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Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches

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1. EXECUTIVE SUMMARY

This paper first presents the background to and context of current discussions and approaches surrounding climate change-related human mobility across borders (Part 1) before identifying the normative gaps in the present international protection regime together with institutional and operational shortcomings (Part 2). It argues that while a relationship between climate change, environmental events and displacement/migration exists, direct causalities are difficult to establish. Rather, such movements are triggered by multiple causes. This has several implications:

(1) While the question of the responsibility of states that historically have been and continue to be the main emitters of greenhouse gases is legitimate and relevant, identifying the needs of people moving across borders in the context of climate change and analysing how these needs should be addressed from a human rights perspective is more appropriate than an approach that would put the responsibility of traditional emitters to admit affected people in the forefront.

(2) Because it is difficult to predict the number of persons who will be displaced or who will decide to migrate for reasons linked to climate change, devising policies on the basis of needs and corresponding rights rather than numbers seems more adequate even though there are clear indications that the numbers will grow.

(3) Despite the complex relationship between climate change and population movements, five scenarios can be identified that trigger such movements. These scenarios are sudden-onset disasters; slow-onset environmental degradation; the destruction of small island states by rising sea levels; areas designated as prohibited for human habitation because of mitigation and adaptation measures or because of a high risk of disasters occurring there; and unrest, violence and conflict over resources diminishing as a consequence of climate change.

In this context, the paper explores general obligations of states at the three levels of mitigation, adaptation and protection. The existence and applicability of legal frameworks differ significantly with respect to the character of the movement of persons, and thus depend on whether such movement takes place within the territory of a state or across borders as well as whether it can be considered voluntary or forced. The lack of an agreed terminology is acknowledged as gap. However, this paper does not consider this absence as a real problem and therefore does neither analyse the many existing definitions nor propose new terminology. Rather, in analyzing relevant branches of international law, the paper concludes that three critical legal issues remain unaddressed: (1) criteria to distinguish between voluntary and forced movements, though such distinction is necessary in light of the fact that international law treats them differently; (2) rights related to admittance and stay on foreign territory; (3) the legal situation and rights of persons on foreign territories, i.e. status rights.

In exploring possible avenues, the paper analyses existing approaches to address cross-border displacement and migration at the domestic, regional and international levels as well as suggestions by private institutions. A strategy based on the four pillars of prevention, migration management, temporary and permanent protection schemes and resettlement is proposed for normative regulations and a returnability test is suggested as a tool to better distinguish between forced and voluntary movements. In balancing the advantages and disadvantages of a hard versus soft law instrument, the paper suggests a multi-level approach to best address the multi-faceted challenges of cross-border migration and displacement at the normative level (Part 3).

2. INTRODUCTION

Climate change creates many challenges for individuals, states, regions and the international community as a whole. Humanitarian organizations have only in recent years become fully aware of the humanitarian consequences that global warming has on communities in many parts of the world, specifically in terms of human mobility. Climate change as potential trigger of flight, displacement or (voluntary) migration has since attracted the attention not only of humanitarian actors, but also states and the international community as a whole.

While there is little agreement on how best to address climate related displacement and (voluntary) migration and the protection of affected persons, there undoubtedly is a normative gap with respect to cross-border migration and displacement.

This paper¹ analyses these normative gaps as well as current approaches on cross-border movements induced by the impact of climate change, and assesses possible strategies to create an effective protection regime for these people, taking account of the likelihood of a substantial increase of affected persons in the future.

3. BACKGROUND AND CONTEXT

3.1 CLIMATE CHANGE AND HUMAN MOBILITY – A CAUSAL LINK?

Climate change is defined in the United Nations Framework Convention on Climate Change of 1992 (UNFCCC) as ‘a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to other natural climate variability that has been observed over comparable time periods’.² This definition has been expanded by the Intergovernmental Panel on Climate Change (IPCC) which refers to any change of climate over time as a result of human activity or due to natural variability.³

There is a widespread agreement that regardless of the exact causes⁴ climate change is a reality and that Africa, Asian mega-deltas and small island states will be the areas most affected by the

¹ This paper is largely based on a study by the authors commissioned by the Political Affairs Division IV – Human Security of the Swiss Federal Department of Foreign Affairs. The authors would like to thank the Political Affairs Division IV – Human Security for the funding support in preparing the study and for its agreement to publish this paper. It also builds on and expands W. Kälin, ‘Conceptualizing Climate-Induced Displacement’ in J. McAdam, *Climate Change and Displacement, Multidisciplinary Perspectives*, (Oxford/Portland 2010), 81-103.

² Article 1(2) UNFCCC.

³ IPCC, *Climate Change 2007: Synthesis Report*, p. 30.

⁴ Even most critics of the IPCC accept that climate change linked to an overall warming of the atmosphere exists, but attribute global warming to natural causes (see, e.g. B. Ellis and S. Akasogu, ‘Climate Change: Science Manipulated - Natural causes of global warming are much more significant than manmade changes’, available online at: <http://climaterealists.com/index.php?id=3524> (last accessed 15 October 2011)).

change of climate. The UN Secretary-General stressed that 'climate change is beginning to magnify the uneven nature of the distribution of disaster risks by increasing the hazards and at the same time eroding the basis for resilience, and therefore further skewing disaster impacts towards poor communities in developing countries'.⁵ Four key findings of the IPCC are particularly relevant for the issue of population movement:⁶

- Reduced availability of water in some parts of the world and increased water availability in others with subsequent water stress for hundreds of millions;⁷
- A decrease in crop yields putting tens of millions at risk of hunger;⁸
- Territories at an increased risk of floods, storms, coastal flooding and eventual submersion due to rising sea-levels with the potential impact on tens of millions;⁹ and
- Negative overall impacts on health, especially for the poor, elderly, young and marginalized sectors of society.

Despite disputes over the magnitude of the phenomenon,¹⁰ there is widespread agreement that climate change has an impact on the movement of persons and numbers of displaced persons and migrants are expected to rise due to more intense and frequent impacts caused by the changing climate. Thus, the IPCC stresses that "[i]f disasters occur more frequently and/or with greater magnitude, some local areas will become increasingly marginal as places to live or in which to maintain livelihoods. In such cases, migration and displacement could become permanent and could introduce new pressures in areas of relocation. For locations such as atolls, in some cases it is possible that many residents will have to relocate".¹¹ While a nexus between the impact of climate change and human mobility can hardly be denied, three considerations should be taken into account from the outset:

⁵ Report of the Secretary-General on the Implementation of the International Strategy for Disaster Reduction, UN Doc.A/64/280, 10 August 2009, para. 8.

⁶ IPCC, above note 3, p. 53, Table 3.2. See also Report of the Secretary-General, Climate change and its possible security implications, A/64/350, 11 September 2009, para. 28. See also Displacement and Climate Change: Towards Defining Categories of Affected Persons, Working paper submitted by the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, 25 August 2008, 1.2.

⁷ Reduced availability particularly in parts of the tropics, the Mediterranean and Middle Eastern regions and the Southern tips of Africa and Latin America. Increased availability in particular in parts of Eastern Africa, the Indian sub-continent, China and the Northern latitudes.

⁸ The most affected region will likely be the African continent.

⁹ The most affected regions will be the densely populated mega-deltas in Asia and Africa as well as small island states.

¹⁰ See *below*, 7-9.

¹¹ Summary for Policymakers, in: Intergovernmental Panel on Climate Change Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, 2011; draft, p. 13, available online at: http://www.ipcc-wg2.gov/SREX/images/uploads/SREX-SPM_Approved-HiRes_opt.pdf (last accessed 14 December 2011). See also, e.g. K. Warner and others, 'In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement', May 2009, and Report of the Secretary-General, Climate change and its possible security implications, above note 6, para. 54.

- Climate change itself does not trigger the movement of persons, but some of its effects such as natural disasters, environmental degradation, sea-level rise or conflict over resources have the potential to do so.
- It is difficult and in many cases impossible to establish a direct causality between climate change and a particular climate-related event¹² triggering the movement of persons. Whether a specific wind-storm such as Hurricane Katrina, e.g., would not have happened without climate change cannot be determined with existing scientific methods.
- Even where, as for instance in the case of rising sea levels, a direct link between climate change and a specific natural event is likely, population movements are multi-causal.¹³ First, the actual impact of a disaster – and therefore its potential to trigger population movements – will depend on a combination of three elements: (1) the climate-related hazard – its intensity, scope and frequency, (2) the vulnerability of affected people to such an event and (3) the capacities of those affected to cope with it (Figure 1).¹⁴

$\text{IMPACT OF THE DISASTER} = \frac{\text{HAZARD} + \text{VULNERABILITY}}{\text{CAPACITIES}}$
--

Figure 1

For example, given the magnitude of a windstorm, its effects will be particularly devastating where affected persons were already vulnerable before the storm and their capacity to cope was particularly low at the same time. In such situations, the occurrence of large-scale displacement will be more likely than in a situation where the resilience of people and their capacity to withstand the storm and address its impact are high. Effective disaster risk and vulnerability

¹² IPCC Summary for Policymakers 2011, above note 11, p. 6. Rising sea-levels may be an exception thereto, which can be directly attributed to climate change. The IPCC in its Summary for Policymakers 2011, above note 11, p. 6, stresses that “[i]t is *likely* that there has been an anthropogenic influence on increasing extreme coastal high water due to increase in mean sea level” and p. 12 highlights that “[i]t is very likely that mean sea levels rise will contribute to upward trends in extreme coastal high water levels in the future.”

¹³ The Secretary-General speaks of ‘many complex local conditioning factors’. See Report of the Secretary-General on Climate change and its possible security implications, above note 6, para. 53. Similarly Council of Europe, Report by the Committee on Migration, Refugees and Population of the Parliamentary Assembly on Environmentally-induced migration and displacement: a 21st century challenge, Rapporteur Tina Acketoft, 23 December 2008, Doc. 11785, para. C-9.

¹⁴ See Report of the Secretary-General on Climate change and its possible security implications, above note 6, para. 27, according to which the impact depends on the degree of exposure, vulnerability and adaptive capacity. See also Council of Europe, Report by the Committee on Migration, above note 13, para. C-26-31 on the influence of pre-existing vulnerabilities. Similarly, IPCC Summary for Policymakers, above note 11, stressing that exposure of people to extreme climate events and their “vulnerability are key determinants of disaster risk and of impacts when risk is realized” (p. 3) and that “[e]xposure and vulnerability are synergetic, varying across temporal and spatial scales, and depend on economic, social, geographic, demographic, cultural, institutional, governance, and environmental factors” (p. 4).

reduction as well as adaptation measures may substantially increase the resilience of affected people and even help to prevent displacement altogether. That said, factors such as population growth, urbanization or sub-standard housing, or generally state policies with negative impact on resilience, exposure to hazards and the like do play an important causal role in addition to climate change and its effects.¹⁵ Thus, climate-related events may be just one push-factor triggering population movements alongside other – maybe even more important – factors. Or, as the Chairperson of the 2011 Nansen Conference in Climate Change and Displacement pointed out: ‘Climate change acts as an impact multiplier and accelerator to other drivers of human mobility.’¹⁶

Thus, while a relationship between climate change, environmental events and displacement/migration does exist, current means of science do not allow establishing a direct and exclusive causality between climate change and the environmental event on the one hand, and between environmental events and the movement of persons on the other. Rather, as shown in the above figure (Figure 1), migration and displacement due to environmental events in the context of climate change are multi-causal even where a strong relationship between them exists.

It is therefore necessary to distinguish between causality and correlation as well as to take into account factors triggering population movements other than environmental events.

3.1.1 CLIMATE CHANGE INDUCED DISPLACEMENT: A MATTER OF STATE RESPONSIBILITY?

The IPCC recognizes the increased emission of greenhouse gases by the industrialized North during the 20th century as a key driver of climate change.¹⁷ In this context, many states in the Southern hemisphere, as well as small island states, emphasize the legal and moral responsibility of industrialized countries for climate-related impacts with negative consequences including displacement. Tuvalu, for example, has been considering launching a complaint with the International Court of Justice against the United States and Australia for their green-house gas emissions that contributed to rising of sea-levels putting Tuvalu’s territory in peril.¹⁸ Other countries as well as civil society organizations call on industrialized countries to generously

¹⁵ Council of Europe, Report by the Committee on Migration, above note 13, para. C-14-16.

¹⁶ The Nansen Conference: Climate Change and Displacement in the 21st Century, Oslo, 5-7 June 2011, Chairperson’s summary, para. 5.

¹⁷ IPCC 2007, above note 3, 37-39.

¹⁸ However, no concrete action has been taken by Tuvalu to file a case with the ICJ. Reasons can be manifold, including in particular the lack of clarity about the Court’s jurisdiction in the matter and lack of respective precedence. See also M. Ammer/M.Nowak/L. Stadlmayr/G. Hafner, ‘Rechtsstellung und rechtliche Behandlung von Umweltflüchtlingen’, study 54/2010 commissioned by the Umweltbundesamt, Vienna November 2010, 112, and more specifically A. Okamatsu, ‘Problems and Prospects of International Legal Disputes on Climate Change’, Ocean Policy Research Foundation, Research paper, available online at: <http://www.sprep.org/att/irc/ecopies/countries/tuvalu/47.pdf> (last accessed 15 October 2011).

admit 'climate refugees' in order to make up for the damage they cause. Thus, the political and legal discourse about state responsibility and climate change on the one hand and cross-border movements of people on the other hand cannot be entirely separated from each other.

While the question of the responsibility of states that historically have been and continue to be the main emitters of greenhouse gases is legitimate and relevant, a responsibility-based approach to population movements in the context of climate change is not fruitful for several reasons. According to present international law as restated in the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (ILC; hereinafter ILC draft Articles),¹⁹ states are responsible for internationally wrongful acts. Such acts presuppose that the conduct of a state consisting of an action or omission (a) is attributable to the state under international law; and (b) constitutes a breach of an international obligation of that state.²⁰ This means that a given emitter could only be held responsible under international law for a specific event of climate-induced displacement if prohibited conduct attributable to it would have caused such event.

As regards the first element (attributability), three considerations are relevant:

- a. Greenhouse gases may be emitted by entities belonging to the state but in industrialized countries with a strong private sector, private actors (industries, private traffic, and households) are the main emitters. States become responsible for the conduct of private actors under the aspect of attributability to the extent that they fail to control, limit or stop such behavior despite an obligation to do so. In this sense, according to the *Trail Smelter case*, 'no [s]tate has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein (...).'²¹
- b. It is, however, necessary to show that such injury was in fact caused by relevant behavior of actors on the territory of the responsible state. The standard set out by the arbitral commission in the *Trail Smelter case*, which arguably is still valid today, is that of 'clear and convincing evidence'.²² Thus to establish state responsibility for a specific case of displacement attributed to climate change it is essential to distinguish between purely natural (geophysical) events and events with anthropogenic components, i.e. climate-related events that contain a component of human activity. Theoretically, such distinction is possible but – arguably except in the case of rising sea levels – very difficult or even impossible regarding a specific individual event of a climate-related disaster: The present state of scientific knowledge does not allow to determine that a specific windstorm destroying large

¹⁹ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter ILC Draft Articles), annexed to UN Doc. A/Res./56/83, 12 December 2001.

²⁰ Ibid., Article 2(a).

²¹ *Trail Smelter (Canada v. USA)*, UNRIAA III, 1906-1982, at 1965.

²² Ibid.

parts of a country would not have happened or would not have been as strong had industrialized countries emitted less greenhouse gases.

- c. Even where such determination can be made, the question arises as to whether one state can be held responsible for displacement caused by greenhouse gas emissions emitted from several states. The question is relevant as arguably only the cumulative amount of emissions by many states triggers today's climate change. Here, the ILC draft Articles clearly provide in Article 47 that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.' However, present international law is not clear as to whether such a state would be obliged to provide reparation for the whole injury or only the part caused by it.²³ Furthermore, and even more importantly, the notion of 'for the same internationally wrongful act' does not extend to cases 'where several States by separate internationally wrongful conduct have contributed to cause the same damage. For example, several [s]tates might contribute to polluting a river by the separate discharge of pollutants'.²⁴ This can only mean that despite Article 47, a particular state could only be held responsible for a specific case of climate related displacement if it caused it with its own emissions, a requirement that in turn would make it necessary for the injured state to establish and prove adequate causality between the injury it experienced in a specific case and the conduct of the state from whose territory greenhouse gases were emitted.

Regarding the second element (breach of an international obligation), state responsibility only arises to the extent that a state emitted or tolerated emission of amounts of greenhouse gases prohibited by international law. While the UNFCCC notes in its preamble that 'the largest share of historical and current global emissions of greenhouse gases has originated in developed countries (...)' and is based on the principle of common but differentiated responsibilities committing developed state parties to adopt national policies and take measures to mitigate climate change including by limiting anthropogenic emissions of greenhouse gases, it does not contain a specific reduction obligation. Such obligations are enshrined in the Kyoto Protocol.²⁵ However, responsibilities for a breach of reduction obligations could only arise in the case of states parties to the Protocol regarding greenhouse gases emitted since its entry into force exceeding permissible amounts. Such obligations thus cover only a rather small part of the overall amount of emissions causing climate change and do not include the large emissions leading to climate change before the entry into force of the Protocol which arguably are the main cause of today's problems. One could also argue that the polluter pays principle, as expounded

²³ See *Yearbook of the International Law Commission* 2001, Vol. 2, UN Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2), 315 – 316 referring to the case of the ICJ of *Certain Phosphate Lands in Nauru* (Nauru/Australia, Preliminary Objections [1992] ICJ Reports 92, 240) where the Court left it open whether Australia would have to pay full reparation for injury it allegedly caused together with two other states (ibid. p. 262, para. 56).

²⁴ Ibid., 317.

²⁵ Article 3, Kyoto Protocol to the UNFCCC.

in the *Trail Smelter case* cited above,²⁶ may prohibit the emission of amounts of greenhouse gases that cause damage incurred by other countries, but it is far from clear whether this is a view shared by a majority of states.²⁷

Even where a breach of an obligation to reduce greenhouse gas emissions would amount to an internationally wrongful act, such breach would, in light of a strict legal perspective, need to be proven to be the specific cause of a particular climate-related impact – such as a disaster and the respective displacement of persons – so that responsibility for such an impact could be attributed to the polluting state. The possibility of establishing in a legal sense such causality is highly doubtful and it would impose an extremely high burden of proof on affected states.

While the discussion on the moral responsibility of industrialized countries under international law is relevant and needs to be deepened, linking it directly to the issue of cross-border displacement and migration – for example, in the sense that emitting states should be obliged to admit people in proportion to the amount of greenhouse gas emissions – is not a promising approach. It shifts a wider discourse to a narrow legal approach which arguably complicates rather than facilitates an adequate solution to questions arising in this context.

In summary, as it is hardly possible to establish by current means of science a direct link between the behavior of an emitting state and a particular instance of displacement or migration, or to clearly identify when such behavior amounts to a breach of international law, legal claims by affected states *vis-à-vis* emitting states put an enormous burden of proof on the claimant state and are likely to fail. Furthermore, cross-border displacement and migration in the context of climate change does and will mostly take place within regions and not necessarily assume south-north patterns, indicating the need for an approach through regions and sub-regions. In light of this, it is unclear what advantages an approach based on a strict state responsibility under international law would entail for Northern or Southern states as well. Elements of a wider responsibility of the North may be accounted for by other means, such as through fair burden-sharing agreements or respective contributions to the adaptation fund established under the UNFCCC regime.

²⁶ Above note 21.

²⁷ Applying *Trail Smelter* to the emission of greenhouse gases would mean that big polluters in the South would also be in breach of international law, a view they would probably reject based on the argument that the UNFCCC and its Kyoto Protocol created a treaty regime with specific rules deviating in permissible ways from the polluter pays principle as enshrined in customary law.

3.2 MAGNITUDE, SCENARIOS AND TRENDS

3.2.1 Two Schools of Thought

It is unclear how many people are and will be displaced or will migrate as a consequence of the effects of climate change, when this will happen and where. Already in the 1990s, the IPCC mentioned migration as one of the major effects of climate change. Some see a direct relationship between the degree of global warming, the number of disasters causing displacement and the magnitude of the number of persons affected by it. Thus, a maximalist school of thought expects hundreds of millions, or even up to a billion, people to be displaced as a consequence of climate change.²⁸ The Stern Review, for example, estimated that 150 to 200 million may become permanently displaced due to the effects of climate change by the year 2050.²⁹

By contrast, a minimalist approach stresses that migration and displacement is triggered by complex and multiple causes among which climate change is just one, and predicts that the number of cases where displacement can be directly linked to the effects of climate change will be few.³⁰ Piguet, for example, stresses in this respect that natural factors associated with climate change, 'are not the sole cause of migration and that the economic, social and political situation of the zone under threat can, depending on the case, increase or decrease' ³¹ population movements. He concludes that while 'environmental degradation can generate migration flows' it can be safely said 'that due to the number of factors involved, no climatic or environmental hazards inevitably result in migration.'³²

As regards the present situation, Castles stresses that 'there is little evidence that climate change has caused much [cross-border] displacement so far'.³³ At the same time, there is growing evidence that at least the number of people displaced by climate-related sudden-onset disasters is very substantial.³⁴ The Norwegian Refugee Council's Internal Displacement Monitoring Centre, for instance, found that a total of almost 95 million people were internally displaced by

²⁸ N. Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 *BioScience* 252, 257 estimated 150 million displaced persons by 2050. Christian Aid estimates 'that, unless strong preventative action is taken, between now and 2050 climate change will push the number of displaced people globally to at least 1 billion'; see Christian Aid 'The Human Tide: The Real Migration Crisis', May 2007, 22.

²⁹ N. Stern, 'The Economics of Climate Change', *The Stern Review*, Cambridge, 2006, 77.

³⁰ On these two schools of thought, see J. Morrissey, 'Environmental Change and Forced Migration: A State of the Art Review', Background paper for Refugee Studies Centre, January 2009, available online at: <http://www.rsc.ox.ac.uk/events/environmental-change-and-migration/EnvChangeandFmReviewWS.pdf> (last accessed 15 October 2011).

³¹ E. Piguet, 'Climate change and forced migration', New Issues in Refugee Research, research paper No. 153, UNHCR, Geneva, January 2008, 3.

