areas of the Sahel have been affected by land degradation, water shortages and an increased frequency of droughts and floods. With regards to the scarcity of water, it is likely that this problem will expand to larger areas by 2050. The worsening of environmental conditions has caused increased conflicts over land and water resources and a change in traditional patterns of migration, largely directed towards big cities and coastal States, without the possibility of returning to arid environments<sup>13</sup>. Moreover, another interesting study concerning refugees from Eastern and the Horn of Africa, has sought to establish the influence of environmental causes on the decisions of these people to leave their States. According to affirmations by the refugees, they perceived the effects of climate change, such as droughts, over farming and unsustainable husbandry practices, stating that these phenomena have had consequences on their livelihoods<sup>14</sup>. However, the interviews gathered in the study did not refer to conflicts caused directly by environmental factors, even though the latter has served to amplify already existing conflicts<sup>15</sup>. What seems particularly interesting in the report, for the purposes of our study, is the conclusion that migration arising from environmental reasons is assumed by the people interviewed as a last resort and is mainly “internal, circular

<sup>13</sup> See WARNER et al., “In Search of Shelter. Mapping the Effects of Climate Change on Human Migration and Displacement”, 2009, pp. 9-10. This report was written with the support from, *inter alia*, the UNHCR and it is available at [https://www.ciesin.columbia.edu/documents/clim-migr-report-june09\\_final.pdf](https://www.ciesin.columbia.edu/documents/clim-migr-report-june09_final.pdf).

<sup>14</sup> AFIFI et al., “Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa”, 2012, pp. 24-27. The report was written thanks to a partnership between the United Nations University for Environment and Human Security (UNU-EHS) and the UNHCR and it is available at <http://www.unhcr.org/protection/environment/4fe8538d9/climate-change-vulnerability-human-mobility-perspectives-refugees-east.html>.

<sup>15</sup> *Ibid.*, pp. 29-30.

and temporary”. In addition, the link between environmental degradation and cross-border migration appears weak, and in any case reduced to a secondary movement or to people living close to borders<sup>16</sup>.

With regard to the protection provided to so-called “environmental refugees” in the African continent<sup>17</sup>, the current section will analyze, in chronological order, the main instruments drafted within the context of the African Union (AU) -succeeded in 2002 to the Organization of African Unity (OAU) – as well as by other African regional organizations. Later, the protection provided in the African continent to IDPs will be considered, given that even internal displacement can have environmental causes.

First of all, we can see the absence of a refugee definition in the constitutive Charter of the OAU<sup>18</sup>, as well as in the Constitutive Act of the AU<sup>19</sup>. Therefore, the refugee protection system is based on the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>20</sup>. The latter, while presenting itself as “the effective regional complement in Africa”<sup>21</sup> of the 1951 Convention, has adopted a wider definition of refugee, which recapitulates that of the Geneva Convention, but augments it, adding a supplementary paragraph that confers refugee *status* also to the persons forced to escape “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality”<sup>22</sup>. As underlined in doctrine, the OAU definition extends the concept of persecution, considering it not derived solely from the conduct of the State of origin, but also from an external event, and consequently resulting in the loss of authority of that government<sup>23</sup>. Furthermore, according to different authors, the concept of “events seriously disturbing public order” could include those caused by natural disasters. Nevertheless, beyond what is stated in the article, it

<sup>16</sup> *Ibid.*, pp. 42-47.

<sup>17</sup> On the causes of environmental degradation in sub-Saharan Africa and on the need to legally recognize “environmental refugees” see OTUNNU, “Environmental Refugees in Sub-Saharan Africa”, *Refuge*, 1992, p. 11 ff..

<sup>18</sup> OAU Charter, signed at Addis Abeba on 25 May 1963.

<sup>19</sup> Constitutive Act of the African Union, adopted on 7 November 2000, entered into force on 26 May 2001 and ratified by 55 States.

<sup>20</sup> This Convention was adopted by the Assembly of the Heads of African State and Government, on 10 September 1969, entered into force on 20 June 1974 and ratified by 46 States.

<sup>21</sup> *Ibid.*, Art. 8(2). In the Preamble there is an additional reference to the 1951 Convention, defined as “the basic and universal instrument relating to the *status* of refugees”.

<sup>22</sup> *Ibid.*, Art. 1(2).

<sup>23</sup> See EDWARDS, “Refugee Status Determination in Africa”, *African Journal of International and Comparative Law*, 2006, p. 204 ff., p. 211.



should be recalled, for the purpose of recognizing the legal notion of “environmental refugees”, that in practice African States do not seem inclined to go beyond humanitarian assistance towards people escaping from environmental degradation. In fact, most authors agree that, in cases where African States have assisted people coming from neighboring countries, they have underlined the voluntary and humanitarian character of their actions, claiming that they did not act in accordance with the legal obligations of the Convention<sup>24</sup>.

It can be stressed that, in subsequent years, examining the acts of African inter-governmental organizations, not much attention has been paid to the category of “environmental refugees”. A Declaration adopted by the Southern African Development Community (SADC)<sup>25</sup>, related to the protection of refugees<sup>26</sup> considers that the flow of refugees and IDPs is caused by “conflicts and civil strife, economic and social imbalances, ethnic and other forms of intolerance, lack of respect for human rights and good governance”<sup>27</sup>. Even if another paragraph of the same article refers to refugees fleeing, *inter alia*, for “events seriously disturbing public order”<sup>28</sup>, the Declaration reaffirms the principles laid down in the Geneva Convention and in the OAU Convention, without any particular innovation. With regard to the need to address the causes of the displacement, the SADC act underlines the commitment of the Organization to the establishment of a foundation to promote the development of democratic institutions<sup>29</sup>, while no reference is made to environmental causes.

<sup>24</sup> *Id.*, p. 227. Furthermore, the author has emphasized that, in absence of an *opinio juris* about it, the concordant practice regarding humanitarian assistance to so-called environmental refugees “may be seen as contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty”. According to another author, the maintenance of public order can be endangered by the occurrence of environmental disasters, but the excessive number of refugees for environmental causes in Africa will not allow a full application of this Convention to their situation. See COURNIL, “Les Réfugiés écologiques: Quelle(s) protection(s), quel(s) statut(s)?” *cit. supra* note 6, p. 1044. On the “humanitarian” character of regional practice see also LADAN, “Addressing the Plight of Environmental Migrants through African Union and Ecowas Community Laws: A Case for Climate Justice”, 2012, p. 1 ff., pp. 20-21, available at: <<http://ssrn.com/abstract=2336108>>.

<sup>25</sup> The SADC was established by a treaty signed on 17 August 1992 and was the successor to the Southern African Development Coordinating Conference (SADCC). It is composed by 15 Member States (Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe), with the objectives of obtaining economic growth, peace and security.

<sup>26</sup> Declaration on Refugee Protection within Southern Africa, adopted by the Heads of State or Government of the SADC on 1<sup>o</sup> January 1998.

<sup>27</sup> *Ibid.*, Preamble, (b)(iii).

<sup>28</sup> *Ibid.*, Preamble, (b)(i).

<sup>29</sup> *Ibid.*, para. 2.

In addition, the African Charter on Human and People's Rights<sup>30</sup> affirms only the right of persecuted individuals to seek and obtain asylum, in accordance with international conventions and national laws<sup>31</sup>. Nevertheless, Article 24 of the Charter emphasizes the right of peoples to a "satisfactory environment", aimed at their development.

The Lomé Declaration on Climate Change and Protection of Civilians in West Africa<sup>32</sup> of the Economic Community of West African States (ECOWAS)<sup>33</sup> which, while not binding, highlights an important concept, is also of significance. Firstly, this document recommends the establishment of a fund, as well as measures to address the needs of people affected by environmental disasters. But, above all, the Member States have underlined the importance of drafting legal instruments to protect persons forced to flee for climate reasons, as current instruments do not provide adequate protection<sup>34</sup>.

After having analyzed the protection granted by the regional instruments on refugees, we shall turn our attention to the protection afforded to IDPs, given the large number present in the African continent. In particular, we consider important to evaluate the possible protection afforded by regional instruments to internally displaced persons for environmental causes, as it could extend to people fleeing to a foreign country.

First of all, it is worth mentioning the Khartoum Declaration, adopted within the framework of the Intergovernmental Authority on Development (IGAD)<sup>35</sup>. This Declaration stated that the causes of internal displacement are not only armed conflict,

<sup>30</sup> Adopted by the Assembly of Heads of State and Government on 1 June 1981, entered into force on 21 October 1986 and ratified by 54 States.

<sup>31</sup> *Ibid.*, Art. 12(3).

<sup>32</sup> See the "Lomé Declaration on Climate Change and Protection of Civilians in West Africa", adopted on 16 September 2009, within the framework of the "Regional Conference on Protection Challenges to Climate Change in West Africa".

<sup>33</sup> The ECOWAS was a regional organization, established on 28 May 1975 with the Treaty of Lagos and composed by 15 Member States (Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo). Its aim is to promote economic and political integration.

<sup>34</sup> See ECOWAS, "Conference Adopts Human Rights-Based Approach to Climate Change Issues in West Africa", 17 September 2009, N°: 090/2009, available at: <<http://news.ecowas.int/presseshow.php?nb=090&lang=en&annee=2009>>.

<sup>35</sup> The IGAD was created in 1996 as a successor to the Intergovernmental Authority on Drought and Development (IGADD) and is composed by 8 Member States (Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, Eritrea and South Sudan). Its objective is to enhance regional cooperation in the sectors of economic cooperation, environmental protection and social development. The Khartoum Declaration was adopted by the Ministerial Conference on Internally Displaced Persons in the IGAD Sub-Region, on 2 September 2003.

but also natural disasters<sup>36</sup> and urged the international community to provide support in the field. Moreover, in the IGAD Declaration, the Member States committed not only to protecting and respecting the human rights of IDPs, but also to addressing the needs of host communities. However, this instrument does not make any reference to the cause of natural disasters, while its effectiveness is limited by its non-binding character. Therefore, we will consider two different binding instruments, adopted some years later.

In 2006, a Protocol on the Protection and Assistance to Internally Displaced Persons was enacted within the International Conference on the Great Lakes Region (ICGLR)<sup>37</sup>, with the stated objective of encouraging adoption of the ONU Guiding Principles by the Member States, in addition to a national legislation consistent with them<sup>38</sup>. With regard to the protection to be granted to IDPs, this Protocol recaps what was affirmed in the aforementioned Principles, urging Member States to ensure, *inter alia*, the respect of the principles of international humanitarian law and human rights; special protection for vulnerable people; adequate conditions of dignity; and freedom of movement and choice of residence, thereby also facilitating the work of humanitarian personnel. However, the Protocol, with respect to the Guiding Principles, places greater emphasis on environmental disasters caused by human projects. First of all, the definition of IDPs draws on that contained in the ONU document, but adds a paragraph regarding people forced to leave “as a result of or in order to avoid the effects of large scale development projects”<sup>39</sup>. In addition, Article 5 is specifically dedicated to displacement caused by development, stating that States shall “ensure that displacement owing to large-scale development projects shall be justified by compelling and overriding public interest and development” and that “all feasible alternatives of development are explored in order to avoid development induced displacement”. In addition, this Article stresses that the States shall take all measures necessary to minimize displacement and mitigate their adverse effects; that they shall

<sup>36</sup> *Ibid.*, para. 1.

<sup>37</sup> Protocol on the Protection and Assistance to Internally Displaced Persons, 30 November 2006. The ICGLR is an inter-governmental organization, established in 2000 under the umbrella of the United Nations and the African Union. It is composed of twelve member States, located in the Great Lakes Region, namely Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia. The Protocol on IDPs is part of the Pact on Security, Stability and Development for the Great Lakes Region, signed on 15 December 2006 and amended on November 2012, and ratified by all Member States.

<sup>38</sup> *Ibid.*, Art. 2(1) and Art. 2(3). This objective is present also in the Pact cited in the previous note, Art. 12.

<sup>39</sup> *Ibid.*, Art. 1(5).

obtain “the free and informed consent” of the people concerned, “as far as possible”; that States shall provide full information on the matter as well as adequate relocation, with the effective participation of the people involved, particularly women.

A second important act related to the protection of IDPs is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, the so-called Kampala Convention<sup>40</sup>. In this Convention, an explicit reference to natural disasters as a root cause of the displacement of people is already made in the Preamble, while the definition of IDPs indicates persons forced to escape because of “natural or human-made disasters”, as well as armed conflict, situations of generalized violence and violations of human rights<sup>41</sup>. The Convention establishes the obligations of the State parties towards IDPs, emphasizing in the first place the duty to protect them from, *inter alia*, genocide, crimes against humanity, war crimes and sexual and gender based violence as well as provide them with adequate humanitarian assistance, while also respecting the role of international organizations. Nonetheless, respect for civil and political rights, as well as the freedom of movement and choice of residence, except for restrictions due to security reasons or public health, must be guaranteed to the IDPs. There is also an important exhortation to the State Parties to adopt national laws in accordance with the obligations of the aforementioned Convention<sup>42</sup>, as well as to protect and assist people displaced due to “natural or human made disasters, including climate change”<sup>43</sup>.

Therefore, with regard to the protection of the rights of IDPs, it can be asserted that the Kampala Convention continues in line largely with the Guiding Principles of the United Nations, previously cited. Nevertheless, it introduces an innovation, devoting more attention to the role played by human-made disasters in the displacement of people. First of all, in the 2009 Convention States are urged to guarantee “the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement”<sup>44</sup>. Additionally, Article 10 concerns the displacement caused by public or private projects, exhorting State Parties to ensure that stakeholders have studied possible alternatives; that the people

<sup>40</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted by the Special Summit of the Union held in Kampala on 23 October 2009, entered into force on 6 December 2012 and ratified by 27 States.

<sup>41</sup> *Ibid.*, Art. 1(k).

<sup>42</sup> *Ibid.*, Art. 3(2)(a).

<sup>43</sup> *Ibid.*, Art. 5(4).

<sup>44</sup> *Ibid.*, Art. 3(1)(i). The Art. 3(1)(h) refers to acts carried out by multinational companies and private military or security companies which cause arbitrary displacement.

concerned are fully informed and consulted with; and that a socio-economic and environmental impact assessment of the said project is carried out<sup>45</sup>. It should also be stressed that the Kampala Convention hands over liability, with duty of State Party to make reparation for damage occurred to IDPs in case of omitted protection or assistance in the event of natural disasters<sup>46</sup>. Undoubtedly, the Kampala Convention represents an improvement in the protection of IDPs, due to both its binding nature as well as the introduction of important concepts regarding human responsibility for environmental disasters<sup>47</sup>. Nevertheless, the fact that it has been ratified by only 27 States is a cause for concern with regard to its effective applicability within the African territory<sup>48</sup>.

More generally, while the Guiding Principles focus on the protection of the human rights of IDPs, both these African protection instruments represent, in our opinion, an innovation, as they attempt to attribute due responsibility for natural disasters<sup>49</sup>.

From the considerations stated above, we can conclude that, in the African context, there was a first attempt to extend the protection of refugees beyond the 1951 definition, introducing the concept of “public order”. However, this concept has not been thoroughly clarified, as it lacks the political will of the States to bind themselves to stricter provisions in the field of refugee protection. Nevertheless, what seems encouraging is the will to ensure greater protection to IDPs, in addition to recognizing the environmental causes underlying the internal displacement, present in binding instruments from various regional organizations. In addition, it is remarkable that

<sup>45</sup> In addition, the Guiding Principles on Internal Displacement prohibit arbitrary displacement, such as, *inter alia*, displacement caused by “large-scale development projects, which are not justified by compelling and overriding public interests”. See Principle 6(2)(c).

<sup>46</sup> See *supra* note 38, Art. 12(3).

<sup>47</sup> The Kampala Convention has been defined as a “historic document”, as per the Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, UN Doc. A/HRC/13/21, 5 January 2010, para. 13.

<sup>48</sup> On the difficulty of effective implementation of the Kampala Convention by Nigeria, despite its ratification, see KOLAWOLE, “Towards the Evolution of Legal and Institutional Framework for the Protection of Internally Displaced Persons (IDPs) in Nigeria”, OIDA International Journal of Sustainable Development, 2013, p. 141 ff., pp. 148-149.

<sup>49</sup> See Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact, January 2014, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/COMPARISON%20OF%20THE%20KAMPALA%20CONVENTION%20AND%20THE.pdf>. According to this briefing note by the International Refugee Rights Initiative – a non-governmental organization founded in 2004– the provisions on responsibility regarding displacement caused by development projects are harsher in the ICGLR Protocol. In addition, given the similarity between the two documents, the note urges States Parties of the ICGLR Protocol who still haven’t become members of the Kampala Convention to ratify it.

an attempt has been made to establish a connection between displacement and development projects, public or private. In our opinion, the latter aspect is worthy of further elaboration.

### *3. – The South-American Context: from the Cartagena Declaration to Recent Trends*

On the American continent as well, environmental phenomena, in particular climate change, has had various consequences. It should be underlined that in Mexico and Central America, in addition to cyclone events of particular gravity, the decline in precipitation and increased drought periods have weakened rain-fed agriculture, typical of smallholder -farmers. Furthermore, deforestation, soil erosion and desertification, with their incidence on agricultural livelihoods, also cause migration<sup>50</sup>. The link between climate change, natural disasters and a rise in migration has also been affirmed in a recent report of the Inter-American Commission on Human Rights (IACHR)<sup>51</sup>.