³² *Ibid.*, 8.

³³ S. Castles, 'Afterword: What Now? Climate-Induced Displacement after Copenhagen', in J. McAdam, *Climate Change and Displacement, Multidisciplinary Perspectives* (Oxford/Portland 2010) 244.

³⁴ See also Nansen Conference, Chairperson's Summary, above note 16, para. 5.

sudden-onset natural disasters during the three year period 2008 – 2010. In 2008, those internally displaced by climate-related disasters amounted to over 20 million, while almost 16 million had to flee due to non-climate-related disasters. In 2009, over 15 out of 16.9 million displaced people have been attributed to climate-related disasters, and in 2010, 38.3 million were displaced due to climate-related events, which is a very large number compared to the 4 million displaced by non-climate-related disasters³⁵. Thus, climate-related disasters have become one of the primary causes of displacement and their number is likely to grow. However, as studies confirm, most of these people remain in displacement for relatively short periods of time only and are able to eventually return to their homes.³⁶

Looking at the debate, we observe that the maximalist and the minimalist schools of thought are not necessarily incompatible with each other but rather reach different conclusions because they look to some extent, at different issues:

‘Minimalists’ tend to focus narrowly on the number of people moving to other countries solely for reasons that have a clear relationship with the natural effects of climate change. In addition, they tend to neglect instances of internal displacement or short-term stays in neighboring countries and, instead, focus on the question of whether receiving countries in Europe and elsewhere should look at climate-related displaced persons or migrants as a relevant factor to be taken into account in migration policies.

‘Maximalists’, in contrast, seem to look at everyone who has to move for reasons somehow related to the effects of climate change, irrespective of the multi-causality of migration and displacement in climate contexts and of whether related movement is internal or cross-border and short- or long-term. They therefore are taking into account a potentially much larger group of persons than the ‘minimalists’ and therefore get to higher levels of population movements in the context of climate change.

What are the conclusions for policy makers that can be drawn from the two schools of thought? A *migration management perspective* would put the emphasis on how to regulate the movement of persons in ways conducive to legitimate state interests; ‘maximalists’ thus would take measures to control such movements, and ‘minimalists’ indicate that action is not really needed, at least not for the time being. A *protection perspective* in contrast would take a human security approach

³⁵ NRC-IDMC, Displacement due to natural hazard-induced disasters, Global estimates for 2009 and 2010, June 2011, 14-15.

³⁶ Piguet, above note 31, 6, referring to studies by N. Kliot, ‘Environmentally Induced Population Movements: Their Complex Sources and Consequences - A Critical Review’ in J. D. Unruh, M. S. Krol, and N. Kliot (eds.), *Environmental Change and Its Implications for Population Migration* (Kluwer, Dordrecht 2004); N. Asmita, E. Stigter, and F. Laczko, ‘Migration, Development and Natural Disasters: Insights from the Indian Ocean Tsunami’, International Organization for Migrations - IOM Migration Research Series 30, Geneva 2007; Burton, I., R. W. Kates, and G. F. White, *The Environment as hazard* (Guilford Press, New York 1993).

and highlight the need to address displacement and migration in the context of climate change regardless of numbers because of the vulnerabilities such movements create for affected persons.

A migration management perspective carries the risk of enticing policy makers in the global North to either adopt an alarmist stance fearing, in line with a maximalist school of thought, that Europe and Northern America will be invaded by affected persons that need to be kept out at any price; or, to the contrary, to downplay, on the basis of a 'minimalist' approach, the seriousness of the issue and thus miss the opportunity to develop sound policy approaches that look at the problem in a holistic way and do not reduce it to an issue of migratory movements from the global South to the North. The migration management perspective is too narrow to address existing and future challenges that the international community as a whole, and individual countries, face today and will face in the future. Highlighting the protection perspective without, however, adopting an alarmist stance, would allow policies to be shaped on the basis of needs rather than numbers.

3.2.2 Causes of Movement: Five Scenarios

In the absence of a direct and exclusive causality between climate change and the movement of persons, it is important to identify and classify situations possibly related to climate change that have the potential of triggering the movement of persons.

Five relevant scenarios may be identified:³⁷

1. *Sudden-onset disasters*, such as flooding, windstorms (hurricanes/typhoons/cyclones) or mudslides caused by heavy rainfalls can trigger large-scale displacement: people are evacuated, or leave on their own before the disasters, or have to leave their homes in its aftermath due to the degree of destruction of houses, infrastructure and services. Depending on recovery efforts, the ensuing displacement need not be long-term, and return will remain possible in most cases because areas of former homes and land remain basically habitable. The success of return of the displaced people will largely depend on the timeliness and effectiveness of recovery and reconstruction efforts. Where these are insufficient, people may remain displaced for years or even decades. While the numbers of those displaced tend to be

³⁷ The following is based on Inter-Agency Standing Committee (IASC), 'Climate Change, Migration and Displacement: Who will be affected?', Working paper submitted by the informal group on Migration/Displacement and Climate Change of the IASC, 31 October 2008, 2-3, available online at: <http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-news-newsdetails&newsid=126> (last accessed 15 October 2011) and W. Kälin, Conceptualising Climate-Induced Displacement, above note 1, 84 – 86. J. McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards', *UNHCR Legal and Protection Policy Research Series*, May 2011, 10-11, uses the same typology as basis for her analysis. V. Kolmannskog and L. Trebbi, 'Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps', *International Review of the Red Cross*, 92, 2010, 717 – 720 also use a similar typology.

high,³⁸ most of these persons will remain within their own country. One explanation is that victims often are (or as a consequence of the disaster have become) too poor to travel to other countries.³⁹ Nevertheless, cases of cross-border displacement exist. For instance, persons found temporary refuge in the United States after Hurricane Mitch had destroyed vast tracts of land in Honduras, Guatemala and other parts of Central America in 1998. During a visit in Mozambique and South Africa in 2008 we heard anecdotal evidence that people from Mozambique and Malawi look for temporary refuge in neighboring countries quite regularly when displaced by flooding. One study indicates that in Bangladesh natural disasters are the main cause of long-term migration to other countries.⁴⁰ Arguably, the recurrent nature of such disasters combined with their long-term negative environmental impact, are important factors triggering such movements. While hydro-meteorological disasters are climate-related, they are not necessarily a causal effect of global warming and the ensuing change of climate patterns. In fact, and as mentioned above, many hydro-meteorological disasters triggering displacement would occur regardless of climate change, and even where they are linked to climate change, such causality is difficult, if not impossible, to prove in a specific case.

2. *Slow-onset environmental degradation* caused, inter alia, by rising sea levels, increased salinization of groundwater and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification or other forms of reduced water resources, are predicted as negative long-term impacts of climate change. The dramatic decrease of water availability in some regions and recurrent flooding in others will impact upon economic opportunities and conditions of life will deteriorate in affected areas. Such deterioration may not necessarily cause displacement, but it may prompt people to consider migration as a way to adapt to the changing environment, and explain why people move to regions with better living conditions and income opportunities. However, if areas become uninhabitable over time because of further deterioration, finally leading to complete desertification, permanent flooding of coastal zones or similar situations, population movements will amount to forced displacement and become permanent. Many factors will contribute to population movements in such situations including political, economic and social elements that may push people to move to other locations inside their own country or abroad. Thus, for example, droughts in the Sahel region forced large numbers of people to leave their habitual places of residence, but in Mali the drought contributed to a reduction of cross-border movements because families no longer had sufficient resources to pay for travel

³⁸ See NRC-IDMC global estimates for 2008, 2009, 2010, above note 35. Piguet, above note 31, reports that between 2000 and 2005, 106 million people, on average, were affected by flooding.

³⁹ Piguet, above note 31, 5-6.

⁴⁰ Piguet, above note 31, 6, referring to C. E. Haque, *Hazards in a fickle environment: Bangladesh* (Kluwer Academic Publisher, Dordrecht 1997).

to other countries.⁴¹ In other words, many factors, including the resilience of communities or the degree to which adaptation measures are taken and successful, will determine the degree of population movements in situations of drought, desertification and other forms of environmental degradation. In contrast, there is clear evidence that rising sea levels are and will become an even more significant cause of population movements in low-lying areas, in particular mega-deltas in Africa (Nile delta) and Asia (Indus, Ganges, Mekong, etc.) that because of their size can hardly be protected by dikes and similar disaster risk reduction measures.⁴²

3. So-called *low lying small island states* present a special case of slow-onset disasters. As a consequence of rising sea levels and their low-lying topology, such areas may increasingly become uninhabitable, triggering emigration to other countries as people lose faith that there is a future for them in their homeland. Environmental degradation will be a very slow process that includes 'loss of coastal land and infrastructure due to erosion, inundation, sea-level rise and storm surges; an increase in the frequency and severity of cyclones, creating risks to life, health and homes; loss of coral reefs, with attendant implications for the ecosystems on which many islanders' livelihoods depend; changing rainfall patterns, leading to flooding in some areas, drought in others, and threats to fresh water supplies; salt-water intrusion into agricultural land; and extreme temperatures.'⁴³ In extreme cases, the remaining territory of affected states may no longer be able to accommodate their population. When this happens, populations would become permanently displaced to other countries. In the most extreme cases, such states may disappear entirely from the surface of the earth, but in any event, the protection concerns of their populations will arise long before actual disappearance.
4. As a consequence of climate change, governments may designate *areas prohibited for human habitation*. This scenario ascribes the displacement of persons to the state and not a natural calamity, but the action of the state serves either to protect potentially affected populations, or to mitigate climate change and to adapt to it. Thus, two types of such governmental interventions can be distinguished:
 - a. *Designation of areas as high-risk zones* too dangerous for human habitation on account of environmental dangers. In such situations, people may (either by consent or

⁴¹Piguet, above note 31, 7, referring to T. Hammer, 'Desertification and Migration', in J. D. Unruh, M. S. Krol, and N. Klot (eds.), *Environmental Change and Its Implications for Population Migration* (Kluwer, Dordrecht 2004), and S.E. Findley, 'Does drought increase migration? A study of migration from rural Mali during the 1983-85 drought', *International Migration Review* 28(3) 1994, 539-553.

⁴² Piguet, above note 31, 8.

⁴³ J. McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is not *the Answer*', 23 *IJRL* 2011, 9, summarizing Otin Taai Declaration, A Statement and Recommendations from the Pacific Churches' Consultation on Climate Change, Tarawa, Kiribati, March 2004.

against their will) be evacuated and displaced from their lands or, if they have already left, be prohibited from returning, or be relocated to safe areas. This may occur, for example, along rivers and coastal plains prone to flooding, but also in mountain regions affected by an increased risk of flooding or mudslides due to the thaw of permafrost. The difference between this situation and the case of sudden-onset disasters (scenario 1) is that governmental action, as opposed to nature, makes return impossible. Such cases affect a relatively low number of people but raise particularly complex legal issues.

- b. *Areas declared to be off limits for human habitation or becoming uninhabitable as a consequence of mitigation or adaptation measures.* Governments may decide to set aside certain areas to create forest carbon sinks where trees store carbon and thus reduce greenhouse gas emissions,⁴⁴ meaning that people who had been living there are obliged to leave. People may also be obliged to give up their homes where large water reservoirs, dikes or other infrastructural measures are taken to adapt to the changing climate and reduce disaster risks. Finally, people may be obliged to leave certain areas turned into large agro-industrial zones where plants used for bio-fuel are grown.⁴⁵ Thus, mitigation and adaptation measures may displace people, in particular where they are not relocated in ways which allow them to continue or even improve their lives
5. Finally, *unrest seriously disturbing public order, violence or even armed conflict* may be triggered, at least partially, by a decrease in essential resources due to climate change (such as water, arable land, or grazing grounds). This is most likely to affect regions that have reduced water availability and cannot easily adapt due to poverty (e.g., by switching to economic activities requiring less water). In such situations, there is little room for equitable sharing of the limited resources, making it difficult to reach peace agreements as long as resource scarcity continues. However, in practice it is difficult if not impossible to establish a clear link and causality between climate change and unrest, violence or armed conflict. Rather, such events are multi-causal.

These five scenarios can be divided into the two categories of climate processes (scenarios 2, 3, and 4) and climate-related events (scenarios 1 and 5).⁴⁶ It has been argued that climate-related

⁴⁴ On this use of forests and legal issues linked to it see, e.g. K. L. Rosenbaum, D. Schoene and A. Mekouar, 'Climate change and the forest sector - Possible national and subnational legislation', FAO Forestry Paper 144, Rome 2004.

⁴⁵ On the impact of bio-fuel production on human rights see, e.g., Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, UN Doc. A/HRC/10/61, 15 January 2009, paras. 65-67, and more generally, International Council on Human Rights Policy, 'Climate Change and Human Rights: A Rough Guide', Versoix 2008.

⁴⁶ See O. Brown, 'Migration and Climate Change', IOM Research Series Report No. 31, 2008, 17-18. See also J. McAdam, From Economic Refugees to Climate Refugees? Review of International Refugee Law and Socio-

events, such as sudden on-set natural disasters, are more likely to cause temporary displacement while climate processes potentially result in permanent migration or displacement.⁴⁷

3.3 THE LEGAL CONTEXT

3.3.1 General Obligations of States in the Context of Climate Change

In the context of climate change, states, according to present international law, have three sets of obligations, namely: *mitigation*, i.e. the task of mitigating the degree of climate change, in particular by reducing greenhouse gas emissions; *adaption*, i.e. the challenge of how best to adapt to the threats caused by the effects of climate change; and *protection*, i.e. the obligation to secure the rights and addressing the (humanitarian) needs of people affected by negative effects of climate change.

All these obligations are relevant for the issue of population movements: addressing the cause of climate change and adapting to its effects can have a preventive effect on displacement and migration. At the same time, measures to mitigate and *ex ante* adapt to climate change and its effects are often insufficient to prevent population movements making it necessary to also addressing its humanitarian consequences. Such measures do not take place in a legal void.⁴⁸

3.3.1.1 Addressing the causes: Mitigating climate change

According to the UN Secretary-General, the extent to which climate change will impact on the well-being of individuals will depend on the success of slowing down climate change, as without such efforts the impacts will be farther reaching and more severe.⁴⁹ State parties to the UNFCCC and its Kyoto Protocol have committed themselves to reducing the emission of greenhouse gases. These mitigation measures aim at slowing down and eventually stopping the change of climate and its disastrous consequences. Even if causalities are difficult to determine,⁵⁰ mitigation measures have an important preventive effect on displacement and other forms of population movements. This preventive character hopefully will be strengthened in a successor agreement to the Kyoto Protocol, in particular by introducing a more effective climate regime based on comprehensive quantified emission limitations. As a hopeful sign, states participating in the 2010 UN Climate Change Conference in Cancún, Mexico agreed 'that countries need to work to stay

Economic Rights: Refuge from Deprivation, Review Essay, *Melbourne Journal of International Law* 31, 2009, 579 and Council of Europe, Report by the Committee on Migration, above note 13, para. C-10.

⁴⁷ J. McAdam, above note 46, 579.

⁴⁸ See W. Kälin, above note 1, 82-84.

⁴⁹ See Report of the Secretary-General on Climate change and its possible security implications, above note 6, paras. 26-27.

⁵⁰ See above Part 1, section 1.1.

below a two degree temperature rise.⁵¹ The specific content of this commitment, however, and the question as to which states should be bound by it in a future legal instrument are still highly contested issues. The Chairperson of the 2011 Nansen Conference on Climate Change concluded that ‘strong political efforts are needed, first of all in industrialized countries, to continue to mitigate greenhouse gas emissions (...)’.⁵²

3.3.1.2 Addressing the effects: Adapting to the effects of climate change by reducing risks created by climate change and vulnerabilities caused by it

Effects of climate change cannot be fully prevented from occurring even if effective mitigation measures were adopted and implemented. Additional global warming, even if it stays below two degree centigrade, will have substantial additional negative impacts. Faced with this reality, governments are expected to take measures to adapt to these new realities by reducing the adverse effects of climate change, e.g. by addressing the impact of natural hazards through reducing vulnerabilities or enhancing resilience capacities. The magnitude of displacement and migratory movements caused by such events will depend on the impact of climate related hazards, the vulnerabilities of the exposed population and resilience and coping capacities (see *Figure 1* above). Reducing the adverse effects of climate change by reducing disaster risks and vulnerabilities, and at the same time strengthening resilience and capacities, is therefore necessary. The UN General Assembly recognized the primary responsibility of states for their own sustainable development and effective measures to reduce disaster risks, including measures to protect people on their territory, infrastructure and other assets from disaster impacts.⁵³ This was reiterated by the Chairperson of the 2011 Nansen Conference, who noted the importance of development interventions to support resilience and highlighted the need for disaster risk reduction and adaptation measures to limit the negative impacts of climate change. At the same time, it was acknowledged that sustainable and human rights-based resilience is a prerequisite to prevent displacement.⁵⁴ The UN Secretary-General recommends using disaster risk reduction as an adaptation tool and suggests including measures of reducing disaster risks in climate change strategies.⁵⁵

⁵¹ United Nations Framework Convention on Climate Change – Secretariat, Press Release: ‘UN Climate Change Conference in Cancún delivers balanced package of decisions, restores faith in multilateral process’, Cancún 11 November 2010.

⁵² Nansen Conference, Chairperson’s Summary, above note 16, para. 3.

⁵³ UNGA Res. 64/2000, 25 February 2010, para. 8.

⁵⁴ Nansen Conference, Chairperson’s Summary, above note 16, paras. 11 and 13.

⁵⁵ Report of the Secretary-General on the Implementation of the International Strategy for Disaster Reduction, above note 5, para. 47.

The 2005 Hyogo Framework for Action: Building the Resilience of Nations and Communities to Disasters,⁵⁶ as well as the Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention adopted as part of the Cancún Agreements in November 2010,⁵⁷ provide states with guidance on how to approach adaptation measures. The Hyogo Framework, while legally non-binding, is a particularly important tool in this respect and its implementation contributes to the prevention of displacement and migratory movements caused by disasters.⁵⁸ Nansen Principle V, presented as outcome of the 2011 Nansen Conference on Climate Change and Displacement, recalls the shared responsibility of international, regional and local actors to implement the principles of the Hyogo Framework.⁵⁹ The Framework identifies five key areas for action, including governance; risk identification, assessment, monitoring and early warning; knowledge management and education; reduction of underlying risk factors; and preparedness and recovery with the strategic goal of substantial reduction of disaster losses in lives and assets by 2015.⁶⁰

International human rights law reinforces states' duties to protect their people against dangers emanating from disasters.⁶¹ Reduction of disaster risks and vulnerabilities, such as by setting up alarm and evacuation systems, has been defined by the European Court of Human Rights as a human rights obligation. If a disaster is foreseeable and the state is able to prevent ensuing threats to the life and property of persons, it has to take appropriate action in conformity with its human rights obligations under the right to life and/or the protection of privacy and property.⁶² According to this case law, the right to life and its corresponding state obligation to protect life require that, with regard to natural disasters, including those related to climate change, competent authorities must: (i) enact and implement laws dealing with all relevant aspects of disaster risk mitigation and set up the necessary mechanisms and procedures;⁶³ (ii) take the

⁵⁶ Hereinafter Hyogo Framework. Adopted by the World Conference on Disaster Reduction in Hyogo, 2005. The Framework has undergone a mid-term review process in 2010.

⁵⁷ 2010 UN Climate Change Conference in Cancún, Mexico, Decision 1/CP.16, Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, available online at: http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf (last accessed 15 October 2011).

⁵⁸ UNGA Res. 63/217, 18 February 2009 on Natural Disasters and Vulnerability stresses the importance of the Hyogo Framework and urges its implementation.

⁵⁹ Nansen Conference, Nansen Principles, above note 16, Principle V.

⁶⁰ Hyogo Framework, above note 56, paras. 11 and 14. The five priorities for action were identified based on a review and gap analysis of the Framework's predecessor the 1994 Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and its Plan of Action.

⁶¹ This is reflected in Nansen Principle II: 'States have a primary duty to protect their populations and give particular attention to the special needs of the people most vulnerable to and most affected by climate change and other environmental hazards, including the displaced, hosting communities and those at risk of displacement.' Nansen Principles, above note 16, Principle II.

⁶² ECtHR, *Budayeva and others v. Russia*, App. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008.

⁶³ The Nansen Principles recommend developing 'legislation, policies and institutions as well as the investment of adequate resources' in order for the State to assume its duty to protect the population. See Nansen Principles, above note 16, Principle II.

necessary administrative measures, including supervising potentially dangerous situations; (iii) inform the population about possible dangers and risks; (iv) evacuate potentially affected populations; (v) conduct criminal investigations and prosecute those responsible for having neglected their duties in case of deaths caused by a disaster; and (vi) compensate surviving relatives of victims killed as a consequence of neglecting these duties.⁶⁴ While the judgments of the European Court of Human Rights do not apply outside Europe, this case law is based on principles pertaining to the duty to protect life, privacy and property that are understood in basically the same way by other international human rights bodies such as the Inter-American Court on Human Rights and the UN Human Rights Committee allowing the conclusion that they would decide such a case more or less in the same way.⁶⁵

While adaptation as set out in the preceding paragraphs has a strong preventive character, it is increasingly recognized that migration itself may be a form of adaptation. Migration as adaptation to climate change can be long- or short-term, seasonal or permanent, internal or cross-border⁶⁶ and may include one family member or whole families. It is argued that ‘migration can make positive contributions to (...) determinants of adaptive capacity’⁶⁷ for example through remittances and is suggested that ‘migration can enhance capacity to adapt to climate change’.⁶⁸ Migration as adaptation may be relevant in the context of slow on-set disasters (scenario 2) or where sea-levels rise (scenario 3). In the case of sudden-onset disasters (scenario 1), such a form of adaptation may occur where they are recurrent or seasonal and thus allow for such planned movements or where, in the aftermath of a disaster, recovery efforts are insufficient. As such, migration as adaptation may be a promising approach if such migratory movements are managed well.⁶⁹ Migration as adaptation, however, has its clear limits as the most vulnerable communities in particular do not have the means to adapt in this manner. Furthermore, where migration turns into forced movement, for example where a long-lasting and expanding drought no longer allows for the survival of pastoralists or nomads and forced them to move to urban areas, one should no longer speak of a form of adaptation. Finally, many countries of destination seem to be reluctant to acknowledge the positive nature of cross-border migration.

⁶⁴ W. Kälin and C. Haenni, ‘Disaster risk mitigation – why human rights matter’, in *Forced Migration Review*, Issue 31, October 2008, 38-39, at 39.

⁶⁵ See W. Kälin and J. Künzli, *The law of International Human Rights Protection* (Oxford 2009) 103-111.

⁶⁶ Penz argues that where migration as adaptation is permanent, such migration can vary a lot in distance depending on where alternatives can be found and can involve cross-border migration, though most likely restricted to the affected region. See P. Penz, ‘International Ethical Responsibilities to ‘Climate Change Refugees’’, in J. McAdam, *Climate Change and Displacement, Multidisciplinary Perspectives* (Oxford/Portland 2010) 154-155. See further Nansen Conference, Chairperson’s Summary, above note 16, para. 15.

⁶⁷ J. Barnett and M. Webber, ‘Migration as Adaptation: Opportunities and Limits’ in J. McAdam, *Climate Change and Displacement, Multidisciplinary Perspectives*, (Oxford/Portland 2010) 44.

⁶⁸ Ibid.

⁶⁹ The Chairperson of the Nansen Conference called upon States to ‘proactively anticipate and plan for migration as part of their adaptation strategies and development plans (...)’ See Chairperson’s Summary, above note 16, para. 15.

3.3.1.3 Addressing the consequences: Protecting individuals displaced by the effects of climate change

Mitigation and ex-ante adaptation measures are often insufficient to protect individuals from suffering the impacts of climate change, including from being displaced by effects such as sudden-onset hydro-meteorological disasters. In a wider sense, adaptation measures must therefore also cover protection of and assistance for persons negatively affected by the effects of climate change including those who (have to) leave their homes. In this context, states as primary duty bearers are bound by human rights law to protect the rights of those affected.

However, while mitigation and adaptation are on the agenda of the regular conferences of States parties to the UNFCCC, the protection dimension - and with it the issue of displacement triggered by the effects of climate change - has been largely neglected in international discussions thus far. This is why the Heads of Organizations of the United Nations Inter-Agency Standing Committee (IASC) – the coordinating body of the UN humanitarian agencies and big international humanitarian civil society consortia – addressed, in April 2009, a letter to the Executive Secretary of the UNFCCC asking to acknowledge and address the humanitarian consequences of climate change in the envisaged successor agreement to the Kyoto Protocol. They drew attention to the fact that over the past two decades recorded climate-related disasters doubled from approximately 200 to 400 per year. They also highlighted the tripling of the number of people affected by disasters over the past decade, reaching an average of 211 million people directly affected annually, and the increase of economic losses to more than \$83 billion per year.⁷⁰

Heeding this call, the Cancún outcome agreement on long-term cooperative action under the UNFCCC now invites states to enhance their action on adaption, including by '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels; (...)'.⁷¹ Humanitarian consequences of climate change, including internal and cross-border displacement alongside migration, are therewith recognized as an adaptation challenge and will become part of national adaptation plans.

⁷⁰ Letter dated 30 April 2009, on file with the authors.

⁷¹ Article 14(f), Cancun outcome document of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention. The Chairperson of the Nansen Conference referred to this provision as an 'important global affirmation of the need for measures related to migration, displacement and planned relocation (...)' Chairperson's Summary, above note 16, para. 10.

3.3.2 Relevant Categories of Persons and Applicable Legal Frameworks

3.3.2.1 *Internal movements of persons*

The character and the territorial scope of the movement of persons triggered by climate-related events may vary, i.e. be either forced or voluntary, and internal or cross-border. While it is easy to distinguish between internal and external movements, the distinction between forced and voluntary movement will become increasingly blurred with new forms and patterns of movements emerging.⁷² The Chairperson of the 2011 Nansen Conference on Climate Change and Displacement acknowledged the ‘complexity of drawing a sharp distinction between “voluntary” and “forced” migration (displacement) spurred by environmental and development factors’ and concludes that ‘[m]otivation is a continuum, with “voluntary” at one end of the spectrum, in a gradual transition to ‘forced’ at the other’.⁷³

As regards internal movements, in terms of their normative protection one can distinguish between internally displaced persons and internal migrants:

1. The magnitude of *internal displacement* due to climate change-related events and processes is substantial⁷⁴ and likely to increase in the foreseeable future. The majority of those displaced by the effects of climate change is not crossing borders but is likely to become internally displaced.⁷⁵ Persons displaced within the territory of states due to climate-related events are internally displaced persons (IDPs). According to the 1998 United Nations Guiding Principles on Internal Displacement (hereinafter: Guiding Principles)⁷⁶ IDPs are ‘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 (...) natural or human-made disasters, and who have not crossed an internationally recognized State border.’ Even though the Guiding Principles do not explicitly include climate change as a cause of internal displacement, they list the causes of internal displacement in a non-exhaustive manner. In particular, they explicitly recognize natural and man-made disasters as possible causes of displacement, irrespective of whether or not they relate to changing climate patterns.⁷⁷ The

⁷² UNHCR, ‘Climate change, natural disasters and human displacement: A UNHCR perspective’, 23 October 2009, 3. These difficulties of increasingly blurred lines is also reflected in the decision framework for determining environmental migrant sub-categories as suggested by F. G. Renaud, O. Dun, K. Warner, J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, *International Migration*, Vol. 49, 2011, pp. 5-29.

⁷³ Nansen Conference, Chairperson’s Summary, above note 16, para. 6.

⁷⁴ See NRC-IDMC’s global estimates for 2008, 2009 and 2010, above note 35.

⁷⁵ See also Nansen Conference, Chairperson’s Summary, abovenote 16, para. 5.

⁷⁶ UN Commission on Human Rights, ‘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, 11 February 1998, UN Doc E/CN.4/1998/53/Add.2.

⁷⁷ This has been re-affirmed at the Nansen Conference in 2011. See Chairperson’s Summary, above note 16, para. 19 and Nansen Principle VIII.

above notion therefore covers all those who involuntarily leave their homes in the context of any of the five scenarios outlined above. Internally displaced persons, as part of the permanent population of the country, are entitled to protection under applicable provisions of human rights law and more specifically the Guiding Principles,⁷⁸ as well as national laws and policies on internal displacement covering climate-related displacement. The Guiding Principles, while non-binding, are recognized by the international community as an ‘important international framework for the protection of internally displaced persons’⁷⁹ and are increasingly being incorporated into domestic legislation,⁸⁰ while actual implementation remains a challenge. At the regional level, this protection is reinforced by the 2009 Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa⁸¹ and the 2006 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons,⁸² two instruments that are legally binding for states parties and cover those displaced by natural disasters. In particular, Article 5, paragraph 4 of the Kampala Convention provides that ‘States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.’ Resolutions adopted by the General Assembly of the Organization of American States (OAS)⁸³ recognize natural disasters as a major cause of internal displacement in line with the Guiding Principles, and call in particular for reducing disaster risks and considering the Hyogo Framework and the IASC Operational Guidelines on Human Rights and Natural Disasters.⁸⁴ In 2010, the OAS urged States, ‘in the care they provide to internally displaced persons, to protect their human rights through a

⁷⁸ UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, above note 76. Some Governments feel uneasy applying the notion of IDPs as contained in the Guiding Principles to those displaced by natural disasters as they perceive IDPs a conflict-related group. See R. Cohen and M. Bradley, ‘Disasters and Displacement: Gaps in Protection’, *International Humanitarian Legal Studies*, Vol. I 2010, pp. 102-103.

⁷⁹ 2005 World Summit Outcome, UNGA Res. 60/1, 2005, para. 132; 62/153, para. 10; and Res. 64/162, para. 11; and Human Rights Council Res. 6/32, para. 5 and Res. 14/6, para. 9.

⁸⁰ An increasing number of states are developing national instruments on internal displacement or particular aspects thereof (*Africa*: Angola, Burundi, Liberia, Sierra Leone, Sudan, Uganda, Kenya [draft]. *Asia*: India, Sri Lanka, Nepal, Tajikistan, Philippines. *Americas*: Columbia, Peru, Guatemala, USA. *Europe*: Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Serbia, Russia, Turkey. *Middle East*: Iraq, Yemen [draft]). Nansen Principle VIII encourages States to ensure the adequate implementation and operationalization of the Guiding Principles through national legislation, policies and institutions. See Nansen Principles, above note 16, Principle VIII.

⁸¹ At the time of completion of this paper, 11 States had notified their ratification of the Convention, which will enter into force after its 15th ratification.

⁸² Article 1(4) of the Protocol includes natural or human-made disasters as cause of displacement and demands Member States in Article 3(2) to mitigate the consequences of displacement caused by natural disasters and natural causes.

⁸³ E.g., OAS AG/RES. 2508 (XXXIX-O/09), June 2009, operative paras 1, 7-8 and OAS AG/RES 2578 (XL-O/10), June 8, 2010, operative paras. 1, 6-8.

⁸⁴ The Guidelines were revised in 2010. See, IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, UN Doc. A/HRC/16/43/Add.5, 31 January 2011, available online at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.43.Add.5_English_only.pdf and http://www.brookings.edu/reports/2011/0106_operational_guidelines_nd.aspx (last accessed 15 October 2011).

comprehensive approach to disaster relief, particularly in disasters and for reconstruction of the communities affected by natural disasters, consistent with international human rights law and domestic law, taking into account the Guiding Principles on Internal Displacement'.⁸⁵ The Council of Europe in a recommendation on environmentally induced migration and development adopted in 2009, recommends incorporating the Guiding Principles on Internal Displacement into national law.⁸⁶

2. Those who decide to leave their homes and places of habitual residence because of effects of climate change, such as a deteriorating environment negatively affecting the production of food, but are not forced to leave or flee as life still would be possible there, are *internal migrants*. They can be distinguished from other migrants who leave for purely economic reasons insofar as their movement is part of individual or family/community strategies to adapt to the effects of climate change.

No specific provisions protecting internal migrants exist. However, these persons are covered by applicable standards of human rights law. In particular, internal migration itself is protected by the freedom of movement and right to choose one's residence.⁸⁷ This right, while not absolute, shall not be subjected to restrictions except when this is provided for by law and necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other human rights.⁸⁸

3.3.2.2 Cross-border movements of persons

Cross-border displacement and migratory movements in the context of climate change, however uncertain in scale at the current stage, is already taking place and will likely increase over time,⁸⁹ but unlike for IDPs no comprehensive normative framework exists. As climate change and disaster-related movement is likely to become more diverse and new patterns will emerge, the question arises as to whether and how present international law and existing systems of protection already address, or could be used to deal with these new movement patterns.⁹⁰ While

⁸⁵ OAS AG/RES 2578 (XL-O/10), June 8, 2010, operative para. 6.

⁸⁶ Council of Europe Recommendation 1862 (2009) on 'Environmentally induced migration and displacement: a 21st-century challenge', para. 6.4. In para. 6.5. the Parliament Assembly of the Council of Europe encourages the UN and its partners to 'seek avenues for extending the Guiding Principles to include people displaced by gradual environmental degradation (...)' overlooking that environmental degradation is a slow on-set natural disaster and with that already an acknowledged cause of internal displacement in Council of Europe, Committee of Ministers Recommendation (2006) 6 on internally displaced persons.

⁸⁷ Article 12 International Covenant on Civil and Political Rights of 16 December 1966, 99 UNTS 171 (ICCPR).

⁸⁸ Article 12 (3) ICCPR.

⁸⁹ Cohen/Bradley, above note 78, 97. V. Kolmannskog, 'Climate change, disaster, displacement and migration: initial evidence from Africa', New Issues in Refugee Research, Research Paper No. 180, December 2009, mentions the cases of people moving from Somalia to Kenya (p. 9) and from Burundi to Rwanda (p. 12).

⁹⁰ Cohen/Bradley, above note 78, 97-98, argue that this long-standing international set up will be challenged by natural disasters and may need to be expanded to accommodate the different forms of movements.

the existing gaps will be discussed below,⁹¹ the following provides an overview of categories of norms that are contained in international and regional treaties or customary law and potentially apply to those having moved across borders:

- a. *International human rights law* is the body of law applicable in times of peace and of armed conflict. Some provisions are derogable to the extent and as long as this is necessary 'in time of public emergency which threatens the life of the nation',⁹² a condition that may exist, for instance in situations of sudden-onset disasters or violent conflict over diminishing resources.⁹³ Everyone is protected by human rights law by virtue of being a human being, and as such persons on the territory of a foreign state and stateless persons are also protected. The non-refoulement provisions of human rights law may prove particularly significant in this regard.⁹⁴ At the 2011 Nansen Conference, the importance of human rights principles, and in particular the prohibition of *non-refoulement*, was highlighted as a possible protection framework for those displaced across borders not falling under the refugee protection regime.⁹⁵ Human rights protection, while important, is however a minimalist protection system. In particular, it does not regulate admission into a foreign state and provides no clear answer as regards the status such persons should be accorded during their stay abroad. The legally non-binding Universal Declaration of Human Rights provides in Article 14 for the right to seek and enjoy asylum, but not to receive it, as this remains a sovereign decision of the state. In contrast, Article 18 of the EU Charter of Fundamental Rights guarantees the right to asylum but limits it to cases of persecution as defined by the 1951 Refugee Convention and its 1967 Protocol.⁹⁶ In addition to the general human rights provisions, there are a number of specific treaties relevant for persons moving or displaced to another country. Particularly important is the International Convention on the Protection of the Rights of All Migrant Workers and Their Families, as it may offer protection to some who have crossed borders in the context of climate change. However, it only applies if the individual concerned is a 'migrant worker', i.e. a 'person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national' and his or her family members.⁹⁷ Furthermore, the number of states that have become party of this Convention is very limited.⁹⁸ Deploring a general gap regarding the protection of the

⁹¹ Below, Part 2, section 2.2.

⁹² Article 4 (1) ICCPR. Similar: Article 15 European Convention on Human Rights (hereinafter: ECHR).

⁹³ Above, Scenarios 1 and 5, *supra* Part 1, section 1.3, sub-section 1.3.2.

⁹⁴ Below, 27-29.

⁹⁵ See Nansen Conference, Chairperson's Summary, above note 16, para. 22.

⁹⁶ Convention relating to the Status of Refugees of 28 July 1951, 189 UNTS. 137 (hereinafter: 1951 Convention), Protocol relating to the Status of Refugee of 4 October 1967, 660 UNTS 267.

⁹⁷ Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, 2220 UNTS 93.

⁹⁸ 45 States parties as of 16 October 2011.

rights of migrants, there are efforts to explore possible avenues to strengthen their rights though with limited success so far.⁹⁹

- b. *International refugee law* applies to persons who have been compelled to flee across borders and provides for a specific status and ensuing status rights. As such, refugee law exclusively protects non-nationals of a state and stateless persons. 'Refugee' is a legal term defined in the 1951 Convention on the Status of Refugees and its 1967 Protocol as a 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.'¹⁰⁰ As will be shown below,¹⁰¹ this notion covers persons displaced by effects of climate change in specific cases only.
- c. At the *regional level*, the 1969 African Convention Governing the Specific Aspects of Refugee Problems in Africa¹⁰² contains the same definition but then expands it by including 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. The 1984 Cartagena Declaration on Refugees¹⁰³ adds the criterion of 'massive violation of human rights'. The Arab Convention on Regulating Status of Refugees in Arab Countries of 1994 also contains a broader definition of refugee. This broader notion is drafted in a particularly interesting way as it encompasses persons who unwillingly took refuge abroad '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'. In Europe, the European Asylum Acquis, in particular the Temporary Protection Directive would need further analysis and political commitment by the EU member States and the Union's organs to be activated. The Temporary Protection Directive¹⁰⁴ provides for the possibility of 'giving temporary protection in the event of a mass

⁹⁹ An International Migrants Bill of Rights was recently proposed by a group of academic researchers: see IMBR Network, International Migrants Bill of Rights, *Georgetown Immigration Law Journal* Vol. 24 No. 3, Spring 2010, 400. Draft Article 1 defines a migrant as everyone 'who has left a State of which he or she is a citizen, national or habitual resident'. Such a broad definition would obfuscate the very different protection and assistance needs of economic migrants, persons who migrate as an adaptation strategy or in the context of regular migration schemes, and persons forced to cross borders.

¹⁰⁰ Article 1 (A) (2) 1951 Convention.

¹⁰¹ Below, Part 2, section 2.2, sub-section 2.2.2.

¹⁰² Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

¹⁰³ Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II .66/doc.10, rev. 1, 190-93 (1984-85).

¹⁰⁴ European Union, 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

influx of displaced persons from third countries who are unable to return to their country of origin' (Article 1), a notion broad enough to at least cover some categories of persons displaced abroad by effects of climate change, even though the non-exhaustive definition of 'displaced persons' (Article 2, letter c) does not mention such situations.^{105,106} Overall, the degree to which refugee law helps to address normative gaps remains very limited and will be further explored below.¹⁰⁷

- d. The *Convention on the Status of Stateless Persons*¹⁰⁸ of 28 September 1954 may become important in the case of loss of territory and the end of statehood. Public international law traditionally set population, effective state authority and state territory as the three constitutive elements of statehood.¹⁰⁹ What remains unclear, however, is whether a state would cease to exist with its submersion, an issue to be examined in detail below.¹¹⁰ Article 1 of the Convention defines stateless person as 'a person who is not considered as a national by any State under the operation of its law'.¹¹¹ The protection provided by the law on statelessness is modest: a right to admission or stay on the territory is not foreseen. The state of domicile or residence offers a set of status rights to stateless persons and as far as possible facilitates their naturalization.
- e. *International humanitarian law* governs situations of international and non-international armed conflict and is therefore of no practical relevance in the protection of persons moving

between Member States in receiving such persons and bearing the consequences thereof, OJ, L 212, 7.8.2001, 12-23.

¹⁰⁵ Article 2 Council Directive 2001/55/EC: '(c) 'displaced persons' means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, *in particular*: (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights' (emphasis added).

¹⁰⁶ In contrast, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ, L 304, 30.09.2004, 12-23, only covers persons threatened by '(a) 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 internal armed conflict' (Article 15 in conjunction with Article 2(e)).

¹⁰⁷ Below, Part 2, section 2.2, sub-section 2.2.2. At the Nansen Conference 2011, the limited protective coverage of the protection regime to cross-border displacement was acknowledged. See Chairperson's Summary, above note 16, para. 20.

¹⁰⁸ Convention relating to the Status of Stateless Persons of 28 September 1954, 360 UNTS 117.

¹⁰⁹ It is argued that the international recognition as a State is the fourth constitutive element of statehood, but this remains contested.

¹¹⁰ Below, Part 2, section 2.2, sub-section 2.2.4.

¹¹¹ This notion is restated in Article 1 of the 2006 European Convention on the Avoidance of Statelessness in relation to State Succession.

across borders in the context of climate change. This is also true for scenario 5 above, unless the country of refuge is a party to the conflict.

4. GAPS IN THE PRESENT PROTECTION REGIME

4.1. LACK OF AN AGREED TERMINOLOGY

A first gap in the present normative framework is the lack of an agreed – or even binding – terminology. In the absence of terminological clarity for those having crossed borders in the wake of climate change impacts, terminological invention has begun early on: such persons have often been referred to as ‘environmental refugees’, ‘climate refugees’ or subsumed under a notion of ‘environmental migrants’.¹¹² The 2011 Nansen Conference noted the lack of an agreed terminology and stressed that misleading and inaccurate terms such as ‘climate refugee’ or ‘environmental refugee’ should be avoided. The Conference recognized, however, the need to clarify terminology.¹¹³

In 1985, the UN Environmental Programme proposed to call ‘environmental refugees’ ‘people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life’.¹¹⁴ This terminology has been contested by, *inter alia*, UNHCR which has expressed serious reservations as it has no basis in international refugee law and could potentially undermine this legal regime.¹¹⁵ Others have stressed that in most cases, environmental factors are just one reason why people are displaced, with ‘a wide range of economic, social and cultural factors’ including the vulnerabilities of affected communities or the lack of governmental capacity to properly respond to disasters being equally important.¹¹⁶

A more recent notion of ‘environmental migrant’ referring to ‘persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their homes or choose to do so, either temporarily or permanently, and who move either within their country or abroad’¹¹⁷ as offered

¹¹² For a more comprehensive discussion of proposed notions, see Ammer et al, above note 18, 16-23.

¹¹³ See Nansen Conference, Chairperson’s Summary, above note 16, para. 21.

¹¹⁴ Essam El-Hinnawi, ‘Environmental Refugees’, UNEP 1985, p. 4.

¹¹⁵ UNHCR, above note 72, 7. Similarly Castles, above note 33, 241.

¹¹⁶ Castles, above note 33, 241. Similarly, Piguet, above note 31, 3.

¹¹⁷ IOM, Discussion Note: ‘Migration and the Environment’, 94th Session of the IOM Council, Doc. No. MC/INF/288, 2007, para. 6. See also IOM, ‘Glossary on Migration’, 2nd edition, *International Migration Law* No. 25, 2011, 33. At the same time, IOM at 34 is suggesting the term ‘environmentally displaced persons’ as ‘[p]ersons who are displaced within their country person of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one’ to describe persons whose movement clearly was forced. It is unclear,

by the International Organization of Migration (IOM) is even more problematic. This notion risks undermining existing protection frameworks, particularly for internally displaced persons, as it does not distinguish between internal and cross-border movements of persons. It also obfuscates the distinction between forced and voluntary movements that is important from a legal protection perspective.¹¹⁸ While it is true that social scientists often use migration as a generic term encompassing both voluntary and forced movements,¹¹⁹ international law does not use the term 'migrant' in the context of forced movements but refers to 'displaced persons' and 'refugees'. At the same time, the legal term 'migrant worker' denotes one, albeit particularly important sub-category of voluntary movement, suggesting that the hitherto not defined term 'migrant' should be used for persons migrating voluntarily.