With regard to the protection of “environmental refugees” in the South American context, the paragraph will analyze acts drawn up within the context of the Organization of American States (OAS), as well as the Cartagena Declaration on Refugees<sup>52</sup>, which is the basis of the Latin American refugee protection system. The latter Declaration was the result of an initiative of a group of regional experts, who, together with the support of the University of Mexico, gathered at the beginning of the 1980’s in response to the weak interest of the OAS in addressing the issue of refugees in Central America<sup>53</sup>.

Going in chronological order, we can see that in the constitutive Charter of the OAS<sup>54</sup> there is no reference to the issue of refugees, while the right “to seek and receive asylum” is enshrined in the American Declaration of the Rights and Duties

<sup>50</sup> *Cit. supra* note 12, pp. 6-7. On environmental issues in the South American continent, see TANZARELLA, “Rifugiati ambientali in Sudamerica”, *Rivista giuridica dell’ambiente*, 2014, p. 277 ff.

<sup>51</sup> IACHR, “Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System”, OEA/Ser.L/V/II, Doc. 46/15 (2015), Chapter 1, para. 17.

<sup>52</sup> Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

<sup>53</sup> On the process leading to the adoption of Cartagena Declaration, see REED-HURTADO, *The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America*, UNHCR, Legal and Protection Policy Research Series, 2013, p. 1 ff., pp. 6 -12.

<sup>54</sup> See the Charter of the Organization of American States, adopted on 30 April 1948, entered into force on 13 December 1951 and ratified by 35 States.

of Man<sup>55</sup>. Moreover, this right has been reaffirmed in the American Convention on Human Rights, which, however, refers to a right granted exclusively to those suffering from political persecution<sup>56</sup>.

With regard to the Cartagena Declaration, it has first and foremost reaffirmed the importance of adopting national laws in accordance with the 1951 Convention and the 1967 Protocol, highlighting the need to ratify these instruments without reservations limiting their effectiveness. Moreover, this Declaration has affirmed, on the basis of the situation in the region of Central America, the importance of widening the notion of refugee, making a clear reference to the previous definition of the OAU Convention and to the reports of the Inter-American Commission on Human Rights. In particular, also according to this instrument, "circumstances which have seriously disturbed public order"<sup>57</sup> can contribute to the determination of refugee *status*.

However, this definition, though innovative, entails a need for further clarification. Therefore, we should consider the International Conference on Central American Refugees, whose final Declaration underlines the important role played by the Cartagena Declaration, but does not address the issue of the correlation between migration and environmental degradation<sup>58</sup>. According to a document prepared by a Group of Experts and adopted during the Conference, the broadening of the refugee definition in the Cartagena Declaration is due to the fact that displacement is largely caused by conflicts within several Central American States<sup>59</sup>. Nonetheless, the document highlights how the concept of public order should be related to human actions and not to natural disasters<sup>60</sup>. Moreover, it stresses a distinction between economic migrants and victims of natural disasters, pointing out that the latter cannot be qualified as refugees, "unless special circumstances arise which are closely linked to the refugee definition"<sup>61</sup>. From the above considerations, we can conclude that this document presents a restrictive view of the refugee definition present in the Cartagena Declaration.

<sup>55</sup> American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, 1948, Art. XXVII.

<sup>56</sup> American Convention on Human Rights, adopted on 22 November 1969, entered into force on 18 July 1978 and ratified by 25 States, Art. 22(7). Para 8 and 9 of the same article affirm the principle of non-refoulement and the prohibition of collective expulsions.

<sup>57</sup> See *supra* note 50, para. 3. This paragraph includes, among other reasons that can cause refugee *status*, "generalized violence, foreign aggression, internal conflicts, massive violation of human rights".

<sup>58</sup> Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, 30 May 1989.

<sup>59</sup> Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, 1989, para. 28.

<sup>60</sup> *Ibid.*, para. 33.

<sup>61</sup> *Ibid.*, para. 38.

In the subsequent statements of the South American States gathered to celebrate the anniversaries of the Cartagena Declaration, no improvements have been made in terms of clarifying the notion of public order. In the San José Declaration, adopted on the Cartagena's Declaration tenth anniversary, the importance of the Cartagena refugee definition was reaffirmed, since it allowed States to overcome the notion contained in 1951 Convention and in 1967 Protocol, extending international protection to people who needed it<sup>62</sup>. However, even in this Declaration there does not appear to be an in-depth analysis of the notion of "public order", so as to extend greater protection to "environmental refugees".

On the occasion of its twentieth anniversary, it was emphasized that the Cartagena refugee definition, though it has been included in the national legislation of several States, should be made more specific. In particular, it has been recalled the need "to clarify (...) the interpretation of the specific grounds and their application in individual cases", taking into account the jurisprudence of human rights organs and tribunals and security concerns of States<sup>63</sup>. Finally, it is important to consider what was affirmed in the statement adopted to commemorate the thirtieth anniversary<sup>64</sup>. The Brazil Declaration recalled the incorporation, by the majority of Latin American States, of the Cartagena refugee definition into their national legislations, while simultaneously emphasizing the difficulties faced by several countries in the application of its extended refugee definition<sup>65</sup>. Moreover, it should be pointed out that this statement took into account the problem of displacement of people caused by climate change and natural disasters, underlining the need to conduct further studies, together with the involvement of the UNHCR, regarding this matter.

Considering other documents relating to the issue of refugees and adopted in the South American context in past decades, "environmental refugees" were not given

<sup>62</sup> San José Declaration on Refugees and Displaced Persons, adopted by the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees", 7 December 1994, Part II, second paragraph.

<sup>63</sup> See Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, adopted on 16 November 2004, Chapter 1.

<sup>64</sup> 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", adopted on 3 December 2014.

<sup>65</sup> Given the actions provided by the "Quality Asylum" Programme, included in the Brazil Plan of Action, related to the Declaration, there was an emphasis on the need to "continue making progress in applying the regional extended refugee definition recommended in the Cartagena Declaration and its incorporation in the national legislation of the countries in the region", p. 9.



much attention. In the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas<sup>66</sup>, there is no reference to the issue of “environmental refugees”, if not in emphasizing “the need to address the fundamental root causes of refugee displacement”<sup>67</sup>.

Taking into consideration the resolutions of the General Assembly of the OAS, it should be noted that greater awareness of the negative effects of climate change has been spreading since the late nineties. Firstly, several resolutions were devoted to the importance of climate change and its socio-economic consequences<sup>68</sup>. Moreover, it should be noted that, in order to address the damage provoked by these natural events, the General Assembly established the Inter-American Committee on Natural Disaster Reduction (IACNDR), with the aim, *inter alia*, to give advice to the Permanent Council regarding effective participation by the OAS in the policies and programs during emergencies; the possible establishment of an emergency fund in favor of countries affected by natural disasters; and activities dealing with advocacy and public information<sup>69</sup>.

Moreover, it seems noteworthy that the General Assembly has underlined the repercussions that climate change can have on the enjoyment of human rights, inviting interested States and civil society organizations to contribute to the efforts of the OAS in helping the affected populations<sup>70</sup>.

In line with the context of the consequences of climate change, during the 2014 Session, a resolution was devoted to the correlation between climate change and the

<sup>66</sup> Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, adopted on 11 November 2010.

<sup>67</sup> *Ibid.*, para. 4.

<sup>68</sup> See, for instance, “Climate Change in the Americas”, UN Doc. AG/RES. 1674 (XXIX-O/99), adopted on 7 June 1999. In this resolution, the General Assembly urged the Inter-American Council for Integral Development (CIDI) to cooperate with member States to tackle the effects of climate change. In addition, in 2010, the General Assembly approved a resolution regarding “Climate Change in the Countries of Hemisphere”. See UN Doc. AG/RES. 2588 (XL-O/10), adopted on 8 June 2010. See also “The Socio-economic and Environmental Impacts of Climate Change on the Countries of Hemisphere”, UN Doc. AG/RES. 1736 (XXX-O/00), adopted on 5 June 2000, in which the General Assembly exhorted the CIDI to take into account this issue. The invitation was renewed in the subsequent session. See the resolution UN Doc. AG/RES. 1821 (XXXI-O/01), adopted on 5 June 2001.

<sup>69</sup> “OAS Natural Disaster Reduction and Response Mechanisms”, UN Doc. AG/RES. 1682 (XXIX-O/99), adopted on 7 June 1999. In particular, see para. 6.

<sup>70</sup> “Human Rights and Climate Change in the Americas”, UN Doc. AG/RES. 2429 (XXXVIII-O/08), adopted on 3 June 2008.

worsening of quality of life across member States, encouraging joint efforts to address the negative effects of this phenomenon<sup>71</sup>.

Nevertheless, the General Assembly recently adopted a Declaration on Climate Change, Food Security, and Migration in the Americas, in which the importance of greater awareness regarding the effects of climate change and phenomena such as *El Niño* and *La Niña* on displacement and increased refugee flows was emphasized. Therefore, the Assembly has cautioned the organs of the OAS, as well as regional and multilateral organizations, to take more of an interest in the aforementioned issue. At the same time, the Declaration urges the member States to strengthen cooperation efforts in order to counteract the negative effects of climate change, with hopes of receiving help from the International Organization of Migration, the General Secretariat of the OAS, other international organizations and civil society<sup>72</sup>. However, this Declaration, while useful in underlining the importance of the problem and the need for a coordinated response, is lacking in that it fails to address the problem of recognizing a new category of refugees.

However, despite greater awareness of the effects of climate change, it can be stated that, even in recent years, the resolutions devoted by the General Assembly to the issue of refugees do not make specific reference to the problem of migration caused by environmental factors. Firstly, a series of resolutions by the General Assembly devoted to the analysis of migration flows should be mentioned, as they affirm the importance of spreading awareness about this phenomenon. Therefore, member States are exhorted to cooperate with the General Secretariat in order to exchange information about their legal frameworks, while the OAS should be also continue to engage in the matter<sup>73</sup>.

Moreover, regarding the refugee issue, the General Assembly has enacted a series of resolutions, which have reaffirmed the importance of the Geneva Convention and the 1967 Protocol as the main instruments to protect refugees; urged both the international community and member States, together with the participation of the UNHCR, to strengthen technical and economic cooperation; and commended the improvements made by countries in the implementation of protection mechanisms,

<sup>71</sup> “Climate Change in the Context of Sustainable Development in the Hemisphere”, UN Doc. AG/RES. 2818 (XLIV-O/14), adopted on 4 June 2014.

<sup>72</sup> “Declaration on Climate Change, Food Security, and Migration in the Americas”, UN Doc. AG/DEC. 88 (XLVI-O/16), adopted on 14 June 2016.

<sup>73</sup> See “Migrant Populations and Migration Flows in the Americas”, UN Doc. AG/RES. 2465 (XXXIX-O/09), adopted on 4 June 2009; UN Doc. AG/RES. 2608 (XL-O/10), adopted on 8 June 2010. In this sense, see also “Attention to Migratory Flows in the Americas with a Human Rights Perspective”, UN Doc. AG/RES. 2690 (XLI-O/11), adopted on 7 June 2011.

in accordance with international law<sup>74</sup>.

With regards to IDPs, the resolutions adopted by the General Assembly make only a weak reference to environmental causes, given that the act makes reference to the UN Guiding Principles, previously cited, in which natural or human-made disasters are considered reasons for displacement. Therefore, the resolution urges member States to prevent the causes of displacement, by addressing the problem of natural disasters, as well as to guarantee the needs of IDPs, when natural disasters do occur<sup>75</sup>.

With concern to the latest developments, we can consider documents prepared by the Committee on Migration Issues (CAM)<sup>76</sup>. In particular, an its recent paper has underlined how the percentage of people forced to migrate in the American continent because of environmental reasons, such as extended floods and droughts, has increased. In addition, such climate change is a threat to collective security and stability. For these reasons, the paper has pointed out that the international community, in its concern with this issue, has urged States to cooperate more closely with one another and exchange experiences in the management of the phenomenon. It is noteworthy to mention that this CAM document underlines the main shortcomings as the “lack of specific rules, formal recognition and guidelines for action on environmental migration, at the domestic and regional levels”<sup>77</sup>.

In order to thoroughly analyze the South American context, it is also worth considering what has been affirmed by other regional organizations. In particular, an interest in the issue of refugees was demonstrated by Mercosur<sup>78</sup>, which, in 2000,

<sup>74</sup> See “Protection of Asylum Seekers and Refugees in the Americas”, UN Doc. AG/RES. 2839 (XLIV-O/14), adopted on 4 June 2014. See also, *inter alia*, UN Doc. AG/RES. 2758 (XLII-O/12), adopted on 5 June 2012; UN Doc. AG/RES. 2678 (XLI-O/11), adopted on 7 June 2011; UN Doc. AG/RES. 2597 (XL-O/10), adopted on 8 June 2010; UN Doc. AG/RES. 2511 (XXXIX-O/09), adopted on 4 June 2009; UN Doc. AG/RES. 2402 (XXXVIII-O/08), adopted on 3 June 2008.

<sup>75</sup> See “Internally Displaced Persons”, UN Doc. AG/RES. 2850 (XLIV-O/14), adopted on 4 June 2014. See also, *inter alia*, UN Doc. AG/RES. 2716 (XLII-O/12), adopted on 4 June 2012; UN Doc. AG/RES. 2667 (XLI-O/11), adopted on 7 June 2011; UN Doc. AG/RES. 2578 (XL-O/10), adopted on 8 June 2010; UN Doc. AG/RES. 2508 (XXXIX-O/09), adopted on 4 June 2009.

<sup>76</sup> This Committee is a permanent Committee of the CIDI and was established by a resolution of the General Assembly, with the aim, *inter alia*, to “be a forum for exchanges of experiences and lessons learned in the member states on the effective management of migration flows and for the identification of possible areas for cooperation”. See UN Doc. AG/RES. 2738 (XLII-O/12), adopted on 4 June 2012.

<sup>77</sup> Committee on Migration Issues, “Climate Change, Food Security and Migration in the Americas. Executive Summary”, OEA/Ser. W, CIDI/CAM/doc.34/17, 1 March 2017.

<sup>78</sup> The Mercosur is a process of economic regional integration, established in 1991 by the Treaty of Asuncion, and currently involves Argentina, Brazil, Paraguay, Uruguay and Venezuela. Bolivia is in the accession process.

along with Bolivia and Chile, enacted the Rio de Janeiro Declaration on the Institution of Refuge. This act makes reference to the traditional definition of a refugee, namely a person persecuted “for reasons of race, nationality, religion, membership of a particular social group, political opinion”<sup>79</sup>, foreseeing the possibility for State parties to also include in the definition of refugees “victims of serious and generalized human rights violations”<sup>80</sup>.

However, in a subsequent Declaration, the Latin American organization took on a more innovative position, as it affirmed the principle of non-refoulement in those territories where the life and physical integrity of refugees would be at risk for reasons related to, *inter alia*, “other circumstances that disturb the public order”<sup>81</sup>. Moreover, the same statement underlined the need to implement the refugee definition contained in the Cartagena Declaration, preferring it to the definitions enshrined in other international instruments.

Taking into account the abovementioned considerations, we can conclude that in the South American context as well there has been an attempt to extend the refugee definition, with the introduction of the concept of public order. But the need for further clarification remains evident. Nevertheless, in our opinion, also analyzing the resolutions of the General Assembly, it is clear that a gap exists between an increased awareness of the adverse effects of environmental phenomena including climate change and effective protection granted to “environmental refugees”.

#### 4. – *The Arab Region*

The problem of climate change dramatically affects the Arab region. According to what was affirmed by the United Nations Development Program (UNDP), severe droughts, water scarcity and rising sea levels will contribute to an increase in displacement<sup>82</sup>. The issue is so important that, recently, the UNHCR and the League of Arab States signed a Memorandum of Understanding in order to cooperate and to address the needs of refugees<sup>83</sup>.

<sup>79</sup> Rio de Janeiro Declaration on the Institution of Refuge, adopted on 10 November 2000, preamble.

<sup>80</sup> *Ibid.*, para. 3.

<sup>81</sup> Mercosur Declaration of Principles on International Refugee Protection, adopted on 23 November 2012. Other reasons of persecution were “race, religion, nationality, social group, political opinion, generalized violence, foreign aggression, internal conflicts, massive human rights violations”.

<sup>82</sup> KHODAY, “Climate Change, Peace and Security in the Arab Region”, 4 November 2015, available at: <<http://www.undp.org/content/undp/en/home/blog/2015/11/4/Climate-Change-Peace-and-Security-in-the-Arab-Region.html>>.

<sup>83</sup> UNHCR, “UNHCR and League of Arab States Sign Agreement to Address Refugee Challenges in

With regard to the legal protection of refugees in this region, we shall consider in particular the instruments drafted within the context of the League of Arab States, a regional organization founded in 1945 with the aim of strengthening the cooperation between member States and “to safeguard their independence and sovereignty”<sup>84</sup>.

In the institutive Charter of the League of Arab States, there is no reference to the right to asylum. Instead, the recognition of the right to seek asylum is present in the Arab Charter on Human Rights, but only with reference to people forced to escape due to political persecution<sup>85</sup>. Moreover, political refugees are not subject to extradition<sup>86</sup>, while measures derogating from the obligations of the State Parties, in case of public emergency deemed dangerous for the life of nation, should not be made over the right to political asylum<sup>87</sup>.