Renaud, based on the notion proposed by IOM, suggests three sub-categories. The 'environmental emergency migrant' refers to persons displaced by an environmental event if they remain within state borders, as well as persons displaced across borders. The 'environmentally forced migrant' is a person who has to leave his or her home 'in order to avoid the worst of environmental deterioration' or a person with no option to return to his or her former home. The urge to leave is weaker for this category than in the first category, but still exists to an extent that justifies qualifying such movement as forced. This category seems to also cover at least certain persons migrating as a form of adaptation. The third category consists of 'environmentally motivated migrants', who still have an option whether to leave their home in the context of deteriorating environments, or who initially were qualified as environmental emergency migrants but have a real return option.¹²⁰ This distinction is drawn in light of the necessity to offer differing responses to the situation of these three categories.¹²¹ While such sub-categorization of the broad and all-encompassing IOM notion does draw the necessary distinction between forced and voluntary movement, it does not correspond to existing international legal frameworks applicable to different categories of people. For example, an environmental emergency migrant would lose protection if return would be assessed as real option, even though s/he would qualify for protection as an IDP under the UN Guiding Principles on Internal Displacement, including the right to opt for local integration or settlement in another part of the country, and would enjoy this protection until a durable solution in fact has been achieved. Another weakness is that these categories apply to internal as well as to cross-border movement without taking account of fundamental differences in applicable legal frameworks.

however, whether this category is separate from the one of 'environmental migrants' or a subsidiary category thereto. Furthermore, this notion risks undermining agreed terminology for internally displaced persons.

¹¹⁸ See also Cohen/Bradley, above note 78, 108 also contesting this notion for its blindness towards protection.

¹¹⁹ See, e.g., R. Zetter, 'Protecting People Displaced by Climate Change: Some Conceptual Challenges', in J. McAdam, *Climate Change and Displacement, Multidisciplinary Perspectives*, (Oxford/Portland 2010), 131-150, in particular at 140-141.

¹²⁰ See Renaud et al, above note 72, 14-15.

¹²¹ Ibid., 17.

The terminological debate amongst humanitarian, migration management and development actors and the difficulties to achieve consensus is to a considerable extent related to mandate issues and responsibilities of the respective institutions, who are trying to defend their own position.¹²²

In this study, we do not purport to come up with new definitions but rather to talk in a descriptive fashion about ‘persons displaced across borders’ when referring to involuntary movements, and ‘migrants’ or ‘persons migrating abroad’ when discussing voluntary movements.

4.2. NORMATIVE GAPS¹²³

4.2.1 Internal Displacement: Norms, but Weak Implementation

As mentioned above, it is likely that displacement and migration due to climate change impacts as per the scenarios above are, to a very large extent, movements within the territory of affected states. Those forced or obliged to move are internally displaced persons falling within the ambit of application of the UN Guiding Principles on Internal Displacement, and they enjoy general human rights protection. Voluntary internal migration is covered by human rights law and, in particular, the right to freedom of movement and to choose one’s residence. Distinguishing between those forced or obliged to move and those moving on a voluntary basis will require the development of specific criteria.¹²⁴

Thus, while a protective legal framework exists, it has its limits as the Guiding Principles remain to date a soft law instrument, despite the fact they have been internationally recognized as an important document for the protection of IDPs.¹²⁵ The protection of and assistance to internally displaced persons need to be further strengthened by implementing the Guiding Principles through the development of national laws and policies that acknowledge natural disasters, or climate change-related events more generally as causes of internal displacement. In this sense, the Nansen Principles encourage states ‘to ensure the adequate implementation and operationalization of these principles through national legislation, policies and institutions’.¹²⁶

¹²² Extensively on these terminology challenges, see Council of Europe, Report by the Committee on Migration, above note 13, para. C-47-78.

¹²³ The following is based on W. Kälin, above note 1, 86-92.

¹²⁴ Below, Part 3, section 3.2, sub-section 3.2.2.

¹²⁵ Above note 76.

¹²⁶ Nansen Conference, above note 16, Nansen Principle VIII.

4.2.2 Displacement Across Borders: Why Refugee Law Does (Not) Apply

International refugee law provides strong protection for people fleeing abroad insofar as it contains the prohibition of *non-refoulement*, that is, it prevents the forcible return to a country of persecution (including non-rejection at the border of countries of refuge where this would lead to such return) and provides refugees with a legal status with attributed status rights.

However, international refugee law was not conceived to protect persons displaced across borders by the effects of climate change, even though they flee particular dangers and therefore may find themselves in a refugee-like situation.¹²⁷ The refugee definition of Article 1A(2) of the 1951 Refugee Convention¹²⁸ contains three key elements, namely (i) presence outside the country of origin, (ii) because of persecution on account of specific reasons (race, religion, nationality, membership of a particular social group or political opinion), and (iii) inability or unwillingness to avail oneself of the protection of one's country.

People displaced across borders by the effects of climate change obviously fulfill the first criterion of having crossed an international border. However, in most cases, they do not fulfill the criterion of being persecuted on account of any of the aforementioned grounds. Qualifying main polluters or even the international community as a persecutor would create substantial difficulties, because one would have to establish the causality between their action/inaction and the respective climate change impact in each individual case, something that is virtually impossible at the present stage of scientific knowledge.¹²⁹ It would also – as Jane McAdam puts it – reverse the refugee paradigm: 'This de-linking of the actor of persecution from the territory from which flight occurs is unknown to refugee law (...). Whereas refugees within the *Refugee Convention* definition flee their own government (or actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from – yet within – states that have contributed to climate change. This, in turn, poses another problem in terms of the legal definition of 'refugee' as in such cases the government does not turn against its citizens but rather wants to protect them'.¹³⁰ Thus, the narrow legal notion of refugee in the 1951 Convention

¹²⁷ Similar McAdam, above note 37, 12-14, elaborating on the limited relevance of the 1951 Convention and the regional refugee instruments.

¹²⁸ Convention relating to the Status of Refugees of 28 July 1951; 189 UNTS 137.

¹²⁹ On this issue see above, Part 1, section 1.2.

¹³⁰ J. McAdam, above note 46, 579. She further argues that even if refugee law may be an attractive ready-made tool for certain displacement contexts, it is not clear that refugee or refugee-like protection is indeed appropriate to respond to the rights and needs of the climate-related displaced. See also the Council of Europe in its Report by the Committee on Migration, above note 13, para. C-56, speaks of a different moral responsibility for climate change related displacement.

cannot generally guarantee protection to persons displaced across borders due to climate change impacts.¹³¹

Nevertheless, similar to persecution, climate change-related disasters and the unavailability of adequate food, drinking water or health services in their aftermath may constitute serious threats to life, limb and health. Thus, in a broader sense, those displaced by the effects of climate change may face similar dangers as refugees, albeit for different reasons. Still, from a legal perspective, there is an intrinsic difference between the two categories: international refugee law is rooted in the notion of the surrogate nature of international protection, i.e. the idea that persons persecuted by the state of origin can by definition no longer turn to its authorities to get protection, and thus depend on protection provided by the country of asylum in particular and by the international community in general. Persecution means that the country of origin of the refugee is unwilling, or in the case of persecution by non-state actors unable, to fulfill its basic duty of guaranteeing peace and security to its citizens thus destroying the 'bond of trust, loyalty, protection, and assistance between the citizen and the state [that] constitutes the normal basis of society'¹³² and is severed in the case of refugees. Robinson, writing in 1953, stressed that someone is not a refugee in the case of 'events which are being combated by the authorities, because in such cases there would be no reason for a person possessing nationality to be unwilling to avail himself of the protection of his country (...)'.¹³³ In this sense, in the case of cross-border displacement caused by effects of climate change, the country of origin normally does not turn against affected people but remains willing to assist and protect them – and even where authorities are unable to do this for lack of resources and capacity, they will usually try to get support from the international community.

The elements of the refugee definition contained in the 1951 Refugee Convention may, however, be fulfilled in certain cases:

- Situations of sudden- or slow-onset disasters (scenarios 1 and 2) if authorities deny any kind of assistance and protection to certain people because of their race, religion, nationality, membership of a particular social group or political opinion and as a consequence expose them to treatment amounting to persecution. The same is true where a climate-related impact meets the threshold of a persecution because it is the consequence of a respective governmental policy with a discriminate impact on a specific group of persons possessing such attributes¹³⁴, or where the destruction of the environment is intended to persecute a

¹³¹ This assessment seems to be shared by UNHCR. See UNHCR, above note 72, 2 and 5 also cautioning against the possibility of a renegotiation of the 1951 Convention as this may lead into a lowering of protection standards for refugees and undermine the regime as such, p. 7.

¹³² Andrew E. Shacknove, 'Who is a Refugee?' 95 *Ethics* 1985, p. 275.

¹³³ N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation, A Commentary* (Geneva 1953), 46.

¹³⁴ Similar J. McAdam, above note 46, 579.

particular group of persons.¹³⁵ Relevant persecution may also arise in contexts where disaster relief is highly politicized. Thus, for example, refugee status was granted by New Zealand's Refugee Status Appeals Authority to a woman activist from Myanmar who had a well-founded fear of being arrested and sentenced for, *inter alia*, having distributed humanitarian aid in areas affected by cyclone Nargis bought with money provided by foreign supporters of an opposition party.¹³⁶ Cases of prohibitions to live in a specific area (scenario 4) if: (1) the designation of zones prohibited for human habitation in itself would, in very exceptional cases, amount to relevant persecution if it is based on one of the five aforementioned grounds and has persecutory effects; or (2) where the creation of such zones is legitimate but forced relocation ensues, amounting to human rights violations and such violence is based on the race, religion, nationality, membership of a particular social group or political opinion of affected persons; or (3) relocated persons are left without any assistance and protection for the same reasons, resulting in grave dangers for the life and health of such persons.

- Situations of violence, serious human rights violations or armed conflict triggered by disputes over shrinking natural resources (scenario 5) if persecutory measures are based on the race, religion, nationality, membership of a particular social group or political opinion of affected persons. The fact that the underlying causes of the conflict are linked to climate change impacts is irrelevant as in cases of relevant persecution, refugee status has to be granted regardless of the root causes of a given armed conflict or violence. However, the 1951 Refugee Convention does not protect people fleeing the general dangers of violent conflict who are not targeted for any of the relevant five aforementioned grounds.

The regional instruments adopted in Africa and Central America contain a wider refugee definition covering people fleeing armed conflicts, generalized violence and events seriously disturbing public order¹³⁷ which is broad enough to cover most cases falling under scenario 5). In Europe, the EU Temporary Protection Directive provides people fleeing armed conflict with temporary protection in situations of mass-influx, and Article 15 EU Qualification Directive allows for subsidiary protection in cases of 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed

¹³⁵ Such as the Marsh Arabs in Iraq, who have suffered persecution during Saddam Hussein's regime through the intentional draining and desiccation of the Tigris-Euphrates marshlands in Southern Iraq (see Panel on Internal Displacement and the Marsh Arabs of Iraq, available online at: http://www.brookings.edu/events/2006/0301_iraq.aspx (last accessed 16 October 2011)). See on environmental persecution Council of Europe, Report by the Committee on Migration, above note 13, para. C-82. See also C. Marcs, 'Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm within the Meaning of the Refugee Convention', 24 *Am.U.Int'l.L.Rev* 2008, 32-71.

¹³⁶ Refugee Appeal No 76374, Decision of 28 October 2009 (B. L. Burson [member]), available online at: https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20091028_76374.pdf (last accessed 3 December 2011).

¹³⁷ See above notes 102 and 103.

conflict' as well as in cases of inhuman or degrading treatment in the country of origin;¹³⁸ The African Refugee Convention and the Cartagena Declaration have, because of their reference to serious disruption of public order, the potential to also cover situations of climate change-related and other natural disasters, provided their impact is severe enough to cause a breakdown of public order (scenarios 1 and 2). While such an interpretation is possible, 'it is not supported by the *opinio juris* of African states. Although regional practice has been to permit people who cross an international border to flee a natural disaster to remain temporarily (e.g. Congolese fleeing eruption of Mount Nyiragongo in 2002 and crossing into Rwanda), African governments have never characterized this as an obligation arising under the OAU Convention'.¹³⁹ Likewise, the Cartagena Declaration does not seem to have been understood as covering natural disasters.¹⁴⁰ However, it cannot be excluded that a process leading to an expanded interpretation of these instruments could be set in motion, even though there is currently no indication that this is happening. In any case, an expansive interpretation of the two instruments risks overstretching their meaning and would run contrary to the drafters' intention which did not mean to include natural disasters in their broader notions.¹⁴¹ The only document covering disaster induced cross-border displacement is, as indicated above, the Arab Convention on Regulating Status of Refugees in Arab Countries of 1994, which covers such situations if they lead to a serious disruption of public order. The Convention, however, has not gained much practical relevance.

We can conclude that apart from situations falling under scenario (5), present refugee law provides little protection for persons displaced across borders by the effects of climate change.

4.2.3 Migration Across Borders: The Limitations of Human Rights Law

Those not compelled to leave and able to return are migrants. As such they enjoy general human rights protection, but human rights law does not regulate their admission to a foreign territory, nor their continued stay there. Unlike refugee law, human rights law does not provide a specific legal status to migrants.

The International Convention on Protection of the Rights of All Migrant Workers and Members of their Families¹⁴² describes the term migrant worker as a 'person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national' (Article 2 (1)). This notion does not generally capture those who opted to leave their

¹³⁸ See above note 104.

¹³⁹ J. McAdam, 'Environmental Migration Governance', University of New South Wales Faculty of Law Research Series, 2009, Paper 1, 13-14, referring to A. Edwards, 'Refugee Status Determination in Africa', *African Journal of International and Comparative Law*, September 2006, Vol. 14, No. 2, 225-227.

¹⁴⁰ V. Kolmannskog, 'The Point of No Return - Exploring Law on Cross-Border Displacement in the Context of Climate Change', *Refugee Watch* No. 34, December 2009, p. 32.

¹⁴¹ See Cohen/Bradley, above note 78, 106-107.

¹⁴² See above note 97.

place of origin due to climate-related events, although some may qualify as such migrants as they will try to get engaged in livelihood activities abroad. But in the context of climate change, the quest for economic opportunities will often not be at the forefront, rather the need for assistance and protection. In particular, the Convention does not grasp the specific needs of those who use migration as part of their individual or family adaptation strategy. Moreover, this Convention does not give any right to be admitted or to remain in another country and thus provides very limited protection. In light of the low number of ratifying states, the protection potential of this Convention remains further curtailed.

Human rights law does provide an indirect right to be admitted and to stay where the removal of a person back to the country of origin would amount to inhuman treatment. The European Court of Human Rights has long derived from the right to protection against inhuman treatment under Article 3 ECHR, and from the protection of the right to life in Article 2 ECHR, a prohibition to forcibly transfer a person to a state where he or she would be exposed to the risk of being subjected to arbitrary deprivation of life, torture or other serious violation of fundamental human rights. According to this case law, expulsion and deportation to another state are prohibited when there are serious reasons to believe that the person concerned would be subjected to torture, killing or a similarly serious human rights violation.¹⁴³ The doctrinal basis of this jurisprudence is the idea that in all such cases it is not the behavior of the state of destination that is being adjudicated but that of the state whose authorities order the expulsion or deportation. Thus, it is the sending state that acts inhumanely and violates its obligations if and when, despite being aware of the danger, it sets a key element in the chain of events leading to torture, ill-treatment or death. At the UN level, the Human Rights Committee and the Committee against Torture follow the same approach.¹⁴⁴

The majority of these cases refer to situations where agents of state or non-state actors in the country of destination carry out serious human rights violations. However, in the case of *D. v. UK* the European Court of Human Rights recognized that Article 3 ECHR may also apply in exceptional cases 'where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the

¹⁴³ See e.g. *Soering v. UK*, ECtHR, A/161 (1989); *Ahmed v. Austria*, ECtHR, Reports 1996-VI; *H.L.R. v. France*, ECtHR, Reports 1997-III; *Vilvarajah and Others v. UK*, ECtHR, A/215 (1991); *Cruz Varas v. Sweden*, ECtHR, A/201 (1991); *Chahal v. UK*, ECtHR, Reports 1996-V.

¹⁴⁴ See UN Human Rights Committee, 'General Comment No.20' (1992); or individual cases, e.g., *Kindler v. Canada*, HRCttee, 470/1991 (1993); *Charles Chitah Ng v. Canada*, HRCttee, 469/1991 (1993); *Judge v. Canada*, HRCttee, 827/1998 (2003); *Byahuranga v. Denmark*, HRCttee, 1222/2003 (2004). The Committee against Torture bases its jurisprudence on Article 3 of the Convention against Torture, Inhuman or Degrading Treatment and Punishment containing an explicit prohibition of *refoulement*. See also McAdam, above note 37, 15-36 on the protection provided by human rights law. The author examines in addition to the human rights *non-refoulement* protection, the relevance of other human rights, but concludes that the *non-refoulement* protection is likely to be the strongest human right applicable.

standards of that Article',¹⁴⁵ i.e. where the individual concerned would be exposed to intense suffering. In this case, the deportation of a terminally ill patient suffering from AIDS in the last stage of the illness to the Caribbean island of St. Kitts was challenged. The Court explained that 'conditions of adversity' reducing the 'already limited life expectancy' of the person concerned, 'subject[ing] him to acute mental and physical suffering' were such to make deportation inhuman.¹⁴⁶

Arguably, this situation could be compared to cases of natural disasters, where people would be sent back to a life threatening situation (e.g. because the disaster has not ended yet or due to secondary hazards) or to a situation where they would not get any humanitarian assistance or where such assistance would be clearly insufficient and inadequate. However, the European Court of Human Rights and other relevant human rights bodies had not had yet an opportunity to decide such a case and it remains to be seen whether they would be ready to expand, in this sense, the notion of prohibited return. Interestingly enough, the Austrian Constitutional Court recently annulled a decision by the Asylum Tribunal that a rejected asylum-seeker could be sent back to his native Pakistan, arguing that the Tribunal had failed to examine under Article 3 ECHR whether the person concerned would have to go back to areas affected by the 2010 floods or would have been able to find a reasonable relocation alternative¹⁴⁷ Thus, while not determining the scope of Article 3 ECHR in cases of return to disaster-affected areas, the Constitutional Court affirmed, albeit without further reasoning, the applicability, in principle, of the prohibition of inhuman treatment to such returns.

Those forcibly displaced across borders also enjoy general human rights protection which, despite the human rights prohibition of *non-refoulement*, is seriously hampered by the absence of a right to be admitted or to stay on a foreign territory. Theoretically, such a person may become a 'person who is to be engaged (...) in a remunerated activity (...) in the foreign state, and thus qualify as a migrant worker, but the protection provided under the International Convention on Protection of the Rights of All Migrant Workers and Members of their Families does not include a right to admission and stay, nor does it correspond adequately to the needs of a person who is forced to flee.

¹⁴⁵ *D. v. UK*, ECtHR, Reports 1997-III, para. 49.

¹⁴⁶ *Ibid.*, para. 52: 'There is a serious danger that the conditions of adversity which await him in St. Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St. Kitts. (...) no evidence has been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients.'

¹⁴⁷ Bundesverfassungsgericht (Österreich), decision U84/11 of 19 September 2011, available online at: www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09889081_11U00084_00/JFT_09889081_11U00084_00.pdf (last accessed 3 December 2011).

4.2.4 The Case of Low-Lying Island States: The Limited Relevance of the Law on Stateless Persons

The ‘sinking’, i.e. destruction of low-lying small islands states will be gradual, meaning that in the initial phases, this slow-onset disaster will incite persons to migrate to other islands belonging to the same country or to other countries in search of better opportunities. If they migrate abroad, these persons are protected by human rights law, including guarantees specifically protecting migrant workers. However, they neither possess a right to be admitted nor to remain there, nor are they granted a specific legal status.

At a later stage, such movements take the character of forced displacement if the remaining territory is too small to accommodate the whole population, becomes uninhabitable or disappears entirely. At this point, return will become impossible and the population becomes permanently displaced to other countries. Those moving abroad will be left in a legal limbo, as they are neither migrant workers nor refugees.

The major difference between this situation and other slow-onset disasters is the fact that such small island states may cease to exist. Thus, the question arises as to whether their populations will become stateless and should be treated as such under the 1954 Convention relating to the Status of Stateless Persons.¹⁴⁸ Statelessness describes a factual situation, that of being without a nationality. Statelessness does not necessarily emerge or alter when people cross borders in the wake of climate-related impacts, but may emerge when the loss of all territory results in the end of statehood as could be the case of inundated small island states. Submersion of a whole territory will, however, be the end of a long and complex process and it is likely that the territory of a small island state would become uninhabitable long before its eventual submersion.¹⁴⁹ Submersion of the full territory or its partial and eventual complete inhabitability will lead to permanent cross-border migration and displacement. In case of loss of nationality with the end of statehood, a situation of *de jure* statelessness would emerge in which the 1954 Convention relating to the Status of Stateless Persons would apply with its minimal protection.¹⁵⁰ While this Convention would provide for a legal status providing important rights, it is silent on the issue of admission to another country, and thus does not address the key problem people displaced

¹⁴⁸ See Submission – ‘Climate Change and Statelessness: An Overview’, by the United Nations High Commissioner for Refugees (UNHCR), supported by the International Organization for Migration (IOM) and the Norwegian Refugee Council (NRC), to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) 1 to 12 June 2009, Bonn, Germany (dated 15 May 2009). For a deeper analysis see also, S. Park, ‘Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States’, UNHCR Legal and Protection Policy Research Series, May 2011.

¹⁴⁹ UNHCR, IOM, NRC, Climate Change and Statelessness: An Overview, above note 148, 2.

¹⁵⁰ See Cohen/Bradley, above note 78, 107.

from submerged small island states would face. Furthermore, the number of ratifications is low.¹⁵¹

In addition, it is far from clear that these people would really become stateless in a legal sense. According to Article 1 of the 1954 Convention, the term 'stateless person' means 'a person who is not considered as a national by any State under the operation of its law'. Statelessness thus means being without a nationality, not without a state. Citizens of small island states do not become *ipso facto* stateless as long as there is some remaining part of the territory of their state and the government continues to exist. As highlighted by McAdam/Saul, the notion of 'statelessness' in international law 'is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a State altogether'.¹⁵² Even where the whole territory of a country disappears, it is far from certain that its laws 'sink' with it.

In such cases, people from such states may become *de facto* stateless¹⁵³ but to treat them as *de jure* stateless persons would be problematic. While states, according to a traditional understanding, come into existence when they have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states,¹⁵⁴ they do not automatically disappear when one element cannot be established anymore. Rather, in contemporary international law, there is, as has been stressed by Crawford, 'a strong presumption against the extinction of states once firmly established'.¹⁵⁵ In the case of small island states, it is probable that their governments would try to retain at least a symbolic presence on their former lands, such as by building up a small island or surrounding it by dykes,¹⁵⁶ even if that land would be too small or under-resourced to host any significant part of the population, and would continue to grant citizenship. Some states, such as the Maldives, have discussed the possibility of obtaining new territory

¹⁵¹ 67 ratifications as of 16 October 2011.

¹⁵² J. McAdam and B. Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' in A. Edwards and C. Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge, (Cambridge University Press, 2009) 9.

¹⁵³ For this reasons, McAdam and Saul, *ibid*, 9 advocate a broader interpretation of the notion 'that would encompass people whose State disappears'.

¹⁵⁴ Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, Article 1, which is said to represent the position under customary international law.

¹⁵⁵ J. Crawford, *The Creation of States in International Law*, 2nd edn (Oxford, Clarendon Press, 2006) 715. On the extinction of States, see I. Ziemele, 'States, Extinction of' in Max Planck Encyclopedia of Public International Law, available online at: www.mpepil.com (last accessed 8 February 2012).

¹⁵⁶ According to J. McAdam, above note 43, 9, footnote 30, President Anote Tong of Kiribati has mentioned the possibility of moving the government to Banaba, the only high land in Kiribati from where people were relocated in the 1950s in favour of phosphate mining.

where their state could continue to exist.¹⁵⁷ Such governments would, thus, be unlikely to declare extinctions and withdraw their membership from the UN as long as they maintain a symbolic presence or continue to operate in exile.¹⁵⁸ It is also difficult to imagine that any other UN member state would want to tarnish their reputation by being seen as lacking any compassion for the dire fate of such states by asking for their exclusion from the UN or other international organizations.

Thus, it cannot be excluded that small island states will continue to exist as legal entities as long as they possess a government and a population maintaining citizenship, even if their territory has disappeared and nobody is ready to formally terminate their statehood. International law would be flexible enough to provide for the continued existence of such states as non-territorial entities, as evidenced by the Sovereign Order of Malta, a subject of international law that continues to survive to this day, even after it lost its territorial base in Malta when Napoleon Bonaparte occupied the island on 12 June 1798.¹⁵⁹ All that is needed is a consensus by the international community in this regard. However, even if statehood would formally continue and affected populations keep their nationality, their ability to exercise their citizens' rights would be seriously jeopardized as *de facto* stateless persons.¹⁶⁰

The key issue, therefore, is not the legal question of statelessness, but rather how one guarantees admission of citizens of submerged island states onto other countries on a permanent basis and how their rights can be secured in a way that avoids marginalization, regardless of whether or not they keep their nationality of origin. In this context, the question of the responsibility of the international community, in particular regarding relocation of whole communities, must be clarified as well. In other words, new law will be required if we are to spare these populations from becoming marginalized and disenfranchised inhabitants of their countries of refuge. The biggest challenge, however, concerns the issue of how to ensure that populations of affected small island states can continue to retain their identities as communities and to exist as viable

¹⁵⁷ See, for example, 'Sinking Island's Nationals Seek New Home' (11 November 2008), available online at: <http://edition.cnn.com/2008/WORLD/asiapcf/11/11/maldives.president/index.html> (last accessed 16 October 2011).

¹⁵⁸ State practice, as evidenced by the cases of Kuwait under Iraqi occupation 1990-91 or Somalia since 1991 until the creation of a Transitional Federal Government in 2004, does not readily assume extinction of a State because a government does not exist at a given moment or is in exile.

¹⁵⁹ F. Gazzoni, 'Malta, Order of' in Max Planck Encyclopedia of Public International Law, available online at: www.mpepil.com (last accessed 8 February 2012).

¹⁶⁰ UNHCR, IOM, NRC, Climate Change and Statelessness: An Overview, above note 148, 2. See Cohen/Bradley, above note 78, 107.

communities even after the loss of most or even all of their territory,¹⁶¹ an issue that goes beyond the scope of this study. As of today, effective responses to this challenge do not exist.

4.2.5 Conclusions: Normative Gaps and the Five Scenarios

Based on the above analysis, normative gaps can be identified for each of the above scenarios as follows:

1. *Sudden-onset disasters.* While such disasters may cause large-scale displacement and incur huge economic costs, the ensuing displacement need not be long-term, provided recovery efforts are effective and return in principle remains possible as a durable solution in many cases. While clearly, the vast majority of those becoming displaced by sudden-onset disasters will become internally displaced persons, some may nevertheless cross borders into other countries if this is their only escape route or if there are no protection and assistance capacities available, or these have already been exhausted or are provided on a discriminatory basis. These persons may not have any other option but to leave their home and country in order to survive in safety and dignity. Their movement is therefore forced, and except in cases of discriminatory refusal to provide life-saving humanitarian assistance or protection, these people will not meet the criteria of the refugee definition. They remain largely unprotected, with the exception of the human rights prohibition of forcibly returning them to a country where they would risk to be exposed to serious dangers for life and health. Otherwise, no specific protection exists for them in present international law. Some may opt to move abroad in the hope for better protection and assistance, despite the availability of adequate and non-discriminatory provision of protection and assistance in their home country. Such movement must therefore be qualified as voluntary. If these people engage in economic activities they are protected by the Migrant Workers Convention if they migrate to one of the few countries that have ratified that instrument. But even then, international law does not grant them a right to admission or continuing stay in the country of destination.
2. *Environmental degradation and slow-onset disasters.* Movements triggered by such disasters have traditionally been perceived as voluntary decisions to cope with and adapt to the changing environment of limited economic opportunities and deteriorated living conditions,¹⁶² at least in the early stages of the degradation and the disasters. Circular or seasonal migration of individual family members in order to sustain the survival of the family living in affected areas is likely to occur initially as an adaptation strategy.¹⁶³ These

¹⁶¹ On the social and cultural impact of displacement and relocation on affected communities see J. Campbell, 'Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land' in J. McAdam, *Climate Change and Displacement, Multidisciplinary Perspectives* (Oxford/Portland 2010), 57- 79.

¹⁶² See Cohen/Bradley, above note 78, 97.

¹⁶³ See G.Hugo, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific' in J. McAdam, *Climate Change and Displacement, Multidisciplinary Perspectives* (Oxford/Portland 2010), 13-15.

people are migrants with no right to admission to another country and little protection apart from the Migrant Workers Convention. With increasing hardship, economic migration by a family member will prove insufficient because the survival of the whole family can no longer be ensured. With worsening environmental degradation, the movement of persons will lose its economic character and become increasingly involuntary. The movement of a whole family away from their homes and lands can be an indicator of the involuntary character of such movements. If the areas become uninhabitable because of complete desertification, submerged coastal zones or inundation, then population movements will amount to forced displacement and become permanent. However, this scenario is also likely to result in internal displacement and migration, rather than cross-border movements. Where people move across borders, they – according to present international law - have no right to admission, receive no specific status and can be sent back to the country of origin except where this would appear to be inhuman in light of the serious risks to the life and health of affected persons.

3. *Small island states.* Areas of small island states, in particular low-lying coastal zones, will initially be affected by rising sea levels and may become slowly uninhabitable because of recurrent high floods, erosion of coastlines and increased levels of salt affecting groundwater and previously fertile soil. It is likely that the movements of persons will initially remain internal, but with inundations progressing, the remainder of the territory will no longer accommodate the whole population or such states will eventually become completely uninhabitable or disappear as a whole. When this happens, the population will have to move to other islands belonging to the same state where these exist, or cross international borders where they are unable to return, becoming permanently displaced to other countries. Naturally, the affected population does not necessarily wait until the point of no return to move away from their homes and so it is likely that movements, whether internal or cross border, will initially be of a migratory character and part of an adaptation strategy, before they turn into forced movements.¹⁶⁴ In both cases, international law, as outlined above, does not provide sufficient protection. In particular, admission of these people will largely depend on the goodwill of other states. In the case of the whole state territory becoming uninhabitable or disappearing, the continuous existence of such a state becomes questionable with the potential for *de facto* statelessness. However, it is far from clear whether affected persons would meet the legal definition of stateless persons, and even if they would, the 1954 Convention on the Status of Stateless Persons would not provide them with a right to be admitted to or stay in a particular country.

¹⁶⁴ The IPCC however indicated that adaptation policies are likely to be limited in this scenario, in 'Climate Change 2007, Fourth Assessment Report', 317.

4. *Zones prohibited for human habitation.* Following a decision to declare an area as a high risk zone too dangerous for human habitation or uninhabitable due to its use for mitigation or adaptation purposes, people will have to evacuate these areas and/or be prohibited from returning. The Nansen Conference identified a gap in adequate guidance on rights-based planned relocation and warned against resorting to involuntary relocation. It further stressed that such relocation needs to be implemented in a non-discriminatory manner and in partnership with those affected.¹⁶⁵ Internal displacement will be the consequence of such governmental action, triggering the authorities' responsibility to provide the displaced with a durable relocation or local integration solution. In the absence of such durable solutions, the displacement will become protracted and entail the risk of people returning spontaneously to these areas, risking their lives and integrity and potentially triggering the responsibility of the state. Cross-border movements are less likely in this scenario but may occur, for instance, if proposed relocation areas are unsuitable or if no durable alternatives in line with human rights standards are offered to the affected population at all. If the designation of the zones leads to discrimination of the population affected, in particular in combination with an absence of viable alternatives, cross-border movements may also occur. In this context, particular problems may exist where indigenous peoples, pastoralists and other communities with particular attachment to land are affected. The character of their movement is unclear and will probably require individual determination as to whether such acts may amount to individual persecution relevant under refugee law.
5. *Unrest, violence, armed conflict.* Social tensions turning into civil unrest, violence and even armed conflict over scarce resources may be one sub-scenario. Violence and conflict may on the other hand also further a disaster, such as a famine, for example when the little available arable land falls in a conflict zone and cannot be or is not anymore used for its original purposes. Both sub-scenarios have a certain potential for internal and cross-border movements, forced and voluntary. Finally, a violent break out may occur in an area that is already affected by a disaster without a direct link to it. Persons fleeing violence and conflict across frontiers may qualify as refugees in need of international protection as foreseen in the 1951 Convention relating to the Status of Refugees or the respective regional instruments. Some may not qualify as refugees in the strict sense of the 1951 Convention, but may receive regional protection through the broader notion of refugee contained in the regional instruments in Africa and Central America¹⁶⁶ or subsidiary and temporary protection in other regions.

We can conclude that serious normative gaps exist regarding persons moving across international borders as a consequence of climate change-related events. These normative gaps

¹⁶⁵ Nansen Conference, Chairperson's Summary, above note 16, para. 12 and Principle VII.

¹⁶⁶ See above notes 102 and 103.

were also acknowledged at the Nansen Conference.¹⁶⁷ In particular, the following set of critical legal issues remains unaddressed:

Firstly, the legal status and level of assistance and protection will depend on the character of the movement, requiring the development of criteria to better distinguish between forced and voluntary movements of persons. One could ask whether those moving voluntarily and those being forcibly displaced across borders should be treated differently not only as regards assistance and protection while away from their homes, but also as regards their possibility to be admitted to other countries and remain there at least temporarily. International law does in fact differentiate between these two groups in many regards. However, the question arises as to whether the clear legal distinction between migration and displacement/flight is properly capturing the reality of migration as an adaptation strategy which lies somewhere in between these two categories.

Secondly, the right to be admitted and to stay on foreign territory is not guaranteed for those migrating or being displaced in the context of climate change, with the exception of those who qualify as refugees. The only exception is the prohibition - derived from the human rights prohibition of inhuman treatment - of forcible return of people to a country where they would be exposed to serious risks to life and health.

Thirdly, the legal situation and the rights of persons on a foreign territory are only addressed through human rights law, but the specific needs of those migrating as a measure of adaptation or being displaced across borders are not taken into account. A set of status rights for such persons is missing in international law and their legal position will also depend on the characterization of their movement as voluntary or forced.

4.3 OPERATIONAL AND INSTITUTIONAL GAPS

One consequence of existing legal gaps is the fact that people moving across borders in the wake of climate-related hazards may often find themselves in a situation of limbo. However, this is not only linked to the lack of appropriate normative frameworks for such persons, but also to institutional gaps in responding to their protection and assistance needs. In other words, no one feels in charge of these persons who are neither just 'ordinary' migrants nor refugees and thus cannot be identified in terms of status and applicable legal framework. *Ad hoc* and unsystematic approaches in the operational response bear many risks for the rights of the affected population.

In this context, it is important to see that unlike in refugee situations, the country of origin maintains a critical role and responsibility towards people who have crossed into another state, as these people have generally not broken ties with their home country. Thus, in the absence of

¹⁶⁷ Nansen Conference, Chairperson's Summary, above note 16, para. 23 and Principle X.

an ability to assist and protect them, it should advocate for and safeguard their interests in the state in which they have found refuge, for example by activating a temporary protection scheme where possible or even necessary.¹⁶⁸ Inter-state cooperation between countries of origin and of refuge, a tool frowned upon in refugee settings, is relevant in this context. Regional and sub-regional organizations also have an important role as it is predicted that climate change will affect certain regions more than others and in specific ways, and its impacts will not stop at state frontiers. More generally, unless states include in their national disaster management laws provisions acknowledging and addressing displacement as one effect of natural disasters, and through inter-state and regional cooperation envisage protection measures and systems to address a potential situation of cross-border displacement, the legal gaps will translate into operational gaps in addressing the specific needs of those affected.

A lack of coherent institutional response at the international level, in particular of humanitarian and development actors, may exacerbate the situation of the affected persons. No agency has so far assumed a responsibility for persons displaced across borders in the context of climate change. IOM's approach is to subsume everyone, whether forcibly displaced or not, across borders or not, under one single notion of environmental migrant, which has been criticized for neglecting the difference between 'forced' and 'voluntary' migration and thus giving 'insufficient attention to human rights protection'.¹⁶⁹ UNHCR's High Commissioner in his opening statement to the Executive Committee in 2009 proposed institutional leadership for disaster-induced IDPs which he saw as a logical and timely extension of the organization's leadership for the protection of IDPs in conflict settings, but in 2011, he had to accept that that "[a]n agreement has not yet been reached on a more predictable engagement in leading the protection cluster at country level in natural disasters, and so we will go on operating on a case by case basis, like in the past."¹⁷⁰ Despite the continuing limited role of UNHCR, it will be hard as a matter of principle to justify a protection involvement with internally displaced persons in a disaster context, but not with persons displaced across borders by the same event, particularly as cross-border displacement is closer to UNHCR's core mandate. A cautious approach to assuming such a broad responsibility is, however, justified in light of the potentially huge additional resources and specialized capacity that would need to be made available. Rather, the magnitude of the challenge suggests an inter-agency responsibility and approach to cross-border displacement and migration.

¹⁶⁸ See Cohen/Bradley, above note 78, 116-117.

¹⁶⁹ Cohen/Bradley, above note 78, 118-119.

¹⁷⁰ Opening Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, at the 60th Session of the Executive Committee of the High Commissioner's Programme (ExCom), Geneva, 28 September 2009, available online at: <http://www.unhcr.org/4ac314009.html> (last accessed 16 October 2011) and Opening Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, at the 62th Session of the Executive Committee of the High Commissioner's Programme (ExCom), Geneva, 3 October 2011, available online at: <http://www.unhcr.org/4e89a67b9.html> (last accessed 3 December 2011).

5. THE WAY FORWARD

5.1 ANALYSIS OF EXISTING APPROACHES

In the face of cross-border displacement and migration, states, organizations and private parties have started to develop approaches and proposals to best deal with the phenomenon, ranging from ad hoc responses to suggestions for a full-fledged new legal framework.

5.1.1 Domestic Level

Many countries have included provisions regarding assistance and protection for persons affected by natural disasters in their country, including internally displaced persons, in their disaster management legislation.

As regards cross-border displacement, there is some anecdotal evidence¹⁷¹ that some states have admitted and received displaced persons on their territory as a temporary measure on a very ad hoc basis, such as in the context of a flooding. This was done on humanitarian grounds, not due to obligations in a particular law or policy or even a bilateral or regional treaty.

Other states have enacted a system of temporary or subsidiary protection for disaster-induced cross border displaced persons.¹⁷² For example, the US Immigration and Nationality Act provides for the possibility to grant Temporary Protection Status (TPS) for nationals of a foreign state if (i) there has been an environmental disaster in the foreign state resulting in a substantial, but temporary, disruption of living conditions; (ii) the foreign state is unable, temporarily, to handle adequately the return of its own nationals; (iii) and the foreign state officially has requested such designation.¹⁷³ TPS was granted in the case of Hurricane Mitch that affected large parts of Central America in 1998; however, in other situations of similar severity, including the devastating 2008 floods in Haiti, this system was not activated. The Finnish Aliens Act also provides for subsidiary protection – subsidiary to granting asylum – to aliens in need of international protection because of an environmental disaster,¹⁷⁴ and temporary protection to foreigners in need of it and who are unable to return due to massive displacement as a result of

¹⁷¹ The authors, while looking at disaster-induced internal displacement in Mozambique in 2008, were told that in cases of severe flooding some people seek refuge in neighboring Zimbabwe and South Africa. See also V. Kolmannskog, above note 89, mentioning people crossing borders from Somalia to Kenya and Burundi to Rwanda to escape drought.

¹⁷² Nansen Conference, Chairperson's Summary, above note 16, para. 22.

¹⁷³ Immigration and Nationality Act (USA) 8 USC§ 244.

¹⁷⁴ Aliens Act 2004 (Finland) 301/2004, Section 88 (1): 'Aliens residing in the country are issued with a residence permit on the basis of a need for protection if the requirements for granting asylum under section 87 are not met but the aliens are in their home country or country of permanent residence under the threat of death penalty, torture or other inhuman treatment or treatment violating human dignity, or if they cannot return there because of an armed conflict or environmental disaster.'

an environmental disaster. Temporary protection is limited to three years.¹⁷⁵ A similar provision on subsidiary protection is contained in the Swedish Aliens Act, again with the entitlement to a residence permit.¹⁷⁶ Apparently, Argentina recently 'adopted legislation providing access to provisional residence permits for people who might not be able to return to their country of origin because of a natural or environmental disaster'.¹⁷⁷

These models have in common that their granting of temporary or subsidiary protection is not based on a legal entitlement of persons concerned but rather depends on the discretion of competent authorities. Thus, they do not provide a predictable protection tool to cover cases of cross-border displacement and are justified by humanitarian considerations rather than a rights-based approach.¹⁷⁸

Some states that are or fear being particularly affected by climate change have been calling for steps going beyond these approaches. Thus, the Maldives, in 2006, proposed amending the 1951 Convention relating to the Status of Refugees to include 'climate refugees', a demand supported by Bangladesh.¹⁷⁹ Kiribati has advocated for agreements with Australia and New Zealand allowing people to migrate there early on in order to build up Kiribati communities there that would be able to keep cultural traditions alive.¹⁸⁰

5.1.2 Regional Level

In Europe, the Parliamentary Assembly of the Council of Europe adopted Resolution 1862(2009) on environmental migration and displacement,¹⁸¹ which invited the Committee of Ministers to

¹⁷⁵ Ibid., Section 109 (1): 'Temporary protection may be given to aliens who need international protection and who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country or its neighbouring areas as a result of an armed conflict, some other violent situation or an environmental disaster. Providing temporary protection requires that the need for protection may be considered to be of short duration. Temporary protection lasts for a maximum of three years in total.'

¹⁷⁶ Aliens Act 2005 (Sweden), 716/2005, Chapter 4, Section 2(3) and Chapter 5, Section 1.

¹⁷⁷ See High Commissioner's Dialogue on Protection Challenges, 'Protection Gaps and Responses' (8-9 December 2010), Breakout Session 1: Gaps in the International Protection Framework, and in Its Implementation, Report by the Co-Chairs: H.E. Ambassador Darlington Mwape, Permanent Representative, Zambia, Mr. Volker Türk, Director, Division of International Protection, UNHCR, 4, available online at <http://www.unhcr.org/4d09e47a9.pdf> (last accessed 16 October 2011).

¹⁷⁸ See also Cohen/Bradley, above note 78, 131. McAdam, above note 37, 36-49, also analyses protection responses at the national level.

¹⁷⁹ J. McAdam, above note 43, 6.

¹⁸⁰ Ibid., p. 20.

¹⁸¹ Council of Europe, Parliamentary Assembly Recommendation 1862 (2009) on 'Environmentally induced migration and displacement: a 21st century challenge', (Reply adopted by the Committee of Ministers on 8 July 2009 at the 1063rd meeting of the Ministers' Deputies), Doc CM/AS(2009)Rec1862 final, 15 July 2009,. The resolution is based on a comprehensive report of the Committee on Migration, Refugees and Population, above note 13.

‘set up a working group, in co-operation with other European institutions, to carry out a comprehensive legal study on the gaps in existing international law and normative regulations with a view to an eventual elaboration of a European framework convention for the recognition of the status of environmental migrants, should this be deemed necessary’ (para. 6.2) and to ‘consider adding a new protocol to the European Convention on Human Rights (...), concerning the right to a healthy and safe environment’ (para. 6.3). The Resolution also urged member states to continue to incorporate the Guiding Principles on Internal Displacement (para. 6.4) and encouraged ‘the United Nations and its other relevant partners to seek avenues for extending the Guiding Principles to include people displaced by gradual environmental degradation, and to consider developing similar guiding principles or guidelines to cover the rights of those moving across international borders for compelling environmental reasons (‘external displacement’), (para. 6.5). The Committee of Ministers, while welcoming ‘the attention of the Assembly on this issue and shar[ing] its concerns’ indicated that it rather preferred to follow ‘closely developments in this field, particularly those within the framework of the United Nations and other international bodies’ than taking own initiatives and, in particular, rejected the idea of an additional protocol to the European Human Rights Convention.¹⁸²

At the level of the European Union, the Directorate-General for Climate Action (established in February 2010) is mainly concerned with technical aspects of dealing with climate change and reducing greenhouse gas emissions. A white paper on ‘Adapting to climate change: a framework for EU action’ implicitly recognizes that migration is one of the effects of climate change by suggesting that migratory flows be considered in the broader EU reflection on security, development and migration policies.¹⁸³ Until now, there seems to be no discussion about expanding the concept of temporary protection to persons displaced by natural disasters, despite such a suggestion made by the United Kingdom some years ago.¹⁸⁴ A basis for a more proactive policy could be provided by the so called solidarity clause of the EU’s Lisbon treaty providing in Article 188 R that ‘[t]he Union and its Member States shall act jointly in a spirit of solidarity if a Member State is (...) the victim of a natural or man-made disaster’. However, this clause does not address disasters in non-member states, and even in the case of a disaster in Europe, is limited to assistance to ‘a Member State in its territory’, i.e. does not cover instances of cross-border movement of persons in the context of disasters. More relevant is Article 10A, according to which the EU is committed to ‘work for a high degree of cooperation in all fields of international relations’, *inter alia*, ‘in order to: (...) assist populations, countries and regions

¹⁸² Ibid., paras. 1 and 9.