Nonetheless, the main refugee protection instrument is the Arab Convention on regulating status of refugees in the Arab countries, adopted by the League of Arab States in 1994. This Convention repeats the definition of refugees present in the Geneva Convention, referring to people subjected to persecution for reasons related to “race, religion, nationality, membership of a particular social group or political opinion”<sup>88</sup>. Nonetheless, the Convention introduces an important innovation, as it also considers refugees persons forced to escape “because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof”<sup>89</sup>. Therefore, it can be stated that the Arab Convention constitutes a remarkable step towards the recognition of “environmental refugees”, as it does not limit itself, like other regional instruments previously ana-

the Arab Region”, 22 September 2017, available at: <<http://www.unhcr.org/news/press/2017/9/59c4d7024/unhcr-league-arab-states-sign-agreement-address-refugee-challenges-arab.html>>.

<sup>84</sup> Charter of Arab League, adopted on 22 March 1945 by seven States (Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan, Yemen), Art. 2. Currently, the League of Arab States is composed by 22 Member States, including Palestine.

<sup>85</sup> Arab Charter on Human Rights, adopted on 15 September 1994, amended on 22 May 2004 and entered into force on 15 March 2008, Art. 28.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, Art. 4(2). As stated in the Art. 4(1), derogations of the State Parties are admitted “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin”.

<sup>88</sup> Arab Convention on Regulating Status of Refugees in the Arab Countries, 1994, Art. 1(2).

<sup>89</sup> *Ibid.*, Art. 1(3).

lyzed, to cite an undefined notion of “public order”, but recognizes that environmental causes are sufficient to grant refugee status.

In addition, considering documents drafted outside the context of the League of Arab States, the Cairo Declaration should also be taken into account. Said Declaration was adopted by a group of Arab experts who came together in order to further explore the issues related to the development of refugee law in the Arab context<sup>90</sup>. Even though this statement makes no reference to the issue of “environmental refugees”, it seems worthwhile to note the attempt to guarantee protection even to persons who do not fall within the definition of the Geneva Convention, the 1967 Protocol or other instruments. In fact, according to Article 5 of the Cairo Declaration, in such cases protection should be guaranteed by the principle of asylum under Islamic law, Arab values, human rights rules established by international and regional organizations, and other relevant principles of international law. Furthermore, it is worth noting that, in Article 6, Arab States are urged to consider a wider notion of refugees and IDPs, awaiting the adoption of an Arab Convention regarding this matter<sup>91</sup>.

Finally, emphasis must be placed on the right to asylum “within the framework of Shari’a”, as is enshrined in the Cairo Declaration<sup>92</sup>, adopted by the Organization of the Islamic Conference, currently replaced by the Organization of Islamic Cooperation, an inter-governmental organization, representative of the Muslim world, established in 1969. However, according to the aforementioned Declaration, the obligation of the State of refuge to provide protection to the asylum-seeker is limited by the fact that the asylum application depends on the commission of an act considered a crime by the Shari’a.

## 5. – *Conclusions*

From the abovementioned considerations, we can conclude that the regional contexts examined are characterized by an attempt to extend the protection granted by general international law to people escaping from their State, in an attempt to overcome the limits of the Geneva Convention. The first attempt to expand upon the definition of refugee occurred in the African continent, with the OAU Convention, which introduced the concept of “public order”, whose disruption can determine the granting of refugee status. Later, the above-mentioned concept was resumed within the South

<sup>90</sup> Declaration on the Protection of Refugees and Displaced Persons in the Arab World, 19 November 1992. As stated in the Declaration, it has been approved at the end of a Seminar on “Asylum and Refugee Law in the Arab World”, organized by the International Institute of Humanitarian Law with the Faculty of Law of Cairo University, with the sponsorship of UNHCR.

<sup>91</sup> *Ibid.*, Art. 6.

<sup>92</sup> Cairo Declaration on Human Rights in Islam, adopted on 5 August 1990, Art. 12.

American continent with the Cartagena Declaration. However, in both regional contexts, there was no clarification of the concept of “public order”, which would allow for its application to people fleeing from environmental degradation. The explicit recognition of “natural disasters” as reason for granting refugee status is present only in the Convention of the League of Arab States, even if it is not clear whether such expression includes environmental degradation caused by climate change. Nevertheless, we believe that this provision is an important basis for subsequent recognition of full protection for people forced to flee for environmental reasons.

Considering another profile, regarding IDPs, it is worth noting that in the African context they are guaranteed greater protection than under general international law, through the adoption of the two binding instruments examined. However, it should be underlined that, although the Kampala Convention represents an important innovation, the fact that it has only been ratified by 27 States raises doubts as to the willingness of the States to bind themselves to obligations towards IDPs.

Another important aspect in the African context is the correlation between environmental disasters and development projects, as well as the attempt to establish accountability of non-State actors, including multinationals. In our opinion, this aspect deserves to be studied in detail, as a starting point from which to establish a form of protection for people fleeing due to environmental causes.





# 6. THE UN OCEAN CONFERENCE AND THE LOW-LYING STATES SITUATION: WOULD THE UN SD GOAL 14 SUFFICE TO AVOID A MIGRATORY EMERGENCY?

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SUMMARY: 1. Introduction. – 2. The Low-Lying States Migratory Emergency: the Relation between the Oceans Degradation and the Human Forced Displacement. – 3. The Borderless Nature of the Oceans: the Need of International Cooperation and Participation to Cope with the Low-Lying Coastal States' Vulnerability to Climate Changes Impacts. – 4. The UN I Ocean Conference and the Sustainable Development Goal 14's Implementation: could it be a Game-Changer for Low-Lying States' Future? – 5. Conclusions.

## *1. – Introduction*

It's undeniable that the impacts of climate change are being felt worldwide, however, the Low-lying States are among the most severally affected. These countries make up the group of nations that largely rely on the oceans to survive, although it is expected that oceans should give rise to their extinction. Considering that one of the

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most relevant United Nations Sustainable Development Goals for these States is Goal 14, named “Conserve and sustainably use the oceans, seas and marine resources for sustainable development”, is the implementation of this goal enough to save these countries?

Climate change effects on the environment and on human life have never been discussed so often as in the recent years. Since the Paris Agreement, the media channels’ interest, in addition to the general public’s awareness on this subject has increased.

Recent hurricanes’ destructive force, as was Irma’s, Jose’s and Maria’s case<sup>1</sup>, linked to the climate change impacts on weather, demonstrated the coastal States’ vulnerability to these effects. Although the 2017 hurricanes had a devastating effect in several countries, the global warming underlying impacts can’t be disregarded.

For a certain group of countries, (also referred as “low-lying coastal States”), stopping, or at least slackening climate changes’ impacts is a matter of survival. These countries are usually located in the Caribbean Sea, the Pacific, Atlantic and Indian Oceans, and are considered Small Island Development States (“SIDS”), containing parts of their territories at or below sea level<sup>2</sup>.

Although these countries are being impacted in different ways, they are all experiencing some kind of induced climate changes negatives impacts. For some<sup>3</sup>, global warming and its impacts on the sea level may cause their vanishing.

In addition, most of these States are developing countries economically reliant on the oceans, struggling with social and economic problems that are bolstered by climate changes negative impacts on a variety of sectors including tourism, freshwater resources, fisheries and agriculture, human settlements<sup>4</sup>.

<sup>1</sup> The 2017 hurricane season has been worse than usual, until mid-September there have been formed seven hurricanes, which four of them were category 3 and above. Experts predict that there will be two or three named storms in October and one in November or December. Rice, Doyle, “Yes, this hurricane season has been worse than usual”, *USA Today*, 18 September 2017. Available at: <<https://www.usatoday.com/story/weather/2017/09/18/yes-hurricane-season-has-been-worse-than-usual/677360001/>>.

<sup>2</sup> ASHE, LIEROP, CHERIAN, “The role of the alliance of Small Island States (AOSIS) in the negotiation of the United Nations framework convention on climate change (UNFCCC)”, in *Natural Resources Forum*, Blackwell Publishing Ltd, 1999. p. 209 ff.

<sup>3</sup> Such as Kiribati, The Maldives, Vanuatu, Tuvalu, Solomon Islands, Samoa, Nauru, Fiji Islands, Marshall Islands.

<sup>4</sup> These effects were already predicted by the Second Assessment Report (SAR) of the Intergovernmental Panel on Climate Change (IPCC) in 1995. BARROS et al, *Climate change 2014: impacts, adaptation, and vulnerability-Part B: regional aspects-Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, New York NY, 2014, p. 1613 ff., p. 1618.

According to the Intergovernmental Panel on Climate Change (“IPCC”) Fifth Assessment Report, “The key climate and ocean drivers of change that impact small islands include variations in air and ocean temperatures; ocean chemistry; rainfall; wind strength and direction; sea levels and wave climate; and particularly the extremes such as tropical cyclones, drought, and distant storm swell events”<sup>5</sup>.

The report also points out the direct cause-effect link between climate changes impacts and the increasing human displacements in the world<sup>6</sup>. The IPCC report predicts a hike in the number of climate-induced displacements in the next years<sup>7</sup>.

Though it is expected that climate change may have a disastrous impact on low-lying countries, causing coastal erosion, increasing coral bleaching and reduced reef calcification rates, changing islands biodiversity, and reducing these regions’ fresh-water supply, ultimately fostering human displacement, it can’t be disregarded that human activities on the shores also play a role in causing these effects.

Documented cases of coastal erosion are often associated with additional circumstances besides global warming<sup>8</sup>. Likewise, the tourism<sup>9</sup> and urbanization rates rise in these areas are also significant causes of reefs degradation and freshwater scarcity<sup>10</sup>.

<sup>5</sup> *Ibid*, p. 1619.

<sup>6</sup> Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report Fifth Assessment Report*, Available at: <[http://ar5-syr.ipcc.ch/topic\\_futurechanges.php](http://ar5-syr.ipcc.ch/topic_futurechanges.php)>

<sup>7</sup> *Ibid*.

<sup>8</sup> “Four examples can be cited. First, on the Torres Islands, Vanuatu communities have been displaced as a result of increasing inundation of low-lying settlement areas owing to a combination of tectonic subsidence and SLR (Ballu et al., 2011). Second, on Anjouan Island, Comores in the Indian Ocean, Sinane et al. (2010) found beach aggregate mining was a major contributing factor influencing rapid beach erosion. Third, the intrinsic exposure of rapidly expanding settlements and agriculture in the low-lying flood-prone Rewa Delta, Fiji, is shown by Lata and Nunn (2012) to place populations in increasingly severe conditions of vulnerability to flooding and marine inundation. Fourth, Hoeke et al. (2013) describe a 2008 widespread inundation event that displaced some 63,000 people in Papua New Guinea and Solomon Islands alone. That event was caused primarily by remotely generated swell waves, and the severity of flooding was greatly increased by anomalously high regional sea levels linked with ENSO and ongoing SLR”. See BARROS, *cit. supra* note 4, p. 1620.

<sup>9</sup> “Coastal tourism, especially in SIDS, the growth of the industry brings with it a host of challenges, including loss of fragile habitat and biodiversity, marine and land-based pollution, inadequate waste management, resource consumption and competition, and limited community engagement and benefit.” Partnership dialogue 5: Increasing economic benefits to small islands developing States and least developed countries and providing access for small-scale artisanal fishers to marine resources and markets, UN Doc. Concept Paper, p. 6. Available at: <<https://sustainabledevelopment.un.org/content/documents/14410Partnershipdialogue5.pdf>>

<sup>10</sup> “Now the majority of the settlement, infrastructure, and development are located on lowlands along the coastal fringe of small islands. In the case of atoll islands, all development and settlement are essentially

Because of the human impact on nature, the effects people are perceiving that climate changes cause, and the lack of international response to the displacements caused by the climate changes issue or even because of the environmental degradation, we aren't able to assess the issue of climate impacts on Low-lying countries isolated of the sustainable development discussions.

Sustainable development debates are presently directly related to the Sustainable Development Goals ("SDGs"). A proposition to establish SDGs was one Rio+20's outcomes, which would guide national policies and international cooperation activities in the next fifteen years, following the Millennium Development Goals ("MDGs").

Past two years of negotiation, the United Nations ('UN') sustainable development goals were adopted in September 2015. There are 17 goals and 169 targets, including issues related to the present paper, such as good health and well-being, clean water and sanitation, sustainable cities and communities, climate action, life below water, life on land.

Considering the low-lying States vulnerability to climate changes impacts and their reliance on oceans sustainability – not exclusively as an economic source, but also as a way to keep sea levels stable –, one of the most important UN SD Goals to these countries is Goal 14, "Conserve and sustainably use the oceans, seas and marine resources for sustainable development".

The first UN Ocean Conference took place in June 2017, and aimed to adopt by consensus an intergovernmental declaration in the form of a call for action to support Goal 14 implementation<sup>11</sup>. The Conference's outcome was the adoption of a declaration entitled "Our ocean, our future: call for action"<sup>12</sup>.

In light of the fact that low-lying nations are the most vulnerable to the unsustainable use of the oceans effects, it's pressing to ascertain if the declaration's adoption will help them to survive and deal with an imminent catastrophe that could lead to inevitable migration flows.

This study sought to examine the UN Ocean Conference's key takeaways, its impact on the low-lying nations' situation, what to expect from the Conference's call

coastal. It follows that populations, infrastructure, agricultural areas, and fresh groundwater supplies are all vulnerable to extreme tides, wave and surge events, and SLR (Walsh et al., 2012)". See Barros, *cit. supra* note 4, p. 1623.

<sup>11</sup> UN. Our oceans, our future: partnering for the implementation of Sustainable Development Goal 14. Available at: <<https://oceanconference.un.org/about>>

<sup>12</sup> UN. Outcomes. Available at: <<https://oceanconference.un.org/about>>

for action, and if this will be enough to avoid a migration emergency. The research methodology adopted in this paper will be qualitative, explanatory, and will be developed by means of a scientific output and documentary review.

The research will be divided into three parts. The first part aims to present the Low-lying States migratory emergency and its relation to the oceans degradation. The second part will study the borderless nature of oceans and the need of international cooperation and participation to the UN Ocean Conference Declaration's success.

The third part will ascertain if the UN Ocean Conference and the Sustainable Development Goal 14's implementation could be a game-changer for the low-lying nations' future, avoiding human displacement due to the climate change adverse effects. The research will look into the possibility to use the Law of the Sea Legal Instruments to support these actions, and also the important outcomes from this event.

## *2. – The Low-Lying States Migratory Emergency: the Relation between the Oceans Degradation and the Human Forced Displacement*

Forced human displacements provoked by the climate are usually treated in international discussions as a concern, but not properly an emergency to be addressed. However, discoveries made by climatologist Patrick Nunn show that at least six uninhabited islands in Micronesia have been submerged since 2007<sup>13</sup>.

But for the Solomon Islands this situation is an ongoing reality, five small Pacific islands that made part of the country's territory have already been vanished due to rising seas and erosion<sup>14</sup>. There were no human groups settled in these islands, however, six other islands were also affected, and large swaths of land were covered by the ocean, and the impacts forced people to relocate due to the villages' obliteration on two of those islands<sup>15</sup>.

Surveys conducted by universities in Queensland suggest that the same effects will be experienced by other Low-lying Pacific Countries, which are experiencing seven to twelve millimetres of sea level rise per year, while the global average is

<sup>13</sup> COLE, "Rising tides: islands lost to the sea", *Geographical*, 07 nov. 2017, available at: <<http://geographical.co.uk/nature/oceans/item/2445-rising-tides>>

<sup>14</sup> This discovery has been considered by Australian researchers as the first scientific evidence of the impact of climate change on coastlines in the Pacific. "Five Pacific islands lost to rising seas as climate change hits", *The Guardian*, 10 May 2016, available at: <<https://www.theguardian.com/environment/2016/may/10/five-pacific-islands-lost-rising-seas-climate-change>>

<sup>15</sup> *Ibid.*

three millimetres<sup>16</sup>.

Climate Change it's being considered one of the largest threats to future generations, and forced global migration is the most serious threats consequence of the adverse impacts of climate Global leaders must face, especially for Pacific Island Nations<sup>17</sup>.

The Climate Change Fifth Assessment Report evidences that a large part of the negative impacts that SIDS experience is due to the global warming effects in the oceans. The same oceans that maintained these States' economy throughout years, thanks to fishing and tourism, may be responsible for their vanishing, by means of floods, advancing sea levels, and oceans acidification, which will lead to the marine wildlife death and fish poisoning<sup>18</sup>.

In the same report the Panel pointed out two types of forced migration that will occur: migration as a response to extreme weather events (likely to increase due to climate change) – such as the recent hurricanes that destroyed entire villages in the Caribbean Sea – and migration due to “longer term climate variability and change” (presumably from sea level rise) which will mainly affect the Low-lying States, due to their more vulnerability to this type of climate adversity<sup>19</sup>.

The importance of the oceans to human life across the planet is undeniable, they influence our climate and are intrinsically linked to the atmosphere through heat storage, transportation of heat around the globe, evaporation, freezing and thawing in polar regions, and gas storage and exchange (including CO<sub>2</sub>)<sup>20</sup>.