¹⁸³ EU Commission, White paper, ‘Adapting to climate change: Towards a European framework for action’, COM(2009) 147 final, 1 April 2009, p. 16.

¹⁸⁴ The UK Home Office stated in 2004 that ‘[t]he European temporary protection directive (...) will enable all European Member States to act quickly and in a coordinated manner in the rare event that people from another country need to be offered temporary assistance because of armed conflict or natural disasters in their home country’: Press release, ‘UK Plans in Place to Protect Victims of Humanitarian Disasters’ (20 December 2004).

confronting natural or man-made disasters', but this provision does not explicitly address admission of persons displaced by such disasters.

Africa has taken an active but also rather recent approach in addressing the many effects and impacts of climate change at the regional and sub-regional levels in various forums and through a number of bodies. The explicit inclusion of climate change as a cause of internal displacement in the African Union's 2009 Kampala Convention,¹⁸⁵ with its explicit obligation 'to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change,' (Article 5, para. 4) is an important step which, however, is limited to internal displacement. Nevertheless, it may constitute an expression of Africa's readiness to also find solutions for persons who have crossed borders. The African Union's Refugee Convention does not foresee climate change or more specifically natural disasters as a cause for cross-border displacement and respective protection needs. However, the Convention predates the current dialogue and may be open for a broader interpretation, although African states do not seem ready at the present stage to take such step.¹⁸⁶ Adaptation is key for the African continent and as such is stressed as a priority by the African Union¹⁸⁷ and by sub-regional African organizations such as the Southern African Development Community (SADC),¹⁸⁸ but not specifically with regard to cross-border displacement and migration. The Economic Community of the West African states (ECOWAS) is promoting a rights-based approach to address climate change challenges to protect affected populations, including migrants. The regional conference on protection-related challenges to climate change in West Africa recommended the drafting of a new legal instrument to ensure the protection for climate change displaced persons outside their country of origin.¹⁸⁹ No such draft is available at this time.

In Asia, the Association of Southeast Asian Nations (ASEAN) has identified the response to climate change and its adverse impacts as one of its priority areas of regional importance for 2009 – 2015. Under this umbrella, the development of an ASEAN climate change initiative is envisaged which includes policy and strategy formulation as one component. This initiative will be implemented by the established working group on climate change, composed of national

¹⁸⁵ See A. M. Abebe, 'The Kampala Convention and environmentally induced displacement in Africa', IOM Intersessional Workshop on Climate Change, Environmental Degradation and Migration, 29-30 March 2011, Geneva, Switzerland, available online at:

<http://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/SessionIII-Paper-Allehone-Mulugeta-Abebe.pdf> (last accessed 16 October 2011).

¹⁸⁶ See above, 26-27.

¹⁸⁷ AU-ECA, climate forum, joint press release, Addis Ababa, 12 October 2010 or Communique from the African Conference on Agriculture, Food Security and Climate Change, 8 September 2010, Bamako Declaration on the Environment for Sustainable Development 2010.

¹⁸⁸ SADC Communique by Ministers of Environment and Sustainable Development, 13 November 2009, para. 4.

¹⁸⁹ Lomé Declaration on Protection Challenges to Climate Change in West Africa, 15/16 September 2009, recommendation no. 5.

focal points.¹⁹⁰ At the political level, the environmental Ministers of ASEAN member states in their Singapore Resolution on Environmental Sustainability and Climate Change emphasize the importance of international cooperation ‘in understanding and adapting to the adverse impacts of climate change’.¹⁹¹

In the Americas, the Organization of American States (OAS) has recognized the negative effect that climate change impacts may have on the enjoyment of human rights. Mitigation to address this and strengthen the resilience and capacity of states and populations to adapt to the consequences of climate change are the three key components of the OAS’ political determination to counter climate change.¹⁹² However, these resolutions do not mention the issue of cross-border displacement and migration. In contrast, the OAS has highlighted the importance of protecting and assisting people displaced by natural disasters within their own country.¹⁹³ The 2010 Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas¹⁹⁴ does not contain any reference whatsoever to climate change or persons displaced by natural disasters, although it looks at current challenges in the area of protecting refugees and IDPs.

5.1.3 International Level

5.1.3.1 *Climate change negotiations*

At the international level, the most important step thus far was made in Cancún in December 2010, with Article 14 of the Cancún Outcome Agreement on Long-term Cooperative Action under the UN Framework Convention on Climate Change inviting states to enhance action on adaptation

¹⁹⁰ For further information, consult <http://environment.asean.org/index.php?page=overview> (last accessed 16 October 2011).

¹⁹¹ ASEAN Singapore Resolution on Environmental Sustainability and Climate Change, 29 October 2009, para. 17.

¹⁹² See Resolution by the OAS General Assembly on ‘Human Rights and Climate Change in the Americas’, AG/RES.2429 (XXXVIII-O/08), June 2008, operative para. 2 expressing the organization’s resolve ‘to pursue and step up the efforts being made from within the OAS to counter the adverse effects of climate change, and to increase the resilience and the capacity of vulnerable states and populations to adapt to the phenomenon of climate change.’ This resolution is based on earlier resolutions by the OAS General Assembly on ‘Climate Change in the Americas’ AG/RES.1674 (XXIX-O/99), ‘Natural Disaster Reduction and Response Mechanisms’ AG/RES.1682 (XXIX-O/99), ‘The Socioeconomic and Environmental Impacts of Climate Change on the Countries of the Hemisphere’ AG/RES.1736 (XXX-O/00) and AG/RES.1821 (XXXI-O/01), ‘Human Rights and the Environment’ AG/RES. 1819 (XXXI-O/01) and ‘Human Rights and the Environment in the America’s AG/RES.1896 (XXXII-O/02) and AG/RES.1926 (XXXIII-O/03).

¹⁹³ OAS AG/RES 2578 (XL-O/10), June 8, 2010, operative para. 6.

¹⁹⁴ Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, adopted on 11 November 2010 by the Governments of the participating countries from the Americas: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and the Bolivarian Republic of Venezuela, available online at: <http://www.unhcr.org/4cdd3fac6.html> (last accessed 16 October 2011)).

by undertaking, inter alia, (...) (f) Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels.¹⁹⁵

This agreement is relevant in several regards.¹⁹⁶ First, the international community recognizes for the first time the humanitarian consequences of climate change-related population movements as an adaptation challenge. Second, displacement can be expected to become part of national adaptation plans foreseen by the agreement,¹⁹⁷ thus providing an entry point for protection and assistance issues. Finally, the agreement recognizes that efforts addressing displacement need to be undertaken not only at the national but also regional and international levels, thus putting climate-related internal as well as cross-border displacement on the international agenda.

This is an important, albeit still limited step that needs to be followed up by discussions on appropriate normative regimes closing current protection gaps. The need to explore the implementation of Article 14(f) of the Cancún Agreement through different appropriate fora was echoed at the Nansen Conference 2011.¹⁹⁸ It remains to be seen to what extent the issue will be taken up and further discussed at future climate change conferences. In any case, the matter was not debated at the 2011 Durban Conference. Nevertheless, with the Cancún Outcome Agreement a consensus has been reached among states which can be built upon in other fora.

5.1.3.2 UN General Assembly and Security Council

In 2009, the UN General Assembly requested the UN Secretary-General to submit a comprehensive report to the Assembly on the possible security implications of climate change.¹⁹⁹ Unlike a previous report providing an overview of United Nations activities in relation to climate change,²⁰⁰ which paid only very little attention to the issue of human displacement and migration,²⁰¹ the report on possible security implications of climate change²⁰² highlights the relevance of population movements. It identifies population displacement and involuntary migration as well as loss of territory and ensuing statelessness or the risks to cultural survival of

¹⁹⁵ Article 14(f), Cancun outcome document of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention.

¹⁹⁶ For a deeper analysis of adaptation policy in the climate negotiations and its relevance for climate-related displacement, see K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', *UNHCR Legal and Protection Policy Research Series*, May 2011.

¹⁹⁷ See Long-term Cooperative Action under the Convention, paras. 14[a], 15 and 16.

¹⁹⁸ Nansen Conference, Chairperson's Summary, above note 16, para. 10.

¹⁹⁹ UNGA Res. 63/281, 3 June 2009.

²⁰⁰ Report of the Secretary-General, Overview of United Nations activities in relation to climate change, UN Doc. A762/644, 10 January 2008

²⁰¹ *Ibid.*, 13, referring to activities by UNHCR.

²⁰² Report of the Secretary-General on Climate change and its possible security implications, above note 6.

indigenous communities as threats to peace and security.²⁰³ The report stresses the need for anticipation, planning and preparedness to best manage such a situation²⁰⁴ and highlights the gaps in international law with regard to cross-border displacement. Finally, it notes the necessity of a new climate-focused legal framework on the protection of persons displaced across borders.²⁰⁵ In order to address the possibility of new cases of statelessness in the context of submerged small island states, the report highlights the principle of prevention of statelessness and suggests multilateral comprehensive agreements as a legal basis regulating admittance to identified territories, stay and the status of affected populations.²⁰⁶

The Security Council has not yet addressed climate change in a resolution, but is not negating that climate change has an impact on international peace and security. In its first ever debate on climate change impact on peace and security, population movements of a forced or migratory nature were identified by several state representatives as a consequence of climate change events with a possible impact on peace and security.²⁰⁷ In 2011, the Security Council considered the impact of climate change under the item 'maintenance of international peace and security'. While not directly referring to population movements, the Council expressed its concern over the potential of adverse climate change impacts, including those related to loss of territory, aggravating existing threats to international peace and security.²⁰⁸

5.1.3.3 *Human Rights Council*

The Human Rights Council commissioned a report from the High Commissioner on the relationship between human rights and climate change.²⁰⁹ The report alludes to internal and cross-border migration and displacement as a consequence of climate change impacts and highlights the applicability of human rights law to all affected people, but notes the insufficiency of this body of law regarding the right to admission to other countries.²¹⁰ Also, the report admits that human rights law does not provide clear answers on the situation of permanent displacement in the 'sinking island' scenario, but suggests long-term political solutions rather than new legal instruments.²¹¹ It recommends studying further existing protection mechanisms

²⁰³ Ibid., paras. 54-63 and 71-73.

²⁰⁴ Ibid., paras. 63 and 101.

²⁰⁵ Ibid., paras. 58-59.

²⁰⁶ Ibid., paras. 72 and 101.

²⁰⁷ Security Council, 5663d Meeting, 17 April 2007.

²⁰⁸ Statement by the President of the Security Council, UN Doc. S/PRST/2011/15, 20 July 2011.

²⁰⁹ HRC Res. 7/23, 28 March 2008. The World Bank has also issued a comprehensive study on human rights and climate change: S. McNerney-Lankford, M. Darrow, L. Rajamani, 'Human Rights and Climate Change, A Review of the International Legal Dimensions', World Bank Study, Washington D.C., 2011.

²¹⁰ Report of the Office of the UN High Commissioner for Human Rights on the relationships between climate change and human rights, above note 45, paras. 55-59.

²¹¹ Ibid., para. 60.

for the affected populations.²¹² The Human Rights Council, in 2009, took note of the report and recognized ‘that climate change is a global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change (...) is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts’, but did not mention climate change induced displacement.²¹³ This resolution was reiterated in 2011, again without any reference to the movement of persons.²¹⁴ The only references to this issue can be found in resolutions of the Human Rights Council with respect to internally displaced persons.²¹⁵

5.1.3.4 *International Law Commission*

The International Law Commission (ILC) decided in 2007 to include the topic ‘Protection of Persons in the Event of Disasters’ into its long-term work plan.²¹⁶ Based on a comprehensive memorandum by the Office of Legal Affairs²¹⁷, the appointed Rapporteur scoped the topic in his preliminary report to the Commission.²¹⁸ Already when scoping the topic, the Rapporteur encountered conceptual key challenges including with regard to the definition of disaster and the notion of protection. The definition of disaster as suggested in draft Article 3, while excluding armed conflict, is wide and defined by its consequences, i.e. widespread loss of life, great human suffering and distress or large-scale material or environmental damage thereby seriously disrupting the functioning of society, rather than by the event itself.²¹⁹ The purpose of the project is to ensure a combined rights and needs-based approach to disaster response.²²⁰ While it outlines the primary role and responsibility of states to assist and protect its

²¹² Ibid., para. 98.

²¹³ HRC Res. 10/4, 25 March 2009.

²¹⁴ HRC Res. 18/22, 30 September 2011.

²¹⁵ See, in particular, HCR Res. 14/6, 17 June 2010: The Human Rights Council ‘8. *Expresses concern* at internal displacement caused by natural disasters, exacerbated by the expected effects of climate change and by poverty, and recognizes the need for a human rights-based approach to early warning, disaster contingency planning, disaster management and mitigation, as well as efforts to find durable solutions.’

²¹⁶ Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10), para. 375. The UN General Assembly took note of this decision, see UNGA Res. 62/66, 6 December 2007.

²¹⁷ International Law Commission, ‘Protection of persons in the event of disasters’, Memorandum by the Secretariat, UN Doc. A/CN.4/590, 11 December 2007 with Add. 1, 2, 3.

²¹⁸ International Law Commission, ‘Preliminary report on the protection of persons in the event of disasters’, by Special Rapporteur Mr. Eduardo Valencia-Ospina, UN Doc. A/CN.4/598, 5 May 2008, paras. 43-58.

²¹⁹ International Law Commission, Protection of Persons in the Event of Disasters, Draft Articles 1-5, UN Doc. A/CN.4/L.758, 24 July 2009.

²²⁰ Draft Article 2, International Law Commission, ‘Protection of Persons in the Event of Disasters, Draft Articles 1-5’, UN Doc. A/CN.4/L.758, 24 July 2009. See also draft Articles 6-8 in this respect, International Law Commission, ‘Protection of Persons in the Event of Disasters, Draft Articles 6-9’, UN Doc. A/CN.4/L.776, 14 July 2010.

population²²¹ it also states a duty to cooperate with relevant international and national actors.²²² Once finalized, the work of the ILC may significantly contribute to the protection and assistance of persons affected by natural disasters, but as of now it looks like it will not address cross-border displacement and migration.

5.1.3.5 UNHCR

The Office of the UN High Commissioner for Refugees (UNHCR) has highlighted the legal gap for cross-border movers for several years. The existence of such a gap was again recognized at the 2010 Dialogue of the High Commissioner on Protection Challenges.²²³ Participants favored 'regional arrangements and regional preparedness, particularly with regard to sudden onset disasters' and recommended to 'consider how to fill normative gaps at the international level, based on existing good national and regional practices and drawing on other relevant bodies of international law' as well as to 'explore whether the approach taken in the Guiding Principles on Internal Displacement could be useful in addressing normative gaps'.²²⁴ The Office is further concerned about potential statelessness arising in the context of low-lying island states, and, in highlighting the principle of prevention, suggests to work towards multilateral comprehensive agreements that set out where and on what legal basis affected populations would be admitted and allowed to stay and what their status would be. As preparedness measures, the Office suggests the introduction, e.g., of educational measures or labor migration schemes.²²⁵

UNHCR was also addressing the protection gap in the area of cross-border movement in the context of the 2011 commemorations of the 1951 Refugee Convention and 1961 Statelessness Convention. As a first step, an expert meeting convened by UNHCR took place in *Bellagio* in February 2011 providing a good forum to the participants from 15 countries to discuss options addressing climate-related displacement, internal as well as across borders. With respect to internal displacement, participants felt that the Guiding Principles on Internal Displacement provide the necessary normative coverage;²²⁶ the value of regional instruments, such as the AU Convention or the Great Lakes IDP Protocol, to address regional specificities was stressed and the potential of regional forums for coordination and funding channelling was noted.²²⁷ Participants also highlighted the usefulness of the IASC Operational Guidelines on the

²²¹ Draft Article 9, International Law Commission, Protection of Persons in the Event of Disasters, Draft Articles 6- 9, UN Doc. A/CN.4/L.776, 14 July 2010.

²²² Draft Article 5, International Law Commission, Protection of Persons in the Event of Disasters, Draft Articles 1- 5, UN Doc. A/CN.4/L.758, 24 July 2009.

²²³ See High Commissioner's Dialogue on Protection Challenges, 'Protection Gaps and Responses', above note 177, 3.

²²⁴ *Ibid.*, 5.

²²⁵ UNHCR, IOM, NRC, Climate Change and Statelessness: An Overview, above note 148, 3.

²²⁶ UNHCR Bellagio Seminar, 'Summary of Deliberations on Climate Change and Displacement', '5, para. 19, available online at: <http://www.unhcr.org/refworld/docid/4d9f22b32.html> (last accessed 16 October 2011).

²²⁷ *Ibid.*, 6, para. 21.

Protection of Persons in Situations of Natural Disasters.²²⁸ At the same time, it was also stressed that the Guiding Principles need to be better disseminated to relevant government institutions and civil society actors, and that national law and policy-making would be an appropriate way to operationalize them.²²⁹ With respect to cross-border displacement, the normative value of existing international and regional human rights and refugee law instruments was noted but a clear legal gap acknowledged.²³⁰ It was suggested that '[i]n order to develop a more coherent and consistent approach to the protection needs of people displaced externally due to sudden-onset disasters, (...) states in conjunction with UNHCR develop a guiding framework or instrument'.²³¹ Participants felt that the Guiding Principles on Internal Displacement would be a useful template or point of reference for any such an endeavor.²³² With respect to slow-onset disasters, regional approaches were strongly recommended as the impact of such disasters would exceed the capacity of a single national jurisdiction, and the need for collaborative efforts by UNHCR, IOM, ILO and other relevant actors was also identified.²³³ The general importance of comprehensive regional approaches, including burden-sharing arrangements, was highlighted but participants also stressed that climate change and its impacts are a global challenge requiring global approaches, international cooperation and burden- and responsibility-sharing.²³⁴ At the same time, it was felt that '[i]n some situations of external displacement following natural disasters or other sudden-onset events, a practical response would be for states to grant admission and some form of provisional, interim or temporary stay, either on an individual or group basis. In other situations, or for some individuals, migration schemes could also address people's needs. For example, extending stay permits granted on work, study or family grounds for those already abroad, or establishing new visa categories or regimes, could be explored'.²³⁵ While acknowledging significant challenges for small islands and low-lying coastal states with respect to migration and displacement of large parts of their population, and whole nations in the most extreme cases, the presumption of continuity of statehood was strongly highlighted.²³⁶ Furthermore, migration was highlighted as a natural human adaptation strategy that should receive support, while noting at the same time that adaptation for those who remain is equally important.²³⁷

The Nansen Conference on Climate Change and Displacement, hosted by the Norwegian Government in Oslo on 6-7 June 2011, built on the Bellagio meeting and provided an important

²²⁸ Ibid., 5-6, para. 20.

²²⁹ Ibid., 6, para. 22.

²³⁰ Ibid., 3-4, paras. 7-10.

²³¹ Ibid., 4, para. 12.

²³² Ibid., 4-5, para. 13.

²³³ Ibid., 8-9, paras. 33-38.

²³⁴ Ibid., 5 and 9, paras. 16, 42-43.

²³⁵ Ibid., 5, paras. 14, 17-18.

²³⁶ Ibid., 5-6, paras. 27-32.

²³⁷ Ibid., 9, paras. 39-40.

platform to continue with relevant discussions. This conference generated an important outcome document consisting of the Chairperson's summary and a set of ten Nansen Principles that were recommended as guidance to address some of the most urgent challenges of climate-related displacement. Principle 9 stresses the need for a more coherent international approach 'to meet the protection needs of people displaced externally owing to sudden-onset disasters' and proposed that 'states, working in conjunction with UNHCR and other relevant stakeholders, could develop a guiding framework or instrument in this regard.' This outcome was designed to feed into the UNHCR Ministerial Meeting to commemorate the 60th Anniversary of the UN Convention relating to the Status of Refugees and the 50th anniversary of the Convention on the Reduction of Statelessness in December 2011.²³⁸ However, the Ministerial Communiqué adopted on this occasion²³⁹ does not contain any direct reference to cross-border movements triggered by climate-related and other natural disasters. The commitment of the more than 70 states present at the conference to 'reinforce cooperation with each other and work with UNHCR and other relevant stakeholders, as appropriate, to deepen our understanding of evolving patterns of displacement and to agree upon ways to respond to the challenges we face in a changing global context'²⁴⁰ could, however, be read as an implicit reference to climate-related displacement.

5.1.3.6 Global Forum on Migration and Development

Potentially, the Global Forum on Migration and Development which met in early December 2011 in Geneva under the chairmanship of Switzerland,²⁴¹ could have provided a forum for discussions on cross-border movements of persons in the context of climate change. However, as on previous occasions, the Forum did not address the issue and none of the topics discussed in 2011²⁴² covered it.

One of the partners of the Global Forum is the Global Migration Group (GMG), 'an inter-agency group bringing together heads of agencies to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of

²³⁸ In addition, the Nansen Conference outcome may feed into other relevant fora and policy processes at the regional and international level. See Nansen Conference, Chairperson's Summary, above note 16, para. 1.

²³⁹ Ministerial Communiqué, adopted at the ministerial meeting held in Geneva on 7-8 December 2011, available online at: <http://www.unhcr.org/4ee210d89.html> (last accessed 12 December 2011).

²⁴⁰ Ibid., para. 10.

²⁴¹ Formally, it will be a meeting of the Friends of the Global Forum on Migration. See Concept Paper, 'Taking Action on Migration and Development - Coherence, Capacity and Cooperation' by the Global Forum on Migration and Development (GFMD), Switzerland 2011, available online at: <http://www.gfmd.org/en/process/background-objectives.html> (last accessed 16 October 2011).

²⁴² Labour mobility and development; Addressing irregular migration through coherent migration and development strategies; and Planning tools for evidence based migration and development policies. See, *ibid.*, 4. The documents of the 2011 Forum are available online at: <http://www.gfmd.org/en/documents-library/switzerland-2011.html> (last accessed 3 December 2011).

international migration'.²⁴³ Migration and climate change is one of the topics addressed but activities so far have been limited to a few publications and workshops organized by some of the Group's members.²⁴⁴

5.1.3.7 Climate Vulnerable Forum

The Climate Vulnerable Forum, a partnership of countries disproportionately affected by the consequences of climate change, is the only inter-governmental forum that explicitly addresses the issue of migration and displacement triggered by the effects of climate change. The 2011 Dhaka Ministerial Declaration adopted by 19 developing states, most of them belonging to the least developed countries, called

for the immediate implementation of paragraph 14 (f) of the Cancún Agreements, which recognises that migration is a viable adaptation strategy to address human displacement induced by climate change, and includes undertaking measures to enhance understanding, coordination and cooperation with regard to climate-induced displacements, migration and planned relocation, and in this respect call for the commencement of an international dialogue for an appropriate framework.²⁴⁵

5.1.4 Private Initiatives

The topic has also attracted the interest of researchers in designing possible approaches and drafting proposals to address the assistance and protection of cross-border moving persons.

The Faculty of Law and Economic Science of the University of Limoges has elaborated a holistic draft Convention on the International Status of Environmentally-Displaced Persons²⁴⁶ with the objective to address admission, stay and status of persons forcibly displaced across borders, whether temporarily or permanently.²⁴⁷ In addition to setting out rights of the displaced and addressing possible stateless problems by granting the right to acquire the nationality of the receiving state,²⁴⁸ it also sets forth the establishment of a World Agency for Environmentally-Displaced Persons.²⁴⁹

Similarly, an Australian initiative focuses on the elaboration of a Convention for Persons Displaced by Climate Change, not only addressing cross-border but also internal displacement, with the main feature being resettlement of affected persons internally or internationally. The

²⁴³ See <http://www.globalmigrationgroup.org/> (last accessed 16 October 2011).

²⁴⁴ See <http://www.globalmigrationgroup.org/en/migration-and-climate-change> (last accessed 16 October 2011).

²⁴⁵ Dhaka Ministerial Declaration adopted at Dhaka, Bangladesh on 14 November 2011, available online at: <http://daraint.org/wp-content/uploads/2011/11/Dhaka.Declaration.pdf> (last accessed 3 December 2011).

²⁴⁶ *Revue européenne de droit de l'environnement*, Nr. 4, 2008, pp. 381.

²⁴⁷ See Articles 1-2 of the draft Convention.

²⁴⁸ See Articles 5-10 of the draft Convention.

²⁴⁹ See Article 11 of the draft Convention.

authors propose to determine the level of admission and stay in countries on the basis of the greenhouse gas emissions of the country concerned, thus including an element of state responsibility and the polluter-pays principle.²⁵⁰

An Austrian study²⁵¹ is suggesting a comprehensive international legally binding instrument with a strong focus on burden- and responsibility-sharing mechanisms, while also guaranteeing the rights of individuals through a human rights-based approach. Burden- and responsibility-sharing being the primary objective, this study rejects the idea of regional regulations. It suggests setting out distinct obligations of states with respect to natural and anthropogenic disasters causing displacement and migration in an international burden-and responsibility-sharing mechanism. In order to implement such an instrument, an international coordination mechanism inspired by the cluster approach of the humanitarian reform is proposed. Financial capacities for implementation should be ensured by a new fund based on contributions from states in line with their obligations under the burden/responsibility sharing mechanisms or particular contributions to be paid for high-emitting activities.²⁵²

The Global Governance Project, a joint research programme of thirteen European research institutions, identifies five key principles for policy making – planned relocation and resettlement; resettlement instead of temporary asylum; collective rights for local populations; international assistance for domestic measures; and international burden-sharing – and suggests embedding these in a Protocol on Recognition, Protection and Resettlement of Climate Refugees to the United Nations Framework Convention on Climate Change.²⁵³

Docherty and Giannini propose a stand-alone convention on ‘climate refugees’ that should cover persons displaced abroad by sudden or gradual environmental disruption if it is more likely than not that human activity contributed to such disruption,²⁵⁴ contain provisions on assistance and shared responsibility, and create an institutional arrangement such as a global fund and a coordinating agency.²⁵⁵

²⁵⁰ For the Convention Framework see *The New Critic*, D. Hodgkinson, T. Burton, H. Anderson and L. Young, ‘Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses’, Issue 8, September 2008. Available online at: <http://www.ias.uwa.edu.au/new-critic> (last accessed 16 October 2011). See also D. Hodgkinson, T. Burton, H. Anderson and L. Young, ‘The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change’, without date, available online at: http://www.ccdpconvention.com/documents/Hour_When_Ship_Comes_In.pdf (last accessed 16 October 2011) and other documents at the project website: <http://www.ccdpconvention.com/documents.html>.

²⁵¹ Ammer et al, above note 18.

²⁵² Ibid., 181-186.

²⁵³ F. Biermann and I. Boas, ‘Preparing for a Warmer World, Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, November 2007, 25-30.

²⁵⁴ B. Docherty, T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ *Harvard Environmental Law Review*, Vol. 33, 2009, 372.

²⁵⁵ Ibid., 373.

While interesting, all these proposals seem to be far too ambitious to be acceptable for states in the present international environment and may only become relevant in the future.

5.1.5 Conclusion

There is a growing consensus:

- That cross-border displacement and migration of people affected by the effects of climate change are real challenges that will grow in importance in the coming decades;
- That in the context of climate-related cross-border displacement of persons, international law contains gaps regarding admission, stay, and status, i.e. protection and assistance; and
- That, therefore, it is important to put cross-border displacement and migration on the agenda of international and/or regional organizations and fora as well as of individual governments.

At the same time, it is also clear that among governmental actors there is not yet a sufficient understanding of these issues, or a clear vision on how to approach them. In addition, there is no inter-governmental forum or process addressing the issue in a consistent way.

The discussion, in other words, is still at an early stage. With the adoption of Article 14 of the Cancún Outcome Agreement on Long-term Cooperative Action Under the UN Framework Convention on Climate Change, states have recognized the challenges created by such movements of people and the need to address them. Article 14 invites states to enhance action on adaptation 'by undertaking, inter alia, (...) (f) Measures to enhance understanding, co-ordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels.'

Thus the issue has been firmly put on the agenda by the international community. At the same time, there is no clarity yet as to which forum would be most suitable to further discuss and negotiate these matters and what the content of such agreements should be.

5.2 POSSIBLE APPROACHES AND STRATEGIES

5.2.1 A Four Prong Strategy

In light of the fact that substantive discussions on a normative framework addressing protection needs of persons affected by negative effects of climate change have not started yet, a detailed discussion about the exact content of such a framework would be difficult, if not premature, and go beyond the scope of this paper. Nevertheless, it is clear that there is no single approach that provides the solution to current challenges. Approaches must be multifaceted, containing internal and external components. In this sense, it is possible to shortly outline a holistic strategy. As regards cross-border movements of persons, such a strategy should comprise four elements:

1. Preventing displacement through disaster risk and vulnerability reduction and other adaptation measures;
2. Managing migration as adaptation measures;
3. Providing temporary protection status for persons displaced to other countries and permanent admission in cases where return turns out to be impermissible, impossible or cannot be reasonably be expected over time; and
4. Organizing resettlement/relocation for populations of low-lying small island states and other states losing substantial amounts of their territory.

5.2.1.1 Preventing cross-border displacement and migration

Alarmist discussions about ‘climate refugees’ and the emphasis on cross-border displacement and migration risk neglecting the important dimension of preventing such movements of people altogether, and shift attention away ‘from the more immediate, alternative and additional responses that may enable people to remain in their homes for as long as possible (which is the predominant wish among affected communities), or to move safely within their own countries (...)’.²⁵⁶

Above,²⁵⁷ we have defined the actual impact of an environmental disaster as a function of the degree of hazard and level of pre-existing vulnerabilities combined with the capacities to respond to the disaster and cope with it. This means that the relationship between the actual magnitude of a disaster, such as the strength of a windstorm or the amount of water flooding a given area, and its effects on people is not linear, but depends on a multitude of factors. However, it is possible to influence the impact of a disaster through

1. hazard reduction measures;
2. measures to reduce the vulnerabilities of affected people and communities; and/or
3. measures to strengthen the resilience of affected people and communities, i.e. their capacities to cope with the disaster and its consequences.

Mitigating the impact of disasters through preparedness measures, in particular measures reducing disaster risks and strengthening the resilience of communities, can effectively contribute to preventing displacement, including across borders, and diminishing pressures on people to migrate abroad. The principles of solidarity and shared responsibility would suggest that countries whose greenhouse gas emissions are higher, significantly contribute to disaster risk and vulnerability reduction and adaptation programs in affected countries and for

²⁵⁶ J. McAdam, above note 43, 5. Similarly, V. Kolmannskog, above note 140, 29.

²⁵⁷ Figure 1, above, 4.

potentially affected populations and communities.²⁵⁸ In this context – and in line with Article 14(f) of the Cancún outcome document of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention – protection of and assistance for people displaced by the negative effects of climate change should be understood as part of adaptation measures.

5.2.1.2 Managing migration as an adaptation measure

The term migration as used in this paper is characterized by its ‘voluntary’ character meaning that people, while not necessarily having the ability to decide in complete freedom, still possess the genuine possibility to choose between different realistic options. Economic migrants often have this choice even where they want to escape poverty. Those opting for migration as an adaptive measure also have some freedom of choice, but their situation is different from the average economic migrant insofar as environmental factors such as slow-onset disasters play an important role in their decision to migrate. Such adaptive migration is often internal and not cross-border, and is circular or seasonal rather than permanent: studies have shown that ‘one adaptive response to drought is to send an older male family member to [a big city] to try and find paid labour to tide the family over until after the drought. Temporary migration in times of climate stress can help top-up a family’s income (through remittances from paid work elsewhere) and reduce the draw on local resources (fewer mouths to feed)’.²⁵⁹ Thus, migration can increase the resilience of those staying at home and reduce the risk that whole families or communities will be forced to leave at a later stage to survive, thus contributing to the adaptation of local communities.

For these reasons migration as an individual, family or community measure of adaptation should be looked at positively by states. At the same time, such migration needs to be managed.

A migration management perspective in the context of climate change should look at migration as a useful tool to assist families and communities that have to adapt to the effects of climate change. Measures such as managed regular migration schemes, including immigration quota or targeted admission of migrants from particularly affected areas, would assist such adaptation efforts and, at the same time, reduce the risks of irregular migration. One way in which such a policy could be implemented is through bilateral or (sub-)regional agreements between countries with traditional migration flows.²⁶⁰ Such arrangements should be based on the principles of cooperation between states, international solidarity and burden-sharing (including financial support for poor countries admitting such migrants) in a manner that safeguards the human

²⁵⁸ E.g. by systematically integrating disaster risk reduction (DRR) and adaptation components into SDC programs and projects in relevant geographical areas or promoting and supporting DRR and adaptation measures with political and financial means.

²⁵⁹ O. Brown, above note 46, 21 referring to coping strategies of families in Western Sudan sending family members to Khartoum during periods of droughts.

²⁶⁰ A list of the top migration corridors can be found in G. Hugo, above note 163, 22.

rights of migrants concerned and protects them against exploitation, discrimination and marginalization. The Nansen Conference called upon states to ‘proactively anticipate and plan for migration as part of their adaptation strategies and development plans’ and referred to existing regional and sub-regional arrangements, notably those relating to the freedom of movement that could be used for climate-related migration as an adaptation measure.²⁶¹

5.2.1.3 *Protection: Creating rights-based temporary protection regimes for persons affected by natural disasters*

As identified above, cross-border displacement is the area with the most important gaps in international law. New instruments to close these gaps should contain the following elements:

Beneficiaries: As we will show in detail in the next section²⁶², people in need of protection should be defined as those whose return to the country of origin would be (i) legally impermissible; (ii) not feasible; or (iii) unreasonable in terms of humanitarian considerations.

Movement-related rights: Beneficiaries should be entitled (i) to enter countries of refuge, (ii) to stay there temporarily, i.e. as long as the obstacles to their return exist; (iii) to protection against *refoulement* as well as expulsion to other countries; and (iv) to permanent admission if after a prolonged period of time (some years) it becomes clear that return is unlikely to become an option again.

Status rights: Beneficiaries should be entitled to such rights as (i) access to the labor market, (ii) access to housing, health services and education, (iii) protection against discrimination; (iv) freedom of conscience, religion and opinion; (v) property rights; (vi) the right of persons belonging to an ethnic, religious or linguistic minority to enjoy, together with the other members of their group, their own culture, to profess and practice their own religion, or to use their own language; and be allowed (vii) to enjoy other relevant rights.

Institutional arrangements: The respective roles and responsibilities of national authorities and the international community, particularly with regard to financial and, where appropriate, operational support for receiving countries with limited means, need to be clarified.

²⁶¹ See Nansen Conference, Chairperson’s Summary, above note 16, para. 15.

²⁶² Below, section 3.2.2.

5.2.1.4 *Solutions: Planning solutions for low-lying small island States and other countries losing substantial parts of their territory*

Countries concerned favor different options ranging from trying to use adaptation projects (including dams, building up low islands, reducing dependency on agriculture, etc.) to avoiding migration and displacement altogether (Tuvalu and the Federated States of Micronesia), promoting migration as an adaptation strategy allowing a build-up of communities abroad to support those staying behind for the time being and safeguard cultural traditions for the future when everyone has to move (Kiribati), or finding new territory to which the whole country could move (Maldives).²⁶³ These discussions and the broad range of possible options suggest that before adopting any normative framework for this special situation, more research and examination of approaches is necessary.

5.2.2 **Identifying people in need of protection abroad**²⁶⁴

5.2.2.1 *Criteria to distinguish between forced and voluntary movements of persons*

Who should be protected? To answer this question, the general distinction made by international law between voluntary and forced movements of persons becomes essential, both in the context of the negative effects of climate change and other environmental disasters. In general, state sovereignty in the area of admission and removal of foreigners is more limited where displaced persons are concerned, as compared to the situation of people who migrate voluntarily.

Voluntary and forced movements often cannot be clearly distinguished in real life but rather constitute two poles of a continuum, with a particularly grey area in the middle, where elements of choice and coercion mingle.²⁶⁵ However, law must always draw clear lines,²⁶⁶ and must therefore necessarily qualify movement as either voluntary or forced. Thus, it is necessary to define criteria relevant for distinguishing between those who voluntarily leave their homes or places of habitual residence because of the effects of climate change, and those who are forced to leave owing to such effects or—even if they left voluntarily in the first place—can no longer return and should therefore be entitled to protection abroad because their initial voluntary movement has turned into forced movement.

‘Voluntary’ - contrary to what the term suggests - does not mean to be able to decide in complete freedom. Rather, voluntariness requires certain room with realistic options to decide upon.

²⁶³ See J. McAdam, above note 43, 18 and 20-21.

²⁶⁴ The following is taken from W. Kälin, above note 1, 95-99.

²⁶⁵ G. Hugo, above note 163, 12-15.

²⁶⁶ For example, between ‘legal’ and ‘illegal’; ‘guilty’ and ‘not guilty’; ‘refugee’ and persons not qualifying as such.

‘Forced’ on the other hand characterizes movements that are not based on a free decision between realistic options.

Whether a reasonable degree of room to choose between staying or leaving exists, or whether pressure to leave outweighs those choices, could be looked at from an *ex ante* (pre-movement) perspective. In this case, one would have to resort to a vulnerability assessment as well as an assessment of causalities between climate processes or events on the one hand and the decision to leave on the other, in order to determine the character of the movement. Clearly, this would be impractical as establishing the causality between climate change, vulnerability and the movement of the person in a given case would be exceedingly difficult or even impossible.²⁶⁷ An *ex post* (post movement) perspective is more practical and promising. Thus, as McAdam has stressed:

Crucially, the focus in any analysis should be the nature of potential harm, not its cause. In a human rights analysis, whether the source of that harm is attributable to climate change or other socio-economic or environmental pressures is immaterial (and misplaces the focus of the inquiry); what matters is the harm likely to be faced by the individual if removed.²⁶⁸

Although those displaced across borders by climate change impacts and other environmental disasters are not refugees, inspiration for developing an adequate concept to determine the involuntary character of their displacement can be drawn from refugee law and in particular the three key elements of the refugee definition in Article 1A(2) of the 1951 Refugee Convention. These elements are: (i) being outside the country of origin, (ii) because of persecution on account of specific reasons (race, religion, nationality, membership of a particular social group or political opinion), and (iii) being unable or unwilling to avail oneself of the protection of one’s country.

People displaced across borders by the effects of climate change and other environmental disasters obviously fulfill the first criterion of having crossed a border. It is also obvious that, except in the case of scenario 5 and some other rare cases²⁶⁹ such people are not refugees, because they do not fulfill the criterion of being persecuted on account of any of the relevant reasons.

²⁶⁷ An *ex ante* perspective is favored by Renaud et al., above note 72, 16ff. They propose to assess the level of negative impact of slow-onset hazards on livelihoods in order to whether a person qualifies as ‘environmentally motivated migrant’ (voluntary) or as ‘environmentally forced migrant’.

²⁶⁸ J. McAdam, ‘Climate Change, Displacement and the Role of International Law and Policy’, International Dialogue on Migration 2011, The Future of Migration: Building Capacities for Change, Intersessional Workshop on Climate Change, Environmental Degradation and Migration, 29-30 March 2011, available online at: <http://www.iom.int/jahia/Jahia/climate-change-environmental-degradation-and-migration/lang/en/cache/offonce> (last accessed 16 October 2011).

²⁶⁹ Above, Part 2, section 2.2, sub-section 2.2.2.

However, similar to persecution, climate change-related disasters and the unavailability of adequate food, drinking water or health services in their aftermath may constitute serious threats to life, limb and health. In this broader sense, refugees and those displaced across borders by the effects of climate change face similar dangers, albeit for different reasons.

The third criterion may also help to conceptualize solutions for these people. Exactly as we do for refugees, we should ask: under what circumstances should those displaced across borders by negative effects of climate related disasters not be expected to go back to their country of origin, and therefore remain in need of some form of surrogate international protection, whether temporary or permanent? In general, the answer will, as for refugees, depend on the elements of inability or unwillingness of the authorities in the country of origin or habitual residence to provide the necessary protection, and in the case of natural disasters, also assistance, to the people concerned. In this regard, however, a very important difference between the two situations exists: in the case of persecution, the *prima facie* assumption is that the authorities of the country of origin are unwilling to protect the person concerned. In the case of disasters, the assumption should be that these authorities continue to be willing to provide protection and necessary assistance, but in many cases it will be clear that the ability to do so is at least temporarily limited or even non-existent. From a protection perspective, the needs of affected people combined with the inability to obtain necessary protection and assistance from the country of origin must be the primary consideration.

<i>Refugee as person in need of international protection</i>	<i>Person displaced across borders by the effects of climate change as person in need of international protection</i>
Refugee as person in need of international protection	Person displaced across borders by the effects of climate change as person in need of international protection
Outside the country of origin or habitual residence	Outside the country of origin or habitual residence
Persecution, i.e. danger to life, limb or liberty, on account of race, religion, nationality, membership of a particular social group or political opinion	Danger to life, limb or health as a consequence of the effects of climate change or the nature of the response, or the lack thereof, by competent authorities in the country of origin or habitual residence
Unable or unwilling to avail oneself of the protection of the country of origin or habitual residence	Unable or unwilling to avail oneself of the assistance and protection of the country of origin or habitual residence

Figure 2: Refugees and persons displaced across borders by the effects of climate change compared

These criteria, in our view, help to determine who should be admitted at the border of another state and allowed to remain, at least temporarily. For instance, it seems obvious that at least in the case of arrival at a border of a neighboring country in the immediate aftermath of a sudden-onset, life-threatening natural disaster those forced to flee should be initially admitted on the basis that their movement was forced and rejecting them at the border would expose them to grave risks.

5.2.2.2 *Returnability test*

The question of whether people admitted in the aftermath of sudden- or slow-onset disasters can be obliged to return to their country of origin once the immediate danger is over is more complex. The point of departure should not be the subjective motives of individuals or communities behind their movement, but rather whether, in light of the prevailing circumstances and the particular vulnerabilities of those concerned, they can be required to return to their country of origin. This ‘returnability’ test, inspired by Swiss law on subsidiary protection²⁷⁰, helps to better identify those in need of protection in another country. It covers not only those who actually flee to another country, but also those whose initial movement was voluntary but who now cannot be expected to return because the situation has deteriorated to such an extent that return is no longer an option. Unlike the test used to determine who is an internally displaced person, which focuses primarily on the forced nature of departure, this test, like the one to determine refugee status, emphasizes the prognosis—whether it would be possible and safe to return.

The returnability of the person concerned should be analyzed on the basis of a three-pronged test that asks whether it is legally permissible, factually feasible and morally reasonable to oblige the person concerned to return to his or her country of origin or permanent residence:²⁷¹

(1) Legal impediments: The criterion of permissibility

There are certain cases where human rights law, by analogy to the refugee law principle of *non-refoulement*, prohibits return of certain persons. Such prohibition exists where there are substantial grounds to believe that an individual would face a real risk of torture or cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life if sent back to a particular country.²⁷² Arguably, this prohibition could apply in cases where a rejection at the border or return would expose an individual to an imminent danger for life and limb related to

²⁷⁰ Asylum Act (Switzerland) SR.142.31 Article 44 (2), Aliens Act (Switzerland) SR. 142.20, Articles 83-88.

²⁷¹ This test is also supported by V. Kolmannskog, above note 140, 32-36.