For Herr and Galland “The ocean acts as a buffer for Earth's climate. The oceanic uptake of CO<sub>2</sub> has somewhat mitigated the effect of global warming by reducing its concentration in the atmosphere. However, this continual absorption of CO<sub>2</sub> changes the ocean in ways that have potentially dangerous consequences for humans and for marine biodiversity”<sup>21</sup>.

Herr and Galland also highlighted that “the scale and rate of environmental

<sup>16</sup> See COLE *cit. supra* note 13.

<sup>17</sup> WARREN, “Forced Migration after Paris COP21: evaluating the ‘climate change displacement coordination facility’ ”, Columbia Law Review, 2017, available at: <<http://columbialawreview.org/content/forced-migration-after-paris-cop21-evaluating-the-climate-change-displacement-coordination-facility/>>

<sup>18</sup> See Intergovernmental Panel on Climate Change *cit. supra* note 6.

<sup>19</sup> *Ibid.*

<sup>20</sup> HERR and GALLAND, *The Ocean and Climate Change: Tools and Guidelines for Action*, Gland, 2009, p. 12.

<sup>21</sup> *Ibid.*

change, driven by the concentration of greenhouse gases in the atmosphere, [...] will negatively affect the ocean's ability to continue to support ecosystems, human populations, and cultures"<sup>22</sup>.

Despite the risk of, in a few decades, being entirely swallowed by the rising seas, a large portion of these Low-lying Countries have developing economies extremely dependent on the oceans, that are already suffering due to climate impacts on marine ecosystems, which are vital to economic sectors such as fisheries and tourism<sup>23</sup>.

The rise of sea level has increased the risk of coastal flooding, and has also increased erosion of coastal land and ecosystems and increased salinization of low-lying agricultural land. "Coastal flooding already leads to displacement of affected populations, erosion of ecosystems such as wetlands and mangroves exposes coastlines to greater risk, and increasing salinization lowers the productivity of agricultural land"<sup>24</sup>.

Usually, human displacement caused by the degradation of the environment due to the climate change impacts drive people to move internally, such persons being recognized as internally displaced persons. However, because of the size of most of the Low-lying States<sup>25</sup>, if the living conditions for their population get worse, people are more likely to migrate to a different State than to migrate internally to seek better living conditions in their own country.

The IPCC's Fifth Assessment Report reveals that the human displacements risk increases when populations that have no resources to a planned migration are exposed to extreme climate conditions, for example, floods and droughts<sup>26</sup>.

The problem is that there is no international policy enabling climate migrants to be admitted and protected in another State. In fact, there is an international resistance in recognizing people that are forced to migrate to other Countries because of the adverse climate or the environmental conditions as refugees.

The UN Refugee Convention doesn't acknowledge the need to flee a Country caused by environmental or climate distress as an inclusion clause in the recognition of a migrant as a refugee.

Both international refugee and international environmental law have been failing

<sup>22</sup> *Ibid*, p. 11.

<sup>23</sup> See Partnership dialogue 5, *cit. supra* note 11, p. 2.

<sup>24</sup> BLACK et al, "The effect of environmental change on human migration", *Global Environmental Change*, p. 53 ff., p. 52.

<sup>25</sup> "Many SIDS have maritime zones that are exponentially larger than their land territory (in Tuvalu, for instance, the size of the exclusive economic zone (EEZ) is more than 26,000 times that of the land mass)". See Partnership dialogue 5, *cit. supra* note 11.

<sup>26</sup> See Intergovernmental Panel on Climate Change, *cit. supra* note 6.

to introduce a solution for this issue, which leaves climate change victims at the mercy of States' goodwill<sup>27</sup>.

Although the effects felt by the Low-lying States are directly related to climate change – as the reports released by the IPCC show in recent years – under the international climate regime the issue of climate displacement is still treated in a very superficial manner.

It should be underlined that the population of low-lying States doesn't want to leave their countries, most of them don't want to become climate migrants<sup>28</sup>, but the local governments of these countries can't reverse their vulnerability to marine environment distress by themselves.

In order to avoid a migratory emergency, measures should be taken to increase the resilience of those countries, which depend on international cooperation to be effective, not only because they are economic developing countries, but also because of the borderless nature of the oceans, which will be discussed in more depth in the next topic.

### *3. – The Borderless Nature of the Oceans: The Need of International Cooperation and Participation to Cope with the Low-Lying Coastal States' Vulnerability to Climate Changes Impacts*

In this section, we will assess the nature of climate and environmental impacts suffered by the low-lying coastal States and the principles of cooperation and participation's relevance in attempting to accomplish SD goal 14.

Mr. Antonio Guterres, UN Secretary-General, opened the conference calling the States to put aside their short-term national gain in favor of the health of our oceans, and to exercise the multilateralism principle, he said: "Oceans are a testing ground for the principle of multilateralism, [...] The health of our oceans and seas requires us to put aside short-term national gain, to avoid long-term global catastrophe<sup>29</sup>."

<sup>27</sup> MONT'ALVERNE and MATOS, "O regime internacional do clima e a proteção aos 'refugiados climáticos': quais desafios da cop 21?", *Brazilian Journal of International Law*, 2016, p. 53 ff., p. 58.

<sup>28</sup> Aso Ioapo from Tuvalu says "migration is the last option of the Tuvaluan people". Erietera Aram from Kiribati affirmed "We don't want to leave our country," Aram says. "We love our land, and it doesn't have the same meaning to be living somewhere else. We don't want to be migrants of climate, but if there is no change our country will disappear into the sea." Doherty, Ben, " 'Our country will vanish': Pacific islanders bring desperate message to Australia", *The Guardian*, 13 May 2017, available at: <<https://www.theguardian.com/world/2017/may/14/our-country-will-vanish-pacific-islanders-bring-desperate-message-to-australia>>

<sup>29</sup> UN Secretary-General, UN Secretary-General opens Ocean Conference, calling on countries to set



To understand what the multilateralism principle means, we bring forward Keohane's concept of it. For him "Multilateralism can be defined as the practice of coordinating national policies in groups of three or more states, through ad hoc arrangements or by means of institutions"<sup>30</sup>.

The concept expresses, therefore, a political project to be promoted with the preference for a collective action standard over individual solutions. Pursuant to this definition, we should also add the goal of universality's normative dimensions, a perception of space indivisibility and common problems, and future prospects, in the pursuit of principles that guarantee a minimum of predictability to the interaction between the actors<sup>31</sup>.

Exercising this principle requires compliance with another international principle, the principle of cooperation. The UN recognized the importance of international cooperation to sustainable development, having included it in its goals. Goal 17 establishes the need of partnership for the goals to strengthen the means of implementation and revitalize the global partnership for sustainable development.

It's also important to highlight the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which established the duty of States to cooperate with one another<sup>32</sup>.

The principle of international cooperation among States is one of the International

aside short-term gain to avoid catastrophe, 05 June 2017, available at: <[https://sustainabledevelopment.un.org/content/documents/15405PR\\_Ocean\\_Conference\\_Opening.pdf](https://sustainabledevelopment.un.org/content/documents/15405PR_Ocean_Conference_Opening.pdf)>

<sup>30</sup> KEOHANE, "Multilateralism: an agenda for research", *International Journal*, p. 731 ff., p. 731.

<sup>31</sup> MELLO, "O Brasil e o multilateralismo contemporâneo", *Instituto de Pesquisa Aplicada*, p. 6 ff., p. 13.

<sup>32</sup> "States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences". Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (1970).

Law principles that is more often portrayed in the preambles of International conventions<sup>33</sup>, especially in those dealing with issues related to man's impact on nature, because of the transnational nature of this kind of action on the environment<sup>34-35</sup>.

This principle can be understood as a process "when actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination"<sup>36</sup>.

As Mr. Antonio Guterres recalls in the UN Ocean Conference opening, we can not discuss the sustainable use of oceans without exercising the multilateralism principle, and, for that purpose, international stakeholders will need to exercise the international cooperation principle.

Climate change negative impacts and direct human actions on oceans are perceived in a more severe way by low-lying coastal States, but they are the least responsible for these effects. This happens because of the oceans' borderless nature, for that the impacts of pollution, predatory fishery and human settlement are not limited to the countries causing these environmental damages, but actually cause transboundary damages.

Considering the need of international cooperation to tackle the oceans vulnerabilities, during the preparatory process of the United Nations Conference to support SD goal 14's implementation, a background note by the Secretary-General was prepared, including a proposal for themes of partnership dialogues for the conference, to be considered by the preparatory meeting that took place in New York in February 2017<sup>37</sup>.

<sup>33</sup> Such as the United Nations Framework Convention on Climate Change, and the United Nations Convention on the Law of the Sea.

<sup>34</sup> "Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment". United Nations Convention on the Law of the Sea, UN Doc. A/37/147 (1982), fourth preambular paragraph.

<sup>35</sup> "Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions," United Nations Framework Convention on Climate Change, United Nations, Treaty Series, vol. 1771, No. 30822 (1992), sixth preambular paragraph.

<sup>36</sup> KEOHANE, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, 1984. Available at: <<http://people.iq.harvard.edu/~olau/ir/archive/keo8.pdf>>

<sup>37</sup> Preparatory process of the United Nations Conference to Support the Implementation of Sustainable

The background note proposed as partnership themes addresses the following topics: addressing marine pollution; managing, protecting, conserving and restoring marine and coastal ecosystems; minimizing and addressing ocean acidification; making fisheries sustainable; increasing economic benefits to small island developing States and least developed countries and providing access for small-scale artisanal fishers to marine resources and markets; increasing scientific knowledge, and developing research capacity and transfer of marine technology; implementing international law, as reflected in the United Nations Convention on the Law of the Sea<sup>38</sup>.

As noted above, the preparatory process of the UN Ocean Conference took into consideration the vulnerability and the the Small Island States' reliance – most of them considered low-lying States – on oceans and has suggested the discussion about increasing economic benefits to SIDS and least developed countries and providing access for small-scale artisanal fishers to marine resources and markets as a theme for a partnership dialogue<sup>39</sup>.

It's nonetheless noteworthy that all the other partnership dialogues are also related to problems that population from the Low-Lying States experience, and that affect their lives and their well-being. However, none of the dialogues addressed the migratory issues faced by the Low-Lying States as one of the imminent effects of the oceans deterioration.

The background note acknowledged that the coastal and marine ecosystem deterioration has a more severe and immediate impact on vulnerable groups, such as small island developing States<sup>40</sup>. The note also highlighted the need of taking into consideration continuing efforts to identify an effective and feasible solution to the development and livelihood needs of SIDS at a multilateral level<sup>41</sup>.

The discussions focused on measures to increase the economic and environmental resilience of the most affected countries, which could postpone the negative effects of climate change on the Low-lying States, but did not address immediate measures to avoid a migration crisis due to the deterioration of living

Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, UN Doc. A/71/733 (2017), para. 2.

<sup>38</sup> *Ibid.*, para. 87.

<sup>39</sup> See Our oceans, our future: partnering, *cit. supra* note 11.

<sup>40</sup> See Preparatory process of the United Nations Conference to Support the Implementation of Sustainable Development Goal 14, *ibid.* para. 8.

<sup>41</sup> *Ibid.*, para. 42.

conditions in places such as Kiribati and Tuvalu.

SIDS face huge sustainable development challenges, as vulnerability to natural disasters and external shocks, small populations, limited resources. They have disproportionately expensive public administration and infrastructure, and little opportunities to create economies of scale. Regardless of that, these States have significant chances to harvest economic benefits from an ocean-based economy that reconciles economic development with sustainable development<sup>42</sup>.

The encouragement of sustainable economic growth has been presented as one of the alternatives to ensure the survival of the affected Low-Lying States and is a way of increasing the possibility of investments in measures of environmental resilience against the adverse effects of climate change on the oceans, which indirectly would guarantee the permanence of the populations of these countries, avoiding a forced human displacement in mass.

Partnership dialogue 5's concept paper acknowledges that maximizing these opportunities will require a multi-stakeholder approach<sup>43</sup>. In this sense, it is also important to mention the participation principle.

This principle is a part of the so-called Lisbon Principles<sup>44</sup>, which are a core set of six principles that provide basic guidelines for the sustainable governance of the oceans.

In accordance with Costanza, the principle of participation means that "All stakeholders should be engaged in the formulation and implementation of decisions concerning environmental resources. Full stakeholder awareness and participation contribute to credible, accepted rules that identify and assign the corresponding responsibilities appropriately"<sup>45</sup>.

The Conference also recognized this principle's importance by encouraging voluntary commitments registration<sup>46</sup> geared at driving implementation of Sustainable

<sup>42</sup> *Ibid.*, para. 4.

<sup>43</sup> *Ibid.*, para. 27.

<sup>44</sup> COSTANZA et al, "Principles for sustainable governance of the oceans", *Science*, p. 198 ff., p.199.

<sup>45</sup> *Ibid.*

<sup>46</sup> "Voluntary commitments for The Ocean Conference are initiatives voluntarily undertaken by Governments, the United Nations system, other intergovernmental organizations, international and regional financial institutions, non-governmental organizations and civil society organizations, academic and research institutions, the scientific community, the private sector, philanthropic organizations and other actors – individually or in partnership – that aim to contribute to the implementation of Sustainable Development Goal 14. Any voluntary commitments made within the framework of the 2030 Agenda targeting

Development Goal 14 and its associated targets by all stakeholders<sup>47</sup>.

Stakeholders were encouraged to register commitments that: advance implementation of SDG 14 and associated targets, reflecting inter-linkages between SDG 14 and other Sustainable Development Goals; respect the United Nations principles and the legal framework in force applicable to the oceans; build upon existing successful efforts (scaling it up, new phase, etc.) or introduce a new one; include means of implementation – such as finance or capacity building – as an element to help ensure the initiative’s longevity and sustainability<sup>48</sup>.

At the end of the Conference 1402, voluntary commitments were made including all targets related to SD Goal 14, most of them by governments and NGOs<sup>49-50</sup>.

The international cooperation and participation importance were also stressed out in the Conference final document named “Our ocean, our future: call for action”, in which the UN Assembly recognized that “our ocean is critical to our shared future and common humanity in all its diversity”<sup>51</sup>, also recognizing “the need to address the adverse impacts that impair the crucial ability of the ocean to act as climate regulator, source of marine biodiversity and as key provider of food and nutrition, tourism and ecosystem services and as an engine for sustainable economic development and growth”<sup>52</sup>.

Finally, the declaration also underlined “the need for an integrated, interdisciplinary and cross-sectoral approach, as well as enhanced cooperation, coordination and policy coherence, at all levels<sup>53</sup>”, and the need “to integrate Goal 14 and its interrelated targets into national development plans and strategies, to promote national ownership and to ensure success in its implementation by involving all relevant stakeholders, including national and local authorities, [...], local communities,[...] as well as the academic and scientific communities, business and industry”<sup>54</sup>.

For that purpose, the General Assembly purposed adopting some actions, among them:

SDG 14 can be registered as voluntary commitments for The Ocean Conference”. United Nations “Voluntary commitments”, Available at: <<https://oceanconference.un.org/commitments/>>.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> 44% and 20%, respectively.

<sup>50</sup> *Ibid.*, para. 48.

<sup>51</sup> Our ocean, our future: call for action, UN Doc. A/RES/71/312 (2017), para. 2.

<sup>52</sup> *Ibid.*, para. 4

<sup>53</sup> *Ibid.*, para. 8.

<sup>54</sup> *Ibid.*, para. 9.

“(b) Strengthen cooperation, policy coherence and coordination among institutions at all levels, including between and among international organizations, regional and subregional organizations and institutions, arrangements and programmes; (c) Strengthen and promote effective and transparent multi-stakeholder partnerships, including public-private partnerships, by enhancing engagement of Governments with global, regional and subregional bodies and programmes, the scientific community, the private sector, the donor community, non-governmental organizations, community groups, academic institutions and other relevant actors”<sup>55</sup>;

It is important to emphasize that, although the commitments assumed and the actions purposed by the General Assembly represent a step forward in the discussions and, especially, in the adoption of practical actions to improve the oceans health and the wellbeing of the populations that depend on it, they were based on measures to increase the resilience of the most affected countries to the oceans distress, not dealing with the Low-Living States migratory emergency directly.

Although these measures are not focused on a permanent and definitive solution to the migratory crisis in these countries, their importance can not be denied.

It can be inferred from the information presented above that, as already acknowledged in priors UN conventions related to the oceans and to the climate change impacts the success of this declaration, and also the success of any action to cope with the enhancement of the low-lying States resilience to climate change impacts on oceans will demand the international community’s cooperation in different areas, especially in implementing obligations that countries took on by signing international instruments on the matter.

Moreover, the French President launched the Global Pact for the Environment's project during the UN General Assembly in September 2017 as a way to develop a single and more coherent text and an international and legally binding document, gathering and harmonizing all environmental laws<sup>56</sup>.

The Pact’s preliminary draft expressly acknowledges the relevance of cooperation to deal with the adverse effects of climate change and to protect the oceans. The draft recognizes the need for integration of the requirements of environmental protection into the planning and implementation of States policies and national and international activities, especially in order to promote the fight against climate change

<sup>55</sup> *Ibid*, para. 13.

<sup>56</sup> The Global Pact for the Environnement. Permanent Mission of France to the United Nations in New York. <https://onu.delegfrance.org/The-Global-Pact-for-the-Environnement>

and the protection of oceans<sup>57</sup>.

International environmental laws harmonization, such as the Global Pact for the Environment advocates, would make the Agenda 2030 and its 17 Sustainable Development Goals<sup>58</sup> – including SDG 14 – implementation easier. Nevertheless, in order to President Macron accomplish his project, he relies on the international community's goodwill to cooperate and engage in this project and to the construction of a sustainable future to mankind, irrespective of present economic gains.

In the next topic, it will be discussed how the States' cooperation and participation to Sustainable Development Goal 14's implementation can help to change the Low-Lying States' future.

#### *4. – The UN I Ocean Conference and the Sustainable Development Goal 14's Implementation: Could it be a Game-Changer for Low-Lying States' Future?*

In this section, the proposals emerging out from the UN Ocean Conference for the implementation of SD goal 14 and its impacts on the survival of the Islands Nations will be analyzed. This section will introduce the support that the Law of the Sea legal instruments can provide to this issue, and will discuss the possible Conference outcomes, especially for low-lying countries and their probable migration emergency.

Despite the importance of the resolution 71/312 adopted by the UN General Assembly, which endorsed the declaration entitled “Our ocean, our future: call for action”<sup>59</sup>, it should be remembered that it was established a legal framework for all matters related to oceans and seas in 1982, the so-called United Nations Convention on the Law of the Sea (“UNCLOS”).

The Convention aimed to regulate all issues related to the law of the sea, and within its framework, it was developed a series of instruments regulating various aspects related to the use of the oceans and their resources and the marine environment, and it is the most important international instrument adopted in this field until these days, currently having 168 States Parties, including all SIDS.

Because of its relevance, the 2030 Agenda for Sustainable Development

<sup>57</sup> The Global Pact for the Environment, UN Preliminary draft (2017), article 3.

<sup>58</sup> See The Global Pact for the Environnement..., *cit. supra* note 56.

<sup>59</sup> See UN, Our Ocean, our future, *cit. supra* note 51.

acknowledged, as one of its target, the need to Enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea<sup>60-61</sup>.

In the UN Ocean Conference's background note, it was highlighted that a wide array of international and regional legal instruments exists, covering many aspects of ocean management<sup>62</sup>, but not all Member States are parties to all relevant instruments. For this reason, continued efforts have been made to strengthen the international legal framework for the oceans and seas with additional instruments to address emerging challenges. It is clear, however, that effective compliance with and enforcement of those provisions remain a challenge<sup>63</sup>.

One of the greatest challenges pointed for the implementation of global commitments was the fragmentation in many States of the policies related to ocean affairs<sup>64</sup>. Therefore, the Secretary-General of the United Nations Ocean Conference suggested "Implementing international law, as reflected in the United Nations Convention on the Law of the Sea" as a theme for a partnership dialogue, in order to promote understanding that there are opportunities for additional partnerships aimed at assisting the development of adequate policy, legislation or regulation to implement the United Nations Convention on the Law of the Sea, and for partnerships aimed at building the necessary monitoring, control and surveillance and enforcement capacity<sup>65</sup> that would contribute to the conservation and sustainable use of oceans, seas and marine resources.

<sup>60</sup> This target is, as a matter of fact, part of a broader target, that is target 7: "By 2030, increase the economic benefits to small island developing States and least developed countries from the sustainable use of marine resources, including through sustainable management of fisheries, aquaculture and tourism".

<sup>61</sup> Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015).

<sup>62</sup> "The United Nations Convention on the Law of the Sea and its implementing agreements are supplemented by several instruments, including global treaties relating to sustainable fisheries, pollution from ships, maritime safety, atmospheric pollution, the release of hazardous substances into the environment, the protection of certain species or habitats and the conservation and sustainable use of biodiversity. In addition, a host of soft law instruments also contain goals and targets, ranging from the outcome documents of the successive United Nations conferences and summits on sustainable development and the annual General Assembly resolutions on oceans and the law of the sea and on sustainable fisheries to guidelines, codes of conduct and programmes of action". See Preparatory process of the United Nations Conference to Support the Implementation of Sustainable Development Goal 14 ..., *cit. supra* note 37, para. 63.

<sup>63</sup> *Ibid.*, para. 63-66.

<sup>64</sup> *Ibid.*, para. 70.

<sup>65</sup> *Ibid.*, para. 86.



The importance of the Law of the Sea and its instruments to the SD Goal 14 achievement was recognized in the Ocean Conference final document, which has emphasized the need to accomplish Goal 14 by implementing international law as reflected in the United Nations Convention on the Law of the Sea, and that the need of enhancing the conservation and sustainable use of oceans and their resources should reinforce and not duplicate or undermine existing legal instruments, arrangements, processes, mechanisms or entities<sup>66</sup>.

The document also called up all stakeholders to cooperate and participate taking various actions on an urgent basis, amongst them, to:

Actively engage in discussions and the exchange of views in the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, so that the General Assembly can, before the end of its seventy-second session, taking into account the report of the Preparatory Committee to the Assembly, decide on the convening and on the starting date of an intergovernmental conference<sup>67</sup>;

Although the relevance of an international legally binding instrument's development on the protection and sustainable use of areas beyond national jurisdiction's marine biological diversity, it should be noted that the instruments already in force under the Convention on the Law of the Sea<sup>68</sup> can assist on the sustainable development goal 14's implementation.

<sup>66</sup> See UN, *Our Ocean, our future*, *cit. supra* note 51, para. 11.

<sup>67</sup> *Ibid.*, para. 13 (a).

<sup>68</sup> The Fish Stocks Agreement is an important instrument to SIDS because of its impact on the economy of these Countries. This agreement sets out principles to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond exclusive economic zone by establishing detailed minimum international standards for managing and protecting straddling fish stocks and highly migratory fish stocks, ensuring that measures taken for this purpose in areas under national jurisdiction and in the adjacent high seas are compatible and coherent "The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001) Overview", available at: <[http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_fish\\_stocks.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm)>.

The Agreement relating to the implementation of United Nations Convention on the Law of the Sea's Part XI is also an important instrument due to the oceans' transboundary nature. This Agreement addresses certain difficulties with the seabed mining provisions contained in Part XI of the Convention related to the area.

Still, the obligations within UNCLOS' implementation doesn't resolve all problems that low-lying States face and that are caused by climate change and human actions on the environment, especially those related to forced human mobility, a topic that is not even superficially addressed in the international documents of the law of the sea. For this reason, the Ocean Conference is so important, and should be analyzed in detail.

During the Ocean Conference finalization, Ms. Isabella Lövin, Minister for International Development and Climate of Sweden<sup>69</sup>, stated "I truly believe this conference will constitute the game changer we so desperately need. Now the work really begins to save our oceans"<sup>70</sup>. The question is whether this Conference will be a real game changer for those mostly affected by the severe impacts of climate change and the marine environment degradation, the Low-lying States?

Minister Isabella Lövin's declaration is related to the political engagement that has been mobilized during this Conference. All 193 United Nations Member States unanimously agreed to a set of measures that aim to contribute to reverse the decline of the oceans<sup>71</sup>. Also, as we already said, the event resulted in 1,402 voluntary commitments from countries, NGOs, companies and other stakeholders<sup>72</sup>, and this number can still increase as the registry remains open for new commitments.

However, none of the commitments made were focused on measures to deal with the forced displacement problem that countries like Solomon Islands, Tuvalu and Kiribati are dealing. The human mobility issue was not included in such commitments.

Among the 2030 Agenda'targets to implement Sustainable Development Goal

UNCLOS's relevance itself should also be highlighted, as well as its Part XII regulating the marine environment's protection and preservation. This is a legally binding Convention that establishes States' obligations to prevent, reduce and control pollution of the marine environment, also predicts the need of global and regional cooperation to achieve this goal, and mechanisms to monitor and assess the marine environment. Finally, the Convention on the Law of the Sea is important because it establishes the different maritime zones, and the Coastal States' obligations for each area, including the obligations related to the marine resources' and marine environment's protection. See UN, Convention on the Law of the Sea, *cit. supra* note 36.

<sup>69</sup> The Ocean Conference was co-chaired by Sweden and Fiji.

<sup>70</sup> Minister for International Development and Climate of Sweden Government Offices of Sweden. "The Ocean Conference", 9 June 2017, available at: <http://www.government.se/government-policy/the-ocean-conference/>

<sup>71</sup> United Nations, "Countries agree on decisive and urgent actions to restore marine world to health as Ocean Conference concludes", available at: <https://oceanconference.un.org/prjune9> >

<sup>72</sup> See UN, Voluntary commitments, *cit. supra* note 46.

14, targets 14.2<sup>73</sup>, 14.1<sup>74</sup> and 14.a<sup>75</sup>, received the largest number of voluntary commitments<sup>76</sup>, and they are directly related to the problems faced by low-lying States.

As already highlighted above, a series of voluntary commitments related to the increase of the resilience of SIDS were presented, stands out measures of efficient removal of plastic pollution at large-scale and from aquatic ecosystems<sup>77</sup>, education programmes on the impacts of marine pollution and on the importance of managing their marine resources in a sustainable manner<sup>78</sup>, among others.

Some of the commitments are more important because will be fulfilled directly in low-lying States, such as the two that will be described below, and could be used not only to improve the lives and the environment to their inhabitants but also as a model to other States facing with the same kind of vulnerability.

<sup>73</sup> “By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans”. See UN, Transforming our world, *cit. supra* note 61.

<sup>74</sup> “By 2025, prevent and significantly reduce marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution”. *Ibid.*

<sup>75</sup> “Increase scientific knowledge, develop research capacity and transfer marine technology, taking into account the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology, in order to improve ocean health and to enhance the contribution of marine biodiversity to the development of developing countries, in particular small island developing States and least developed countries”. *Ibid.*

<sup>76</sup> 718, 549 and 543 voluntary commitment, respectively.

<sup>77</sup> The Ocean Cleanup it is an organization committed to efficiently remove plastic pollution at large-scale and from aquatic ecosystems, covering SDG target 14.1. The expectation is to deploy their first cleanup system in mid-2018. United Nations, “The Ocean Cleanup”, available at: <<https://oceanconference.un.org/commitments/?id=15227>>

<sup>78</sup> WiseOceans is an initiative from the private sector devoted to marine education as a manner to increase people’s knowledge on the oceans and the impact they have on them. They pledged to create a section in their website and social media platforms to educate the audience on the impacts of marine pollution, specifically plastics, and on their land-based sources, by 2018, with an interactive approach, leading the audience to pick one commitments to reduce their plastic consumption. United Nations, “WiseOceans commitment to marine education and reduction of marine plastic”, available at: <<https://oceanconference.un.org/commitments/?id=20396>>

“WiseOceans in collaboration with their partners, Four Seasons Resort Seychelles, recently reported that they have successfully launched a programme with Baie Lazare Primary School in Seychelles, mangroves being one of the topics covered. The programme includes traditional classroom based sessions (involving a presentation), and a field trip. Additionally, the children of the programme has created a mural for their school wall on mangroves. The programme is being promoted through social media channels, and has been recognized by the Ministry of Education, Seychelles”. *Ibid.* WiseOceans’ commitment it is important not only because it aims to implement SDG target 14.1, but also because it is a pledge related to target 14.7, which intends to increase the sustainable use of marine resources’ economic benefits for SIDS.

The Phoenix Islands Protected Area (“PIPA”) Conservation Trust is a NGO launched the bring PIPA home initiative to help enabling the biodiversity and sustainability values to be more accessible to the Kiribati public. The project covers SDG targets 14.1, 14.2, 14.5<sup>79</sup>, 14.a., and has registered five commitments, among them: to scope and guide the establishment of 8 community Marine Protected Areas in other regions of Kiribati by 2025, consistent with SDG 14.5; support mangrove replanting in Kiribati’s Gilbert and Line Islands; support in banning the use of single plastic bag; and supporting coastal clean-up based on governmental involvement, as well as private sector’s and local communities’ engagement<sup>80</sup>.

The World Team Project: Sustainable Solutions Oceans Opportunities & Small Island States (“SOS-IS”) it is a NGO that has as its goals to build renewable energy micro grids toward energy independence, clean water and power, biodiversity protection, and leading technology demonstration. The Project has been assessing and removing invasive species, and replanting mangroves in Fiji as part of their voluntary commitment, and they are also reaching out to various stakeholders and donors in New York and California in order to bring additional resources<sup>81</sup>.

This is another example of commitment that is being implemented in a low-lying State and could serve as a model to increase their resilience against climate change’s adverse effects.

These were just a few voluntary commitments that were made by stakeholders to assist SD Goal 14’s implementation in accordance with the Conference final document. In addition, the Call for action established the need to adopt various measures to conserve and sustainably use of the oceans, seas and marine resources for sustainable development, among them a few should be underlined for their connection with low-lying States’ vulnerability:

- (g) Accelerate actions to prevent and significantly reduce marine pollution of all kinds [...];
- (j) Support the use of effective and appropriate area-based management tools [...];
- (k)

<sup>79</sup> “By 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information”. See UN, Transforming our world, *cit. supra* note 61.

<sup>80</sup> Phoenix Islands Protected Area (PIPA): Bring PIPA Home. Available on: <<https://oceanconference.un.org/commitments/?id=20784>>

<sup>81</sup> The World Team Project: Sustainable Solutions Oceans Opportunities & Small Island States (SOS-IS). Available on: <<https://oceanconference.un.org/commitments/?id=21714>>

Develop and implement effective adaptation and mitigation measures that contribute to increasing and supporting resilience to ocean and coastal acidification, sea level rise and increase in ocean temperatures, and to addressing the other harmful impacts of climate change on the ocean as well as coastal and blue carbon ecosystems[...];(l) Enhance sustainable fisheries management, including to restore fish stocks in the shortest time feasible at least to levels that can produce maximum sustainable yield as determined by their biological characteristics [...];(q) Support the promotion and strengthening of sustainable ocean-based economies, which, inter alia, build on sustainable activities [...]<sup>82</sup>.

Despite the substantial engagement from States and the stakeholders that made voluntary commitments in approving the UN Ocean's Declaration, it should be stressed that this is not a legally binding instrument, being considered by the international legal regime as soft law, which may hamper the predicted actions' implementation.

For that reason, many member States and stakeholders underscored at the Ocean Conference that, in order to ensure that all Nations are working to meet their Goal 14 implementation obligations, an effective follow up to the Ocean Conference would be crucial<sup>83</sup>.

Participants from governments, UN system and other stakeholders took part in the first webinar in September 2017, which aimed at discussing arrangements for following up on voluntary commitments related to mangroves. The United Nations will organize a series of global webinars, to provide a virtual platform where all actors can share updates on the implementation of their commitments<sup>84</sup>.

Nevertheless, because of this declaration's soft law nature, it is important to seek the protection and sustainable use of oceans and their resources by implementing the Convention on the Law of the Sea and its instruments, because their legally binding nature, which usually compels States to be more committed to complying with assumed international obligations.

<sup>82</sup> See UN, *Our Ocean, our future*, *cit. supra* note 51, para. 13.

<sup>83</sup> See UN, *Voluntary commitments*, *cit. supra* note 46. This concern and desire on the follow-up to the Conference led member States to agree to include it in the declaration "Our Ocean, our future: call for action", including: "(t) Welcome follow-up on the partnership dialogues and commit to implementing our respective voluntary commitments made in the context of the Conference; (u) Contribute to the follow-up and review process of the 2030 Agenda by providing an input to the high-level political forum on sustainable development on the implementation of Goal 14, including on opportunities to strengthen progress in the future". See UN, *Our Ocean, our future*, *cit. supra* note 51, para. 13.

<sup>84</sup> United Nations, "The UN follows up on the Ocean Conference Voluntary Commitments for the implementation of Sustainable Development Goal 14", available at: <<https://oceanconference.un.org/UN-follows-up-on-the-Ocean-Conference-Voluntary-Commitments>>

In the end, the Conference did not address urgent measures to assist Low-Lying States facing an imminent migratory crisis, the focus was on the sustainable use of the oceans and on enhancing the resilience of the affected populations, which is the main focus of SD Goal 14.

It can be inferred from the commitments made, as well as from the measures proposed in the call for action, that once again the international community has failed to address and develop immediate solutions for the forced human mobility of Low-Lying States populations caused by environmental degradation, in this case especially by the oceans conditions.

The UN Ocean Conference was an event centered around the environmental issues related to oceans and seas that discussed the importance and the means to implement SD Goal 14 and its targets. For that reason, measures to directly solve the Low-Lying States migration emergency weren't discussed, but the actions suggested during the Ocean Declaration, and also the voluntary commitments will assist those Countries in enhancing their resilience against adverse effects of climate change and human actions on the environment, especially on the marine environment.

As already underlined most of the population of low-lying States don't want to leave their countries, that is why the discussion of the adoption of effective and immediate resilience measures is so important to them.

As the Ocean Declaration reminded, all the Sustainable Development Goals are integrated and have an indivisible character, especially to the people living in States that are severely affected by the human impact on nature, such as the low-lying States, because of that it is necessary to seek the implementation not only of the SDG 14, but the implementation of the 2030 Agenda as a whole, so that countries facing the greatest climate, economic and social vulnerability can be able to resist the climatic adversities.

As recognized by the President of the UN General Assembly, Peter Thomson, one of the most important outcomes of the Conference was to raise awareness of the international community on the decline of ocean's health<sup>85</sup>. If this awareness will be enough to prompt stakeholders to take urgent and effective measures to improve the health of the oceans and seas and increase the resilience of countries most dependent on them to the effects of climate change, only time will show.

<sup>85</sup> United Nations, "Countries agree on decisive and urgent actions to restore marine world to health as Ocean Conference concludes", available at: <<https://oceanconference.un.org/prjune9>>

## 5. – *Conclusion*

The United Nations Ocean Conference was an important step towards the sustainable development goals' implementation, especially for countries that rely on the oceans, whether for economic reasons or even for their survival in the face of the adverse effects of climate change, which is the case of the Low-Lying States.

The Conference generated a momentum for the discussion on the topic and succeeded in involving all Member States of the UN General Assembly that agreed to adopt the measures proposed in the final document, as well as the event was able to draw attention to the importance of marine resources and to its current state of degradation, more than 1400 voluntary commitments related to the implementation of the SDG 14 objectives were made, until now, by States, NGOs, companies and other sectors of society.

This Conference's focus wasn't on immediate measures to resolve the migratory emergency of some of the Low-Lying States, but on measures to increase resilience and restore the living conditions of marine resources. However, the importance of such measures to these countries can't be denied, since the majority of their population, as well as their governments, understand that migratory measures should be treated as a last resort.

The great issue that will define whether the Ocean Conference, in fact, represented a game changer for low-lying States, will be the cooperation and participation of stakeholders in order to effectively implement the actions and commitments undertaken, so that such proposals will cease to be only promises and could become reality.

Even though low-lying States are the countries most affected by the degradation of the oceans, they are the ones that generate the least environmental impacts in relation to them, so they have no means to resolve the problem without global involvement and engagement.

Finally, it is emphasized that the Declaration of the Oceans is a soft law document, therefore, one of the most effective means of ensuring the implementation of the commitments made especially by the Member States of the United Nations will be through the effective Convention on the Law of the Sea's and of its legally binding instruments' implementation.





# **THE *NANSEN INITIATIVE* AND *MIGRANTS IN COUNTRIES IN CRISIS INITIATIVE*: NEW FRAMEWORKS FOR MORE EFFECTIVE MIGRANTS' PROTECTION**

*Patrycja Magdalena Zgoła\**

SUMMARY: 1. Introduction and Key Concepts. - 1.1. Outline of the Problem. - 1.2. The Protection of Displaced Persons in the Context of Climate Change Impacts, Including Disasters, in International Law. - 2. A Challenge towards a Global Protection Agenda. - 3. Goal and Scope of the *Nansen Initiative*. - 3.1. Global Consultations on Migration. - 3.2. The *Nansen Principles*. - 4. *Migrants in Countries in Crisis Initiative*: Background and Key Areas of the Protection Agenda. - 4.1. Principles, Guidelines, and Practices. - 5. Concluding Remarks.

## *1. – Introduction and Key Concepts*

In the absence of international legal instruments to ensure that appropriate assistance is provided to those who have been forced to relocate due to a disaster, the *Nansen Initiative* was launched in 2012 by the governments of Switzerland and Norway. The protection agenda lists priority areas for future actions at national, sub-regional and international level. In 2014, led by the United States Government and the Philippines, the *Migrants in Countries in Crisis Initiative* (MICIC) was created to improve the protection of migrants in countries where they experience conflict or

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natural disaster. The initiatives have identified a wide range of assistance measures for displaced persons, including, for example, the issuance of visas, the granting of refugee status in exceptional cases, or the issuance of work permits. Issued in June 2016, the *Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster*<sup>1</sup> contain guidance that contributes to a comprehensive approach to cross-border communication after disaster, including through disaster risk management in the country of origin. Interestingly, the Initiatives do not establish new international legal obligations, do not limit or replace existing frameworks. They provide practical, non-binding and voluntary guidelines for states, international organizations and civil society to help migrants before, during and after emergencies.

Initiatives use terms such as “disaster”, “disaster displacement”, “environmental migrant”. The term “disaster” refers to disruptions triggered by or linked to hydro-metrological and climatological natural hazards, including hazards linked to anthropogenic global warming, as well as geophysical hazards. The term “disaster displacement” refers to situations where people are forced or obliged to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard.<sup>2</sup> It should be noted that disaster displacement can occur within a country causing an internal displacement, or across international borders, which results in cross-border disaster-displacement. According to the Guiding Principles on Internal Displacement,

“internally displaced persons are individuals or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.”<sup>3</sup>

The term “environmental migrant” was adopted by the International Organization for Migration (IOM). According to IOM; “Environmental migrants are persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave

<sup>1</sup> *Migrants in Countries in Crisis Initiative, Guidelines To Protect Migrants In Countries Experiencing Conflict Or Natural Disaster*, (2016).

<sup>2</sup> The Nansen Initiative Global Consultation. Conference Report, Geneva, 12-13 October 2015 (2015), p.28

<sup>3</sup> Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement (1998), UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.”<sup>4</sup>

According to existing legal regulations there are distinguished two types of disasters: a) Slow-onset disasters, which take a long time to produce emergency conditions, for instance natural disasters such as drought or socio-economic decline, which are normally accompanied by early warning signs <sup>5</sup>; b) Sudden-onset disasters, which are both “natural” disasters (e.g. earthquakes, hurricanes, floods) and man-made or “complex” disasters (e.g. sudden conflict situations arising from varied political factors), for which there is little or no warning. <sup>6</sup> Both types of the disasters may cause extensive migration movements.

### *1.1. – Outline of the Problem*

Displacement of people living in a country or region, change of residence, called migration, is a common phenomenon. Such activities date back to the Palaeolithic period when prehistoric spread of human species took place, related to the search for food, seasonal or environmental changes. Migration is a very dynamic and heterogeneous process. Hence, in the demographic and sociological studies, various qualification criteria for migration are taken into account in terms of duration (permanent, seasonal and pendulum), range (internal and external), causes (economic, political, coercive, environmental), forms (immigration, emigration, repatriation, refugee, deportation, evacuation), and legality (legal, illegal)<sup>7,8</sup>. However, it has been recently that environmental migration has brought more attention to society, non-governmental organizations and academics, and to a political scene. This is mainly due to observed large-scale migration caused by natural disasters, which, according to numerous scientific analyses, are associated with climate change and the degradation of the environment.

The causes of global warming remain the subject of research. The first results of the Cosmic Leaving Outdoor Droplets (CLOUD) experiment show that the impact of external factors on the Earth’s climate is much higher than previously thought. One of the key factors shaping the climate is the formation of clouds. CERN experience has shown that cosmic rays play a key role in this process, which accelerates

<sup>4</sup> International Organization for Migration (ed.), Discussion Note: Migration and the Environment, MC/INF/288-1’ (2007).

<sup>5</sup> Glossary of Humanitarian Terms (2008), available at [www.reliefweb.int/glossaries](http://www.reliefweb.int/glossaries).

<sup>6</sup> Glossary of Humanitarian Terms (2008) available at [www.reliefweb.int/glossaries](http://www.reliefweb.int/glossaries).

<sup>7</sup> CASTLES, MILLER, “The Age of Migration: International Population Movements In the Modern World”, American Foreign Policy Interests (2005), pp.537-541.

<sup>8</sup> CLIFFORD JANSEN, “Migration: a sociological problem”, in C.J. Jansen (ed.) *Readings in the Sociology of Migration*, 1970, Oxford: Pergamon Press, pp. 3-35...

cloud formation around aerosols in the atmosphere. One of the theories related to CERN studies assumes that the most important factors shaping our planet's climate are Sun, volcanoes, climate change from other natural sources, and human-induced changes<sup>9</sup>. In addition, greenhouse gases such as carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O) and chlorofluorocarbons (CFCs) absorb heat (infrared radiation) emitted from the Earth's surface. Increasing concentrations of these gases in the atmosphere lead to warming up the Earth by capturing more of this heat. While these greenhouse gases represent a fraction of the percentage of Earth's atmosphere, their impact on the climate is enormous. As a result of human activity - especially through the burning of fossil fuels, the concentration of CO<sub>2</sub> in the atmosphere has increased.<sup>10</sup> Both in short and long term, climate change will lead to increased drought, land degradation, desertification, salinization, coastal erosion, sea level rise and flood intensity, tropical cyclones and other geophysical events. Detailed research has shown that warming up during this time is mainly due to increased concentrations of CO<sub>2</sub> and other greenhouse gases. Constant emissions of these gases can cause further climate change,<sup>11</sup> including a significant increase in global average surface temperature and significant regional climate change.

Consequently, climate fluctuations leading to changes in the environment fundamentally influence the situation of people on many levels. Limited access to water supply, loss of yields and food production, loss of livelihoods and health issues, force people to leave their homes and migrate. Obviously, this can create conflicts between migrants and local communities. It is pointed out that one of the reasons for the outbreak of the current Syrian conflict was also environmental change<sup>12,13</sup>. At the end of 2010, The New York Times reported that after four consecutive years of the worst drought in 40 years, agricultural areas in Syria, along with adjacent areas in Iraq, were seriously threatened:

<sup>9</sup> See DUNNE et al., "Global atmospheric particle formation from CERN CLOUD measurements", *Science*, 2016, pp. 1119-1124

<sup>10</sup> Intergovernmental Panel on Climate Change, *Fourth Assessment Report: Climate Change*, 2007.

<sup>11</sup> See more about the effects of greenhouse gas emissions in RIPPLE, WOLF, NEWSOME, GALETTI, ALAMGIR, CRIST, MAHMOUD, LAURANCE, and 15,364 scientist signatories from 184 countries, "World Scientists' Warning to Humanity: A Second Notice", *BioScience*, 2017, pp. 1026-1028

<sup>12</sup> KELLY, MOHTADI, CANE, SEAGER, KUSHNIR, "Climate change in the Fertile Crescent and implications of the recent Syrian drought", *Proceedings of the National Academy of Sciences of the United States of America*, 2015, pp. 3241-3246

<sup>13</sup> SALMAN, MUALLA. "Water demand management in Syria: Centralized and decentralized views", *Water Policy*, 2008, pp. 549-565.

“Ancient irrigation systems have collapsed, underground water sources have run dry and hundreds of villages have been abandoned as farmlands turn to cracked desert and grazing animals die off. Sandstorms have become far more common, and vast tent cities of dispossessed farmers and their families have risen up around the larger towns and cities of Syria and Iraq.”<sup>14</sup>.

Many of the Syrian farms have reduced or stopped food production. This in turn has led to an increase in unemployment and, consequently, to the dissatisfaction of society that has turned into an open conflict with the government.

The Intergovernmental Panel on Climate Change (IPCC) predicted in its first report in 1990 that the most important consequence of climate change could be population migration <sup>15</sup>. It has been estimated that as many as 25 million people were forced to leave homes and areas of residence as a result of a number of serious environmental pressures, including pollution, land degradation, droughts, and natural disasters. It was also claimed that that the number of “ecological refugees”, as they were called, exceeded any documented number of refugees from caused by war and political persecutions taken together<sup>16</sup>. Estimated value of 25 million of “ecological refugees” was repeated in 2001 in the World Disasters Report of the Red Cross and the Red Crescent Societies. In October 2005, the UN’s Institute for Environment and Human Security warned that the international community should be prepared for an increase in the number of “ecological refugees” to 50 million, in 2010<sup>17</sup>. Prof. Myers’s estimates of 200 million climate migrants by 2050 are widely cited in respected scientific publications, including the Intergovernmental Panel on Climate Change (IPCC) and the Stern Review on the Economics of Climate Change<sup>18</sup>.

<sup>14</sup> Worth Robert F., “Earth Is Parched Where Syrian Farms Thrived”, The New York Times, 13 October, 2010, available at <http://www.nytimes.com/2010/10/14/world/middleeast/14syria.html>.

<sup>15</sup> HOUGHTON, JENKINS AND. EPHRAUMS (eds.), *Climate Change: The IPCC Scientific Assessment* (1990), Report prepared for Intergovernmental Panel on Climate Change by Working Group I, Cambridge University Press, Cambridge, Great Britain, New York, NY, USA and Melbourne, Australia p. 223

<sup>16</sup> MYERS, N. (2001), *Environmental Refugees: Our Latest Understanding*, *Philosophical Transactions of the Royal Society B*: 356, pp. 1-5.

<sup>17</sup> United Nations University, Institute of Environment and Human Security “As ranks of “Environmental Refugees” swell worldwide, calls grow for better definition, recognition, support”, UN Day for Disaster Reduction, 12<sup>th</sup> October 2005, pp. 1-4. United Nations document,

<sup>18</sup> STERN (ed.) (2006), *The Economics of Climate change: the Stern review*, Cambridge, 2006, p. 3.

*1.2. – The Protection of Displaced Persons in the Context of Climate Change Impacts, Including Disasters, in International Law*

In such a changing world, it is necessary to modify the approach to migration. Displacement due to catastrophes is a global challenge in humanitarian law and human rights. Disasters undermine development and, in some situations, may affect safety. International law does not explicitly regulate the circumstances in which displaced persons affected by disasters will find protection in another country and what rights they have during their stay. The problem is also the traditional definition of the term “refugee”, which, according to some observers, should take into account new situations and circumstances. The current debate on environmental migration also addresses the lack of binding terminology of the definition of migrants and environmental migration. While refugees who are fleeing persecution and war are protected by international law, it is not clear what conventions and policies effectively protect people displaced by natural disasters, including those related to climate change<sup>19</sup>. The most commonly used working definition is the already mentioned definition developed by IOM<sup>20</sup>. Many organizations and legal bodies point out the diversity of legal solutions applicable to environmental migration. They also underline the fact that environmental migrants are not refugees within the meaning of the Convention on the Status of Refugees, and that the persons affected by changes in the natural environment or forcibly displaced for that reason are not covered by adequate legal protection. However, even though the lack of political will to establish a legal definition of an environmental refugee will have significant consequences for the international community’s obligations under international law, changes in this situation should not be expected in the near future. There is also no consensus on the scale of the problem. As stated above, Myers<sup>21</sup> have estimated that the number of environmental migrants may reach nearly 200 million in the near future, while

<sup>19</sup> See: the United Nations High Commissioner for Refugees, United Nations Framework Convention on Climate Change Secretariat, Norwegian Institute of International, National Center for Atmospheric Research, United Nations University, International Institute for Environment and Development, Center for Unconventional Security Affairs, Refugee Studies Centre, University of Oxford United Nations Habitat, The Nansen Conference: Climate Change and Displacement in the 21st Century , (2011), available at: <http://www.refworld.org/docid/521485ef4.html> [accessed 11 April 2017].

<sup>20</sup> LACZKO. AND AGHAZARM. (eds.), *Migration, Environment and Climate Change: Assessing the evidence*, IOM, Geneva, (2009).

<sup>21</sup> Myers, N. (2002). Environmental refugees: A growing phenomenon of the 21st century. *Philosophical transactions of the Royal Society of London. Series B, Biological sciences.* 357. 609-13. 10.1098/rstb.2001.0953. and Myers, N. (2001), *Environmental Refugees: Our Latest Understanding*, *Philosophical Transactions of the Royal Society B*: 356, pp. 1-5

Black<sup>22</sup> presents an opinion that there are no environmental migrants, and that desertification, for example, is only a result of vegetation response to rainfall fluctuations.

It is a fact that people who leave their current place of residence for environmental reasons do not belong to one particular category and fall outside systems of protection currently provided for by the international community. Terms such as “environmental refugee”, “ecological refugee” or “climate refugee” do not have legal grounds in the international refugee law. According to UNHCR, the use of these terms should be avoided as they may be misleading and potentially violate the international legal system for the protection of refugees. Indeed, many difficulties appear when it comes to distinguishing between “forced” and “voluntary” migration related to environmental factors, except in the case of near and sudden disasters. Despite growing importance in the political, national and international arena, environmental migration is still not regulated in the international legal framework. There are, however, a number of international and regional instruments that could be relevant as regards the various forms of displacement associated natural disasters and climate change, but these instruments have not been applied in such circumstances. Similarly, they have not been applied to people who cannot return because of long-term effects of climate change in their current place of residence. Even the United Nations Framework Convention on Climate Change (UNFCCC) and its 1997 Kyoto Protocol do not deal with human migration. These instruments focus on mitigating and adapting to climate change and the associated funding and support mechanisms. However, positive efforts have been made in the context of the Cancun agreement of 2010, which calls on all parties to take appropriate measures, including “actions to improve understanding, coordination and cooperation related to national, regional and international resettlement, migration and planned resettlement”<sup>23</sup>.

It is also worth mentioning that the International Law Commission (“ILC” ) is involved in the development of legal rules on the protection of persons in the event of natural disasters.<sup>24</sup>

In summary, transboundary movements caused by natural disasters represent a serious problem that has been particularly aggravated in recent years as a result of global warming. National and international measures to protect people affected by a disaster are inadequate. In effect, resettled people are protected in their own country

<sup>22</sup> BLACK., , “Environmental refugees: myth or reality?”, New Issues in refugee research, Working Paper No. 34, University of Sussex, 2001, pp. 1-20

<sup>23</sup> UNFCCC (2010). The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention.FCCC/CP/2010/7/Add.1, (2011), para. 14 (f).

<sup>24</sup> All documentation related to the ILC’s work on the Protection of Persons in the Event of Disasters is available at: [http://untreaty.un.org/ilc/guide/6\\_3.htm](http://untreaty.un.org/ilc/guide/6_3.htm).

by the UN Guidelines on internal displacement<sup>25</sup> and by regional instruments, but there is a gap in legislation regarding cross-border movements caused by natural disasters. Usually, as indicated above, such persons are not victims of persecution and therefore they are not protected under the UN Refugee Convention. Further, human Rights Conventions do not regulate key aspects such as the right to enter the country, settlement and basic rights of those affected. There are also no criteria to distinguish between cross-border movements caused by natural disasters and voluntary migration. . It is well known that there are regions, such as the Pacific Ocean area, where population movements are caused by several factors (?). They are caused by natural hazards, but also by lack of resilience, existing legal gaps or lack of development. In some other regions conflicts and violence are constantly erupting, which is especially true for the Horn of Africa. In this region we observe direct link between the impact of natural threats and the ongoing conflicts. Clear example of that is an armed conflict in Somalia or the conflict between communities in countries like Kenya and Uganda, which proliferates as a result of declining amount of natural resources. Local shepherds are losing their lands due to ongoing drought, and subsequently they try to migrate to other, unaffected by the disaster areas. On the way they are met by other communities, what often results in escalating conflicts around access to water and grazing areas.

## 2. – *A Challenge towards a Global Protection Agenda*

The analysis of law, the activities of relevant institutions and the activities related to the protection and assistance of displaced persons as a result of disasters, indicates the lack of readiness for a quick and effective response. It is important to look at these situations in a multidimensional manner, and good solutions must concern not only natural threats but also holistic approaches that take into account a dimension of a conflict. For this reason, attention should be paid to the need for a holistic approach focused on human security in the context of environmental migration, to regulate all forms of mobility in a comprehensive way, placing environmental migrants at the centre of attention rather than focusing on formal legal categories.<sup>26</sup>

<sup>25</sup> United Nations Human Rights Office of the High Commissioner, *Situations of Migrants in Transit*, Available at: [http://www.ohchr.org/Documents/Issues/Migration/StudyMigrants/OHCHR\\_2016\\_Report-migrants-transit\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Migration/StudyMigrants/OHCHR_2016_Report-migrants-transit_EN.pdf), pp. 7-24.

<sup>26</sup> See: Discussion note: Migration and the Environment (2007)MC/INF/288, available at [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/evolving\\_global\\_economy\\_2728112007/MC\\_INF\\_288\\_EN.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/evolving_global_economy_2728112007/MC_INF_288_EN.pdf). Some more explanation may be found in: World Migration 2008: Managing Labour Mobility in the Evolving



It is also worth noting that there is currently no international agency or organization specifically authorized to protect and support people affected by disasters. Furthermore, the lack of data and general gaps in knowledge of cross-border movements resulting from natural disasters make it difficult to develop appropriate measures. The problem is also to study the influence of particular elements of the natural environment on the decisions of individuals or communities. Climate change migrations - both internal and external - take different forms and require different responses at national, sub-regional, regional and international levels to address the specificity of different situations. National legislation, policies and institutions will be crucial for developing appropriate responses to both internal and external dimensions of climate change migration. Collaboration between the country of origin and the country of refuge is important, as well as cooperation with international community with a view to supporting the reception of displaced persons across borders and finding lasting solutions. The main goal seems to be to set up preventive measures that meet the needs of people and communities who are displaced by natural hazards and adverse effects of climate change across borders. Thus, the paradigm of refugees is not ideal. New actions are needed, with innovative solutions. And more importantly, when conditions of an environment deteriorate, for example due to droughts or floods, people should be able to move freely, voluntarily, in order to adapt to these challenges. Voluntary migration as an adaptation is, in these situations, a true coping strategy. In order to achieve this goal, technical assistance and capacity building may provide a basis for raising community awareness to political level and to complement and strengthen national adaptation policy. Preventive measures and effective practices in appropriate areas, including disaster risk reduction, climate change adaptation and humanitarian responses, are therefore essential.

Taking all of the above mentioned factors into consideration, it was necessary to find solutions that would reduce a tension between the need for security, on the one hand, and the need for people to move to at least temporarily escape difficult situation, on the other. Such gaps often provide inadequate protection and assistance to those displaced by disasters. In order to fill these gaps, an intergovernmental process is required, for example through more effectively organizing such population movements. Good example could be seen in northern Kenya, where effective mediation between the host communities and the shepherds arriving from the other side of the border was undertaken. It is important to bear in mind that the challenges of mobility

do not just address the humanitarian issue. They are also related to underdevelopment issues, as displacement adversely affects development, and development interventions can help prevent displacement by stabilizing the situation. From the perspective of climate change so far observed by scientists, it can be concluded that, regardless of whether or not greenhouse gas emissions are reduced, more people will move, especially because of rising desertification, droughts, hurricanes and rising sea levels. Therefore, countries should be prepared for what is already easy to predict and try to develop a whole set of tools to help meet these challenges.

In response to the needs and questions presented above a chance for better protection of persons displaced by natural disasters has arisen through the *Nansen Initiative*. Also, in 2016 the *Migrants in Countries in Crisis Initiative* (MICIC) was undertaken, which led to *Guidelines for the Protection of Migrants in Countries experiencing Conflict or Natural Disasters*. These projects aim to meet the demand for normative and institutional measures to protect displaced persons. The government of Nepal described the *Nansen Initiative* as “one of the most effective forums to accelerate collaborative efforts among all the related stakeholders to tackle these issues”.

### 3. – *Goal and Scope of the Nansen Initiative*

The purpose of this program is to create a framework and identify effective practices to strengthen the protection of displaced persons as a result of disasters as well as for humanitarian reasons, and to launch international solidarity with affected communities. It also aims at providing guidelines on improving the management of the risk of resettlement in the country of origin, through better monitoring of risk factors and their minimization, facilitating migration from hazardous areas, as well as promptly taking action in the event of a catastrophe and after a catastrophe. The initiative also identifies opportunities to enhance the role of local communities in addressing natural disasters. The comprehensive approach of the Agenda is to address the protection and assistance needs of people who have been resettled abroad and, at the same time, to respond to the needs of internally displaced persons.

The initiative deals with catastrophes such as floods, droughts, cyclones, melting of glaciers, earthquakes, tsunamis, and eruptions of volcanoes. The Agenda also takes into account the effects of both emergency and slow-moving threats, including those related to the adverse effects of climate change.

### *3.1. – Global Consultations on Migration*

The bottom-up consultation process, aimed at identifying effective practices and building consensus on key principles and elements to meet the needs for the protection and assistance of people resettled across borders in the context of natural disasters, including the adverse effects of climate change, has been launched by the Governments of Norway and Switzerland, in October 2012. The initiative was supported by Australia, Bangladesh, Costa Rica, Germany, Kenya, Mexico and the Philippines and accompanied by the Group of Friends co-chaired by Morocco and the European Union. This provided an opportunity to undertake many activities, such as the adoption of paragraph 14 point f) of the regulatory framework for adaptation to guidelines provided by Cancun Treaty, according to which states have been invited to “*better understand, coordinate*” and cooperate on resettlement, climate change migration and resettlement, where appropriate, at national, regional and international level. The Nansen Initiative Protection Agenda has been endorsed by 109 governmental delegations during a Global Consultation in October 2015, which gathered a total of 361 representatives from states, international organizations, academia and civil society.

In the context of the Nansen Initiative on Disaster-Induced Cross-Border Displacement was also drafted a Guide to Effective Practices for member countries of the Regional Conference on Migration (RCM) to create more harmonised responses to disaster-related movement.<sup>27</sup>

The Platform on Disaster Displacement constitutes the next stage and aims at the implementation of the Protection Agenda. The Platform, launched at the World Humanitarian Summit in Istanbul, in May 2016, was created as a follow-up mechanism. It has started work during the German term of office since July 2016. Many countries, including Switzerland, declared that they will continue to be active in its efforts in this field and support the implementation of the Protection Agenda as a member of the platform. According to Elizabeth Ferris, a member of the Consultative Committee, one of the Nansen Initiative’s strengths was its focus on ‘very concrete tools which can be used to help governments and others which are faced with the reality of cross-border movements occurring because of disasters, such as humanitarian visas, stays of deportation, bilateral or regional arrangements on free movement of persons, etc.’<sup>28</sup>

<sup>27</sup> Protection for Persons Moving across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries (2016). The RCM Member Countries are Belize, Canada, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States..

<sup>28</sup> FERRIS, ‘Climate Change, Migration and the Incredibly Complicated Task of Influencing Policy’

The Initiative Program is essentially based on three pillars:

- 1) the concept of a comprehensive approach to disaster mobility, focusing primarily on the protection of internationally displaced people;
- 2) the compilation of effective practices that can be used to ensure more effective future responses to such resettlement;
- 3) stressing the need to link many policies and activities and to ensure better cooperation between them.

Three priority areas for further action to address the gaps identified by the program are:

- 1) data collection and awareness raising on cross-border disaster recovery;
- 2) increasing the use of humanitarian protection measures for transnationally displaced persons as a result of disaster, including mechanisms for sustainable solutions, for example by harmonizing approaches at sub-regional and regional level;
- 3) strengthening disaster risk management in the country of origin by: combining mobility of people as a part of disaster risk reduction, climate change mitigation strategies and other relevant strategies; facilitating migration in dignity as a potentially positive way to deal with the effects of natural hazards and climate change; improving the use of scheduled relocations as a means of preventing or responding to catastrophic hazards and eliminating them; ensuring that the needs of IDPs (internally displaced persons) are addressed in detail by relevant statutory and policy provisions responsible for disaster risk management or internal dislocation.<sup>29</sup>

In addition, there is a need to improve the coordination of the overall approach of governments to planning and response, which in turn includes the involvement of local authorities and affected communities. Regional coordination and planning are also crucial and can include

“Regional consultation processes (on migration), human rights mechanisms, disaster risk management centres, climate change adaptation strategies, as well as common markets and free movement of persons”.<sup>30</sup>

At international level, a wide range of institutions and organizations dedicated to

(Speech delivered at the Conference on Human Migration and the Environment: Futures, Politics, Invention, Durham University,) 1 July 2015) 8 ???.

<sup>29</sup> *Ibid.* 10.

<sup>30</sup> *Ibid.*

humanitarian actions, development projects, human rights, migration, refugee protection, disaster risk reduction, adaptation, climate change and development sectors can provide operational, technical and capacity building support.<sup>31</sup>

As a result of implementing guidelines of the Nansen Initiative, The Sendai Framework for Disaster Risk Reduction 2015-2030 was undertaken<sup>32</sup>. It focuses on displacement in response to extreme events and provides solutions to protect people moving due to/in anticipation of gradual changes in climate. As a result of joint efforts, the Sendai framework includes an important step on human mobility in the context of disasters.<sup>33</sup> It aims to significantly reduce the risk of catastrophes and loss of life, livelihoods, health and assets. Sendai Framework recognizes that resettlement is one of the most destructive effects of natural disasters and that the reduction of the risk of natural disasters requires “protection of people and their property, health, livelihoods and resources, cultural and environmental resources, promoting and protecting all human rights”. National and local authorities, on the other hand, must “make regular preparations for disaster response, including evacuation, training and support systems, in order to ensure rapid and effective response to disasters, including access to safe shelters and food, depending on local needs”.<sup>34</sup> It highlights the need to develop “public policies, where applicable, aimed at addressing the issues of prevention of human settlements in disaster risk-prone zones”<sup>35</sup> and calls for the promotion of “cross-border cooperation in order to increase resilience and reduce the risk of disasters, including the risk of displacement”.<sup>36</sup> Another step forward has been taken thanks to the Paris Agreement, which calls for the establishment of a task force, under the auspices of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts<sup>37</sup> “to develop recommendations for

<sup>31</sup> *Ibid.*

<sup>32</sup> Sendai Framework for Disaster Risk Reduction 2015-2030, available at [http://www.unisdr.org/files/43291\\_sendaiframeworkfordrren.pdf](http://www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf)

<sup>33</sup> Walter Kälin, “Sendai Framework: An Important Step Forward for People Displaced by Disasters”, *Up Front*, 20 March 2015, available at <<http://www.brookings.edu/blogs/up-front/posts/2015/03/20-sendai-disasters-displaced-kalin>>.

<sup>34</sup> *Ibid.* para 33(h).

<sup>35</sup> *Ibid.* para 27(k).

<sup>36</sup> *Ibid.* para 28(d).

<sup>37</sup> The 2012 Doha Decision 3/CP.18 acknowledged the need for ‘further work to advance the understanding of and expertise on loss and damage’, including ‘[h]ow impacts of climate change are affecting patterns of migration, displacement and human mobility’. See United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on Its Eighteenth Session, Held in Doha from 26 November to 8 December 2012, UN Doc FCCC/CP/2012/8/Add.1 (2013) para 7(a)(vi). Following on from that decision, in 2013 the Warsaw Mechanism for Loss and Damage was created ‘to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in devel-

integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change’’.<sup>38</sup>

### 3.2. – *The Nansen Principles*

During the process of the Nansen Initiative ten Principles were stated. They contain a set of recommendations for the emergence of climate change and other environmental hazards. Principle I stresses the need to have the knowledge base needed to respond to climate change and mobility. According to Principle II, primary responsibility for the protection of the population affected by climate change and other environmental threats, including both displaced people and host communities endangered by the process of resettlement, rests on the states that have to devise appropriate legislation, policies and institutions, and allocate adequate resources. It has also been stressed that without the leadership and involvement of local governments and communities and the private sector, the challenge of climate change, including those related to human mobility (Principle III), cannot be effectively tackled. Where national capacity is limited, actions undertaken by governments on local level must be complemented by regional frameworks and international cooperation. Such cooperation will help to build national capacity to prevent displacement, or provide assistance and protection for people and communities affected by resettlement, and provide the basis for finding lasting solutions, as Principle IV points out. Therefore, it is particularly important to strengthen prevention, increase immunity in accordance with the Hyogo Framework<sup>39</sup> (Principle V) and build local and national capacity to prepare and respond to catastrophes (Principle VI). Nansen’s principles also emphasize that the existing norms of international law (Principle VII) should be fully exploited. With regard to internal displacement, they point out that “Guiding Principles on Internal Displacement provide a sound legal framework to address protection concerns arising from climate- and other environment-tally-related internal displacement” and urge states to “to ensure the adequate implementation and operationalization of these principles through national legislation, policies and institutions” (Principle VIII). At the same time, it indicates that “more coherent and consistent approach at the international level is needed to meet the protection needs of people

oping countries that are particularly vulnerable to the adverse effects of climate change’. See United Nations Framework Convention on Climate Change, Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, UN Doc FCCC/CP/2013/10/Add.1 (2014) para 1.

<sup>38</sup> United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1, (2015), para 49; see also para 50.

<sup>39</sup> Hyogo Framework for Action 2005-2015: Building Resilience of Nations and Communities to Disaster (2005). Extract from the final report of the World Conference on Disaster Reduction (A/CONF.206/6), available at [www.unisdr.org/wcdr](http://www.unisdr.org/wcdr)

displaced externally owing to sudden-onset disasters” and urges the development of a guiding framework or instrument by the states together with the UNHCR (Principle IX). The Principles conclude that “policies and responses, including planned relocation, need to be implemented on the basis of non-discrimination, consent, empowerment, participation and partnerships with those directly affected, with due sensitivity to age, gender and diversity aspects”, having regard to the voices of the displaced or those threatened with displacement (Principle X).

Although the Nansen Principles are not universally accepted, they constitute a comprehensive normative framework, based on the principles of international law, human rights and good practices. The Principles fill the legal gap with regard to cross-border movements in the context of disasters and the effects of climate change that exist between national law, international human rights law, and the UN guidelines on internal resettlement and several regional instruments. Lastly, the Principles provide a good reference for further discussion on the interaction between human rights and climate change.

#### 4. – Migrants in Countries in Crisis Initiative: *Background and Key Areas of the Protection Agenda*

The idea of “mini-multilateralism” has taken hold in the migration arena. The term refers to situations where a large number of states are unable to reach agreement through formal processes, and a smaller group takes action on a pressing issue.<sup>40</sup> The *Migrants in Countries in Crisis Initiative* (MICIC) is an activity undertaken by the United States and the Philippines to improve the protection of migrants when the countries they live, work or learn in, experience a conflict or a natural disaster. This multilateral consultation process, was launched in 2014 at the Global Forum on Migration and Development (GFMD) in Stockholm, to develop non-binding, voluntary principles, guidelines and effective practices for states and other stakeholders to better prepare, respond and address the long-term effects of migration from conflict-affected countries. The co-chairs were joined by a working group comprised of the governments of Australia, Bangladesh, Costa Rica, and Ethiopia; the European Commission; the International Organization for Migration (IOM); the United Nations High Commissioner for Refugees (UNHCR); the Office of the UN Special Representative of the Secretary General for International Migration; the International Cen-

<sup>40</sup> NAIM, “Minilateralism: The Magic Number to Get Real International Action”, Foreign Policy, 2009, pp.3-4.

tre for Migration Policy Development (ICMPD); and the Georgetown University Institute for the Study of International Migration (ISIM). IOM serves as the Secretariat. In 2015 and 2016, the MICIC Initiative organized a number of consultations, including six regional consultations, to develop a range of good practices in preparing and responding to these situations. Events, such as the 2015 Sendai World Conference on Disaster Risk Reduction, the 2015 GFMD in Istanbul, and the 2016 World Humanitarian Summit in Istanbul, garnered additional perspectives.

The scope of the MICIC Initiative is limited to migrants caught in countries experiencing specific types of crises such as conflicts/civil unrest and natural disasters. The initiative encompasses all migrants/non-citizens, with or without legal status, who are present in a country temporarily or permanently at the time a crisis ensues.

#### *4.1. – The Principles, Guidelines, and Practices to Protect Migrants in Countries Experiencing Conflict or Natural Disaster.*

The results of the consultations contributed to a set of principles, guidelines, and practices that were presented on June 15, 2016 at the United Nations. The MICIC Guidelines do not create new international legal obligations nor limit and replace the existing frameworks. They provide practical, non-binding and voluntary guidelines for states, private sector entities and international organizations to protect and assist migrants before, during and after emergencies. The Guidelines also include general principles (foundational, cross-cutting ideas that inform and guide actions by all stakeholders to protect migrants) along with 15 thematic guidelines. Under the rules, basic rights and duties are distinguished - the duty to save lives during conflict or disasters is the first responsibility. Rule 6 explicitly states that “Migrants are rights holders and capable actors, resilient and creative in the face of adversities, not merely victims or passive recipients of assistance.”<sup>41</sup> States, private sector representatives, international organizations, and civil society can use the guidelines to inform and shape crisis preparedness, emergency response, and post crisis action”<sup>42</sup>. They were organized according to the division into the stages of the crisis: before, during and after the crisis. Each of them takes into account the application of specific practices, supporting their implementation. Specifically, crisis preparedness is discussed in detail, as it is a time when many effective actions can be taken. The guidelines recommend a continuous assessment of the situation and flexibility in adapting and introducing innovation where appropriate during the reaction period. They also demand to pay particular attention to the long-term needs of migrants displaced by conflicts

<sup>41</sup> MICIC Guidelines to Protect Migrants In Countries Experiencing Conflict Or Natural Disaster (2016)

<sup>42</sup> *Ibid.* 19 .



and natural disasters as well as the needs of the communities they can move to.

Through the process of extensive consultation, the MICIC initiative seeks to improve capacity of states and other stakeholders to effectively protect the dignity and rights of migrants from the affected countries. Where appropriate, the Initiative takes into account links with the international refugee protection system, but does not intend to change existing practices in this area.

Similarly as in the case of the Nansen Initiative, MICIC provides several principles that are fundamental, cross-cutting precepts, drawn, in some instances, from international law. The Principles are intended to inform, underpin, and guide actions to protect migrants.<sup>43</sup> There are 10 basic Principles:

1. All possible measures to save lives and provide migrants with the opportunity to move to a safe place and apply their right to leave any country in accordance with international law must be undertaken.
2. All responses to crises and post-crisis situations should be respectful of the human rights of migrants, with particular regard to immigration status, gender, age, disability, sexual orientation, race, nationality or other characteristics that may limit access and safety. The principle of non-refoulement should be fully respected at all times.
3. The main responsibility for the protection of migrants in their territories and their own citizens, including abroad, is borne by host countries and transit states that have obligations to all persons within their territories, irrespective of their immigration status. States of origin, on the other hand, are responsible for their citizens, even if they live, work, study or travel in other countries.
4. The private sector, international organizations and civil society play an important role in the protection of migrants and in supporting countries in the protection of migrants.
5. Humanitarian action to protect migrants should be guided by the principles of humanity, neutrality, impartiality, and independence. The purpose of humanitarian action is to protect life and health and to respect human beings. Humanity means that human suffering must be addressed wherever it is found. Neutrality means that humanitarian actors must not take sides in hostilities or engage in racial, religious, or ideological controversies. Impartiality means that humanitarian action must be carried out on the basis of need alone, without discrimination, giving priority to the most urgent cases of distress and making no distinction on the basis of immigration status or other grounds. Independence means that humanitarian action must be autonomous from the political, economic, military, or other objectives of taking such action.
6. Stakeholders should promote the participation and empowerment of all migrants, including migrants of different ages, genders, and abilities in efforts related to crisis preparedness, response and recovery so migrants can mitigate risks and take charge of their well-being.

<sup>43</sup> *Ibid.* p. 16.

7. Promoting positive communication about migrants by emphasizing tolerance, non-discrimination, openness and respect for migrants.
8. Effective and increased engagement at local, national, regional and international levels will enhance the protection of migrants.
9. Partnership, cooperation and coordination are essential between countries, private sector actors, international organizations, civil society, local communities and migrants because they promote trust, increase the effectiveness of limited resources and opportunities, and improve responses.
10. Through regular and joint research, state science and innovation, private sector actors, international organizations and civil society can improve approaches, policies and tools to better protect migrants.<sup>44</sup>

There were also fifteen guidelines prepared, which represent some suggestions, organized by theme, that identify in broad terms the actions needed to better protect migrants. Stakeholders can use these guidelines to inform and shape crisis preparedness, emergency response, and post-crisis action. The Guidelines are as follows:

1. Track information on conflicts and natural disasters, and potential impact on migrants.
2. Collect and share information on migrants, subject to privacy, confidentiality, and the security and safety of migrants.
3. Empower migrants to help themselves, their families, and communities during and after the crisis.
4. Incorporate migrants in prevention, preparedness, and emergency response systems.
5. Involve migrants in contingency planning and integrate their needs and capacities.
6. Communicate effectively with migrants.
7. Establish coordination agreements in advance to leverage strengths and trusts.
8. Build capacity and learn lessons for emergency response and post-crisis action.
9. Communicate widely, effectively, and often with migrants on evolving crises and how to access help.
10. Facilitate migrants' ability to move to safety.
11. Provide humanitarian assistance to migrants without discrimination.
12. Establish clear referral procedures among stakeholders.
13. Relocate and evacuate migrants when needed.
14. Address migrants' immediate needs and support migrants to rebuild lives.
15. Support migrants' host communities. The Practices are a non-exhaustive selection of examples that illustrate ways to implement the Guidelines and address the needs of migrants. They are based on existing practices as well as recommendations and can be adapted to suit particular contexts and priorities.<sup>45</sup>

<sup>44</sup> *Ibid.*, p. 21.

<sup>45</sup> *Ibid.*, p. 16.

## *5. Concluding Remarks*

In a world full of crises, conflicts and disasters, migrants will increasingly move either within or outside borders. Since mobility of people due to conflicts, natural hazards or environmental degradation cannot be avoided, measures should be prioritized to support lasting solutions aimed at solving the displacing problem in the least human-inducible way. Resettlement is one of the main challenges for reducing the risk of natural disasters. Appropriate measures to prevent disasters, including better understanding of threats, readiness, prevention (e.g. through data collection, early warning and awareness raising) will provide people with greater security which will encourage them to stay home. Where relocation is unavoidable, identification of places of refuge can mitigate its negative effects and enable evacuations, voluntary migration or planned relocation of the population. These measures must be taken into account before, during and after the occurrence of natural disasters or conflicts and include coordinated reconstruction phase.

Humanitarian aid and protection systems without coordinated action will be inadequate and ineffective. Comprehensive and sustainable solutions will have to take into account the dimensions of migration, humanitarian solutions, development and security. International agencies, including the IOM, the UNHCR, the Red Cross, strengthen their cooperation to support states and migrants in addressing the current challenges of migration resulting from the complexity of crises. Key factors are: planning and preparing for the crisis, coordinating the actions during a crisis, and greater attention to long-term developmental implications. The Nansen and the MICIC initiatives share the similarity of being state-led consultative processes concerned with establishing non-binding guidelines and identifying and disseminating best practices. While the Nansen Initiative launched its “Agenda for the Protection of cross-border displaced persons in the context of disasters and climate change” in 2015, MICIC followed with the launch of its “Guidelines to protect migrants in countries experiencing conflict or natural disaster” in 2016. The main motivation for setting up the Nansen Initiative and its successor were gaps in existing international law, which does not address the needs of displaced people outside the borders in the context of disasters and climate changes. In this context, a possible approach is to create a broader systemic policy. Thanks to existing regulations, the state has the capacity to shape such situations – whether it is humanitarian catastrophe, evacuation and return, voluntary migration or planned relocation. Although the ideal result may be to avoid displacement at all, the planned mobility strategy will still be far more advantageous than hasty actions in the face of a catastrophe. Such strategies are not only intended to provide a safe passage and shelter but also to build resilience in the long run by providing access to education, employment and secure legal status. It is

therefore important that the Disaster Mobility Platform continue this forward-looking perspective, taking care of the needs, rights and privileges of people and communities.

Finally, these initiatives are good examples for further actions that will help translate proposed guidelines into international instruments. Global Compact on Migration provides an excellent opportunity to adapt these models to make progress on other issues; for example, on state efforts to develop guiding principles for migrants in difficult situations, as the New York Declaration suggests.<sup>46</sup>

The Initiatives propose several solutions that states can take at national, regional and international level. The change in the current approach is that instead of calling for a binding international convention on cross-border disaster-displaced persons, the agenda fosters an approach that focuses on integrating effective practices by states and regional organizations in their own normative framework, in line with their specific situations and challenges. The findings were the result of years of detailed consultation, evidence gathering and discussion with various stakeholders from around the world.

Both initiatives are inclusive, consulted with many governments, civil society and experts from over a hundred countries. They have launched a global dialogue on human mobility in the context of disasters and climate change to meet the needs of cross-border displaced people around the world. In addition, the Initiatives have revealed regional diversity - not only in terms of the cross-border phenomenon itself, but also in terms of experience and response. Both conservation programs provide valuable toolsets for affected countries and other entities, presenting a comprehensive picture of the phenomenon of cross-border catastrophe and displacement.

<sup>46</sup> See New York Declaration for Refugees and Migrants (2016). Resolution adopted by the General Assembly on 19 September 2016. United Nations A/RES/71/1. In addition to a potential state-led effort, the Global Migration Group (GMG) has generated “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations within large and/or mixed movements”.

### **I. Six of One, Half a Dozen of the Other: the Inefficiency of Recognizing Refugee Status to Environmentally Displaced Persons** (Mariana Ferolla Vallandro do Valle)

This article seeks to analyse the concrete effects of proposals for expansion of refugee status to environmentally displaced persons and why transposing the norms of refugee law to provide a protection framework for these persons is not the appropriate solution. Firstly, we will briefly clarify why the concept of “environmental refugees” is not legally sound under the 1951 Convention relating to the Status of Refugees. Secondly, it will be shown that, even if a category of environmental refugees is recognised as legally binding, the protection regime of refugee law is not adequate to the needs of environmental migrants, due to the lack of political will of States to receive these persons, the temporary character of refugee status, and the fact that refugee law does not apply to internally displaced persons. Accordingly, even if refugee status is extended to environmental migrants, little will change regarding their effective protection, evincing the need for other solutions.

### **II. State Responsibility for Climate Change under the UNFCCC Regime: Challenges and Opportunities for Prevention and Redress** (Fulvia Staiano)

Climate change is increasingly affecting human mobility worldwide. Environmental degradation linked to this phenomenon undermines livelihood security, espe-

cially for rural communities, who are then pushed to resort to migration as an adaptation strategy. Moreover, climate change causes natural disasters such as severe storms, floods and droughts, with the consequent displacement of affected populations. The pressing need to address these issues was also acknowledged by the Conference of the Parties of the United Nations Framework Convention on Climate Change on the occasion of the adoption of the 2016 Paris Agreement. The creation of a dedicated Task Force on Displacement and the framing of climate-change related displacement as loss and damage in this context constitute an acknowledgement that this phenomenon cannot be avoided or prevented through mitigation or adaptation efforts. However, these developments do not settle a crucial question in this field, concerning state accountability and responsibility for causing environmental damage in breach of the UNFCCC regime and other sources of international environmental law. This chapter focuses on such a matter, with specific reference to two main questions. First, it reflects on the allocation of responsibility for GHG emissions, on the grounds of the causal links between the latter, climate change and human displacement. With this respect, it enquires on which type of responsibility, if any, is better suited to face questions of prevention and reparation for climate-change related events such as human displacement. Second, this chapter analyses the potential of international law principles - such as the prohibition of transboundary harm, the polluter pays principle and the precautionary principle - to provide protection and redress to persons displaced by climate change-related events.

### **III. Environmental Migrants and the EU Immigration and Asylum Law: Is There any Chance for Protection?** (Giuseppe Morgese)

This contribution discusses some legal options aimed at protecting environmental migrants (EMs) within the EU, none of which however proves to be fully satisfactory mainly due to the lack of (at least) a European common legal definition. On the one hand, the legal framework for international protection according to the Qualification Directive has shown to be inadequate, insofar as neither refugee status nor subsidiary protection status are fit for purposes of EMs; also the Temporary Directive and the possibility of adopting temporary non-legislative measures according to Article 78(3) TFUE look like unsatisfactory. On the other hand, humanitarian provisions in the Visa Code, the Schengen Borders Code and the Return Directive are not viable

legal instruments because they are non-mandatory for Member States. Furthermore, protection against removal orders according to relevant human rights law applicable in the EU is not a valid solution for all cases. Finally, it should be noted that resettlement programmes, humanitarian admission schemes, private sponsorships and protection within Regional Development and Protection Programmes might be useful only in specific cases. As a conclusion, we stress the need for a European *ad hoc* legal instrument dealing with every aspect of the protection of EMs.

#### **IV. Sudden-Onset Disasters, Human Displacement, and the Temporary Protection Directive: Space for a Promising Relationship?** (Giovanni Sciacaluga)

This paper faces the question of environmental displacement through the lenses 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 entire category of persons massively migrating into the EU 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 they were to protect immigrants fleeing rapid-onset natural disasters, since these cause damages that are restorable in a relatively brief period. Hence, the paper calls for some modifications of the directive with the view of rendering it more specifically disaster-oriented.

**V. The Protection of “Environmental Refugees” in Regional Contexts** (Maria Vittoria Zecca)

Despite the number of people forced to flee from their States due to environmental causes is steadily increasing over the past few decades, the general international law fails to recognize the so-called “environmental refugees” as an autonomous category. Therefore, the purpose of this paper is to focus on three different regional contexts, in order to assess the protection afforded to this category of people. A critical analysis of asylum regional instruments highlights different attempts to extend the notion of refugee present in the Geneva Convention. These attempts need a further clarification and still can not provide an effective protection to the people fleeing from environmental degradation, but nevertheless they contain interesting aspects that should be studied in detail.

**VI. The UN Ocean Conference and the Low-Lying States Situation: Would the UN SD Goal 14 Suffice to Avoid a Migratory Emergency?** (Ana Carolina Barbosa Pereira Matos, Tarin Cristino Frota Mont’Alverne)

For Island Nations the ocean has always been a friend, however in the last decades this friend has also been a foe, seeing that for these States one of the most important United Nations - UN Sustainable Development - SD Goal is Goal 14 “Conserve and sustainably use the oceans, seas and marine resources for sustainable development”, but is the implementation of this goal enough to save these countries? When we think about countries severally affected by climate change, the most recalled examples are from the Low-lying States. These countries are, literally, sinking owing to the global warming effects, such as the melting of polar ice and rising sea levels. Inasmuch they depend on the oceans to survive, it is expected that the same oceans will cause their extinction. In June 2017, the first UN Ocean Conference took place, aimed at adopting by consensus an intergovernmental agreed declaration in the form of a call for action to support the implementation of Goal 14. The outcome of the Conference was the adoption of the declaration entitled “Our ocean, our future: call for action”. In the light of the fact that the Low-lying Nations are the most vulnerable to the effects of the unsustainable use of the oceans, it is urgent to analyze if the adoption of this declaration will help them survive and deal with an imminent



catastrophe, that could lead to inevitable migration flows. This study sought to examine the important outcomes from the UN Ocean Conference and its impact on the situation of Low-lying Nations, what to expect from the Conference's call for action, and if this will be enough to avoid a migration emergency. The research methodology adopted in this paper will be qualitative, explanatory, and will be developed through a bibliographic and documentary analysis. At the end of this research, we concluded that this Conference's focus was on measures to increase resilience and restore the living conditions of marine resources. However, the importance of such measures for the Low-lying countries can't be denied, since the majority of their population, as well as their governments, understand that migratory measures should be treated as a last resort.

**VII. The *Nansen Initiative* and the *Migrants in Countries in Crisis Initiative*: New Frameworks for More Effective Migrants Protection** (Patrycja Magdalena Zgoła)

A consultative process launched in 2014 developed a consensus on a global program on the protection of migrants in the areas affected by military conflicts or natural disasters. The Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate (the "*Nansen Initiative*" which gave birth to the Disaster Displacement Platform), and the *Migrants in Countries in Crisis Initiative* (MICIC) have made progress at the margins of improving overall conditions for migrants by dealing with topics such as migrants affected by natural hazard-induced crises and people displaced across borders by disasters. These Initiatives have developed guidelines, that provide specific and practical instructions for stakeholders at local, national, regional and international level. These non-binding and voluntary principles, guidelines and practices define the roles and responsibilities of various stakeholders on immigrants in countries in crisis and provide clear guidance on how to prepare and respond to crises.



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