²⁷² This prohibition was derived by the European Court of Human Rights from Article 3 of the European Convention on Human Rights (e.g., case of *Soering v United Kingdom*, 1989 and case of *Chahal v United Kingdom*, 1996, para. 74) and the UN Human Rights Committee from Article 7 of the ICCPR (see, e.g., case of *C v Australia*, 900/1999 [2002] para. 8.5; *Byahuranga v Denmark*, 1222/2003 [2004], para. 11.3).

the disaster causing their displacement, or to the absence of adequate provision of protection and assistance by their home country.

(2) Factual impediments: The criterion of feasibility

Return may be factually impossible due to temporary technical impediments, such as when roads are cut off by floods or airports in the country of origin closed. Return is also impossible for administrative reasons if the country of origin refuses readmission for technical or legal reasons: during an emergency, a country may lack the capacity to absorb large return flows, or it may prevent readmission of persons whose travel documents or proof of citizenship were destroyed, lost or left behind when they fled.

(3) Humanitarian impediments: The criterion of reasonableness

Even where return would be permissible and feasible, people should not, on the basis of compassionate and humanitarian grounds, be required to go back if the country of origin does not provide any assistance or protection in any part of the country that can be reached by the displaced, or if what is provided falls far below international standards of what would be considered adequate. The same is true where authorities do not provide any kind of durable solutions to the displaced that are in line with international standards and would allow them to resume normal lives, especially where areas of land have become (or have been declared) uninhabitable and people have been unable to find an acceptable alternative themselves.

If the answer to one of these questions—is return *permissible*? Is it *feasible*? Can it *reasonably be required*?—is ‘no’, then individuals concerned should be regarded as forcibly displaced persons in need of protection and assistance in another state. In this case, they should be admitted and granted at least temporary stay in the country where they have found refuge until the conditions for their return in safety and dignity are fulfilled. Permanent solutions on the territory of other states must be found particularly where vast parts of a country have become uninhabitable so that it can no longer host its entire population; where, as in the case of low-lying small island states the whole state territory disappears; where sustainable solutions in the country of origin are not available; or where displaced persons cannot return in safety and dignity for other reasons.

In the case of persons who had no choice but to leave in the first instance due to rapid onset hazards, Renaud *et al.*²⁷³ suggest looking into return perspectives by assessing the recovery efforts in the areas where people had fled from. This approach is not entirely convincing, as it excludes those people who left voluntarily before the disaster happened but cannot be expected to go back because a lack of recovery makes it impossible to live there. With respect to slow onset hazards, the proposed framework falls entirely short of taking into account an *ex post* perspective in order to assess the character of the movement of persons and relies exclusively on

²⁷³ See Renaud *et al.*, above note 72, 16ff.

pre-movement assessment of the level of negative impact on livelihoods,²⁷⁴ which is assuming, if not impractical.

5.3 TOWARDS NEW INSTRUMENTS

5.3.1 The Challenges of Creating an International Regime

In situations where a multitude of national and international actors face similar problems, they need to coordinate their behavior and efforts. In such circumstances we often see what political scientists call ‘international regimes’ or ‘global governance’, i.e. a set of ‘implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations’.²⁷⁵ Such a regime exists regarding refugees, for example, where, a multitude of norms contained in international and regional conventions or soft law instruments, as well as in domestic laws, together with a multitude of operational actors such as UNHCR and other humanitarian agencies, regional human rights courts, domestic authorities and civil society organizations ensure – despite disagreement in certain areas – an important overall degree of consensus and harmonization in approaches and cooperation when dealing with refugees.

In contrast, many authors have highlighted the weakness of global migration governance, i.e. an international regime in the area of voluntary migration, which is marked by the lack of a clearly mandated international organization, a lack of clear rules about the institutional responsibilities of different actors and a weak set of universally applicable norms.²⁷⁶ While, as the Global Commission on International Migration in its 2005 report stressed, the ‘very nature of transnational migration demands international cooperation and shared responsibility (...) the reality is that most states have been unwilling to commit fully to the principle of international cooperation in the area of international migration, because migration policy is still mainly formulated at the national level’.²⁷⁷ Relevant factors explaining this situation include the fact that states still see the regulation of immigration as a substantially domestic matter within the purview of their sovereignty and are therefore reluctant to agree on binding international norms,

²⁷⁴ Ibid.

²⁷⁵ S.D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ in S. D. Krasner, *International Regimes* (Cornell University Press, Ithaca NY, 1983), 2.

²⁷⁶ See, e.g., R. Kunz, S. Lavenex, M. Pannizon, ‘Introduction: Governance in international migration’, in R. Kunz, S. Lavenex, M. Pannizon (eds.), *Multilayered Migration Governance* (Routledge, London/New York 2011), 1 with references; A. Betts, ‘Migration Governance, Alternative Futures’, IOM, Background Paper WMR 2010, 6-7. See also A. Betts, ‘Soft Law and the Protection of Vulnerable Migrants’, *Georgetown Immigration Law Journal*, Vol. 24, 2010, 533-552, at 535-6.

²⁷⁷ ‘Migration in an Interconnected World: New Directions for Action’, Report of the Global Commission on International Migration, October 2005, available online at: <http://www.gcim.org/en/finalreport.html> (last accessed 16 October 2011), p. 66.

the absence of strong interdependences between sending and receiving states and the asymmetric character of power in these relationships, the regional character of the most important migrations streams, and the lack of leadership at the international level.

These factors exist, in particular, in the area of cross-border displacement and migration in the context of climate change: states, beyond the very general statement in the Cancún Agreement²⁷⁸, have not yet committed to any international obligations. In other words, they view the admission and treatment of affected persons as a mainly domestic matter. There is no international organization or other institutional set-up with a clear mandate to protect and assist such persons or otherwise deal with them. Those states that are most likely to become countries of origin due to their vulnerability or inability to take sufficient adaptation measures in time tend to be among the weakest and poorest states, with little relevance for rich industrialized countries. Available information indicates that adaptive migration and cross-border displacement will essentially take place between neighboring countries or at a (sub-) regional level. Finally, a strong voice at the international level leading the process of creating a (stronger) regime in this area is largely absent.

This does not bode well for quick success. Rather, it allows a prediction that many states will not be eager to engage in negotiating processes on the issue of cross-border population movements in the context of climate change. This raises the question as to what would be necessary to make progress in this area.

In a particularly interesting study²⁷⁹, Betts analyzed a series of processes led by UNHCR²⁸⁰ in order to identify the factors underlying those processes. He concluded that '[i]n the successful cases, Northern states did not contribute to refugee protection in the South for altruistic reasons. They contributed only insofar as they had linked interests in other issue areas. (...). However, in the absence of structural interdependence, Northern states contributions were very limited' and noted the importance of recognition of structural interdependence by such states, something that was sometimes not achieved because of weak leadership by UNHCR.²⁸¹

This suggests that the key ingredients of a successful process of negotiating and developing new standards and institutional arrangements in the area of cross-border movements of persons are (i) the existence of *structural interdependence* between the interests of states in more than one area

²⁷⁸ Above, 39-40.

²⁷⁹ A. Betts, 'International Cooperation in the Global Refugee Regime', Global Economic Governance Programme Working paper 2008/44, November 2008, 20-21 (available online at: <http://www.globaleconomicgovernance.org/project-migration?id=2753> (last accessed 16 October 2011)).

²⁸⁰ ICARA I and II (International Conferences on Assistance to Refugees in Africa of 1981 and 1984); CIREFCA (International Conference on Refugees in Central America 1987 – 1995); Indo-Chinese CPA (Indo-Chinese Comprehensive Plan of Action 1988 – 1996) and Convention Plus (2003 – 2005).

²⁸¹ Betts, above note 276, 20-21.

(e.g., movement of persons and trade/security/development etc.); (ii) the actual *linkage of different issues* in the bargaining process, and (iii) *strong leadership* by an international organization.

Cross-border movements of persons in the context of climate change, if they reach a certain level, may have negative impacts on development, undermine existing abilities to control admission, raise security concerns linked to irregular movements of persons, overburden asylum procedures if no alternative ways of admission are available, and create new and exacerbate existing humanitarian crises. All these challenges can hardly be tackled by states on an individual basis and require coordination. More generally, states – as they have accepted in Cancún – should have an interest in addressing cross-border movements of persons, and the protection of such persons is an important aspect of the many challenges climate change creates for the international community. Thus, the first element of structural interdependence of relevant issues exists.

To actually link these issues in negotiations on the protection of persons migrating or displaced across borders in the context of climate change will be more difficult. It will be necessary to: 1. Identify a forum (or several fora) where such linkage is possible in terms of mandates and knowledge of participants; and 2. Have the necessary strong leadership to establish such linkages.

Before using these criteria in order to determine the best ways forward, it is relevant to determine whether one should aim for a treaty or rather for soft law. This choice will help to determine the best approaches, as certain institutions are more appropriate for treaty making than others.

5.3.2 Treaty Law versus Soft Law

Do we need a new binding convention to address the issues identified in the preceding sections, or would a soft law approach be more appropriate? This is a complex question and the response might be different for the various topics outlined above, depending on the specific issue concerned.

Nevertheless, some general remarks on an instrument focusing on protection of persons displaced across borders in the context of climate change and, in particular, in the scenarios outlined above,²⁸² are possible.

Treaties have the obvious advantage of being legally binding and thus, to some extent and depending on available legal remedies at the domestic and/or international level, enforceable. They are particularly useful where *normative gaps* are a reality, i.e. where existing international

²⁸² Above, Part I, section 1.3., sub-section 1.3.2.

law does not provide normative answers to important questions, as is the case in the area of cross-border movements of persons affected by the effects of climate change. At the same time, it is exactly in such areas where it may be particularly difficult to reach a consensus, meaning that it would most likely take a very long time to negotiate a new instrument. In addition, *lack of consensus* at the negotiating stage often leads to *ratification gaps*, i.e. situations where important states are not ready to ratify the treaty, thus weakening or even undermining its effectiveness and leaving persons in need of protection in a legal vacuum.

In the present context, it is likely that negotiating a convention on cross-border movement of persons in the context of climate change would be very difficult because of largely incompatible interests of potential countries of origin and countries of destination of such movements. While the former would probably push for a maximum of rights regarding admission and status, the latter, taking into account their restrictive attitude towards refugees and asylum-seekers, are not likely to accept more than minimal obligations. It is also likely that attempts to include an element of international responsibility into the treaty, i.e. calls to oblige industrialized countries to accept substantial numbers of migrants and displaced persons as a kind of 'compensation' for having caused the current climate change, would further complicate negotiations. Some observers have therefore concluded 'that States presently seem to lack the political will to negotiate a new instrument requiring them to provide international protection to additional groups of people'.²⁸³

Jane McAdam has recently added a list of arguments why a 'refugee' type of convention on the admission and protection of persons displaced across borders by effects of climate change would not be desirable.²⁸⁴ She is concerned 'that if a treaty becomes the *main* focus of international policy development, attention may shift from the more immediate, alternative and additional responses that may enable people to remain in their homes for as long as possible (which is the predominant wish among affected communities), or to move safely within their own countries, or to migrate in a planned manner over time'.²⁸⁵ Furthermore, she feels that a treaty would come too early, as empirical evidence indicates that at least today, most displacement caused by effects of climate change is internal and not cross-border.²⁸⁶ In fact, overall scientific findings are still insufficient to fully understand the causal relationship between climate change and cross-border displacement. Finally, she stresses that effects of climate change are just one among several drivers of displacement including poverty, and asks not only whether it is appropriate to single out a category of 'climate-displaced people' in an international treaty but also whether

²⁸³ J. McAdam, above note 43, 15-16.

²⁸⁴ *Ibid.*, 2-27.

²⁸⁵ *Ibid.*, 5.

²⁸⁶ *Ibid.*, 8-12.

displacement should 'be addressed in terms of what drives it, or rather in terms of the needs of those who move'.²⁸⁷

These concerns are justified. They lead to the conclusion that – at least for the time being – a soft law approach is overall more appropriate. As indicated by the Cancún Agreement,²⁸⁸ political will to negotiate such an instrument may exist to some extent. Soft law is also more appropriate where there are factual uncertainties, as it is flexible and allows scope to experiment with new ideas.

Nevertheless, the question arises as to the character such a soft law approach should have:

Soft law can be understood as instruments and norms that create more than merely political or moral obligations and less than legal obligations, i.e. they 'share a certain proximity to law and have a certain legal relevance, but at the same time they are not legally binding per se as a matter of law'.²⁸⁹ Soft law allows states to balance their interest to keep sovereignty (as non-compliance with such norms does not amount to a violation of international law) with 'the need to establish rules to govern international relations', i.e. 'to create a *modus vivendi*, to guide their international behaviour in a flexible way'.²⁹⁰ In other words, by adopting soft law, states 'can maintain a large degree of freedom of action while improving the basis for international co-operation'.²⁹¹

There are different types of soft law with differential normative force. Soft law can merely outline a vision or common project, requiring states to do no more than working towards achieving that goal in the near or distant future. The Universal Declaration of Human Rights of 1948, for example, originally had this character. Soft law can also be adopted as a precursor to treaty law. An example is the 1967 Declaration on the Elimination of Discrimination against Women that became the Convention on the Elimination of All Forms of Discrimination against Women in 1979. Finally, soft law can be 'interpretative', i.e. restate existing obligations and highlight in more details what is inherent in more general treaty law. The 1998 UN Guiding Principles on Internal Displacement are an example.

Soft law is usually negotiated by states but may also be drafted by experts, particularly where the emphasis is not on creating new law but rather on restating and refining existing law. Examples include not only the Guiding Principles on Internal Displacement but also much of the

²⁸⁷ Ibid., p. 14.

²⁸⁸ Above, 39-40.

²⁸⁹ D. Thürer, 'Soft Law', para. 2 in Max-Planck Encyclopedia of International Law (Oxford University Press, online publication at www.mpepil.com, last accessed 8 February 2012).

²⁹⁰ Ibid., para. 6.

²⁹¹ Ibid., para. 6.

work done by the UN's International Law Commission on the codification of general international law.²⁹²

Soft law on displacement and migration in the context of climate change and environmental disasters should adopt a rights-based approach, because such a framework helps to systematize a response even in the absence of clear institutional responsibilities and clarity on status and applicable legal frameworks. In this regard, the Guiding Principles on Internal Displacement are sometimes mentioned as a model to be followed.²⁹³ This is certainly a good suggestion but, at the same time, this model has its limitations. The Guiding Principles draw much of their authority from the underlying hard law; they did not create new law, but to a very large extent highlight the relevance and specific meaning of existing obligations *vis-à-vis* internally displaced persons. In contrast, a soft law instrument on cross-border displacement in the context of climate change and environmental disasters would mainly, though not exclusively, address the many gaps in present international law identified above.²⁹⁴ This would make it necessary to negotiate such an instrument with the participation of all interested states. Such negotiations would probably be difficult but, because of the non-binding character of soft law, they still would be easier than negotiating a treaty.

5.3.3 A Multi-Level Approach to Closing the Protection Gaps

As mentioned above, in order to optimally protect persons affected by the effects of climate change, it is important to work in parallel on issues of mitigation, adaptation and protection/assistance. Here, we focus on the last element only.

At what level (global? regional? national? local?) and in what fora should new approaches to protect persons moving across borders be dealt with? Clearly, activities at all levels are necessary as we are dealing with a problem that touches all levels, from the local to the global, and can only be solved through international cooperation.

²⁹² One example is the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, above note 19.

²⁹³ There are also suggestions to develop soft law on the protection of vulnerable migrants based on the example of the Guiding Principles. See Betts, above note 276, 542 ff. This suggestion, however, fails to take into account that unlike in the case of IDPs, relevant hard law does not address many of the relevant issues.

²⁹⁴ McAdam, *supra* note 37, 57 and Annex I, to the contrary suggests elaborating a global guiding framework on climate change-related movements '[b]y drawing together relevant law derived from States' existing treaty obligations, they would not require States to assume new obligations, but clarify how those obligations might apply in the climate change displacement context. They would gain authority from the fact that they would reflect, and be consistent with, binding human rights law.' In light of identified normative gaps in the protection of persons moving across borders in the context of climate change, it is doubtful that such an approach would adequately address the protection gaps.

5.3.3.1 *International level*

At the international level three processes are presently relevant:

1. Article 14(f) of the Cancún outcome document of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention invites states to take '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.' This provides a potential opening for further discussions within the framework of the climate change conferences in the aftermath of Cancún. In fact, a discussion as to which measures would be appropriate is urgently needed.

The main advantage of locating negotiations on these issues within the on-going conferences of States parties (COPs) to the UN Framework Convention on Climate Change is the fact that establishing structural interdependencies would be particularly easy. Southern states in affected regions may be ready to accept certain obligations regarding persons moving across borders, because they may receive access to additional support by the Adaptation Fund and because Northern states may assume some degree of burden-sharing. Northern states may commit to admit persons under certain circumstances in exchange for commitments by the South in other areas of the climate change negotiations.

However, there are several arguments speaking against this option:

- At the time of writing, it is wide open as to whether states will be ready to work on the migration/displacement challenge in the context of climate negotiations, or rather focus on other related yet still unsolved issues that are perceived as being more important. In any case, the 2011 Climate Change Conference in Durban (COP 17) did not address the issue beyond a weak reaffirmation that the Adaptation Committee established in Cancun was created to, *inter alia*, provide "technical support and guidance to the Parties, respecting the country-driven approach, with a view to facilitating the implementation of adaptation activities, including those listed in [paragraph 14 of the Cancun Outcome], where appropriate."²⁹⁵
- The climate change negotiations also have the disadvantage that migration experts do not participate in the conferences of states parties to the UN Framework Convention on Climate Change. Rather, these conferences are dominated by state representatives dealing with environmental and financial issues.

²⁹⁵ Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention to be presented to the Conference of the Parties for adoption at its seventeenth session, FCCC/AWGLCA/2011/L.4, 9 December 2011, para. 87(a).

- The biggest disadvantage is the fact that this forum can only deal with climate change-related matters. However, as shown above, it is –possibly with the exception of rising sea levels –often difficult to establish a direct link between climate change and a specific disaster.²⁹⁶ Furthermore, and even more importantly, not all natural disasters are climate-related, meaning that the issue of cross-border movements of persons as a consequence of disasters goes beyond the scope of issues that can be addressed within the framework of climate change negotiations. Disasters such as volcanoes or earthquakes have similar impacts on people and may also cause movement of persons across borders. The earthquakes that caused the Tsunami of 2004 and that affected Pakistan in 2005, Sichuan in 2008, Haiti in 2010 or Japan in 2011 show that the displacement of persons, albeit largely internal, was one of the biggest impacts the disasters had, rendering affected persons as vulnerable and in need of assistance and protection as those who move due to climate-related events. In 2008, an estimated 20 million persons were internally displaced due to climate-related disasters and 16 million were displaced as a result of non-climate related disasters.²⁹⁷ From a protection perspective, it is difficult to argue why people displaced by those events should be treated any differently from those affected by climate impacts. Therefore, despite the current emphasis on climate change, it is conceptually more sound to look at disasters as a cause of displacement, and not to limit the focus to those that may be triggered by global warming.

Despite these reasons, it will be important to reiterate the commitment made in Article 14(f) of the Cancún outcome at future COPs to ensure that this commitment remains high up on the agenda, and does not get side-lined by other important issues.

2. The process initiated by UNHCR within the framework of this year’s commemorations with the Bellagio ‘Expert Meeting on Climate Change/Natural Disasters and Displacement’ in February 2011, followed by the ‘Nansen Conference on Climate Change and Displacement’ on 6-7 June 2011 in Oslo,²⁹⁸ and the December 2011 Ministerial Meeting looked promising as it provided a forum to discuss these issues. Thus, the Nansen Conference suggested that states develop, together with UNHCR and other stakeholders, a guiding framework for the protection of such persons.²⁹⁹ However, as mentioned above, it was not possible to get a clear endorsement for this approach from the Ministerial Meeting.

Therefore, it is necessary to look for alternative approaches. At the Ministerial Meeting, Norway, Switzerland and Germany offered a possible perspective when they made a group pledge “to cooperate with interested states, UNHCR and other relevant actors with the aim

²⁹⁶ Above, Part 1, section 1.1.

²⁹⁷ See above note 35.

²⁹⁸ Above, 42-43.

²⁹⁹ See Nansen Conference, Chairperson’s Summary, above note 16, para. 23 and Nansen Principle IX.

of obtaining a better understanding of such cross border movements at relevant regional and sub-regional levels, identifying best practices and developing consensus on how best to assist and protect the affected people.”³⁰⁰ Mexico also made a similar pledge.

3. As mentioned above,³⁰¹ the ILC is presently working on the topic ‘Protection of Persons in the Event of Disasters’ but has not yet addressed the issue of cross-border movements of persons. It is unlikely that the ILC will take up this issue at the present time. However, looking at the work done so far, one would hope that the ILC would treat the topic at least at a very abstract level, for example by mentioning obligations of states to protect and assist persons displaced across borders as a consequence of a disaster and to cooperate with each other in this regard. This would make an important contribution to the overall process of strengthening the protection of such persons, as a complement to, rather than substitution for, other efforts.

Other alternatives

Another possibility would be to propose and lobby for the creation of a Global Commission on Movement of Persons in the Context of Climate Change by the UN Secretary General that would use a methodology similar to the one utilized by the Global Commission on International Migration,³⁰² i.e. conduct background research, convene regional hearings and consultations and prepare a report with specific recommendations on processes, institutional arrangements and substantive guarantees.

Conclusion

At the time of writing, the Norwegian-Swiss proposal to start a process of consultations and discussions among interested states outside the UN or other international organizations seems the only realistic approach to advance the discussion. Previous initiatives in the area of migration could serve as a model. The Berne Initiative, for example, was ‘a States-owned consultative process with the goal of obtaining better management of migration at the national, regional and global level through enhanced cooperation between States’ which ‘enabled governments from all world regions to share their different policy priorities and, together with relevant stakeholders, identify a common orientation to migration management, based on notions of co-operation, partnership, comprehensiveness, balance and predictability’ and resulted in the adoption of the International Agenda for Migration Management (IAMM) that facilitates inter-state cooperation

³⁰⁰ Norway pledges to raise awareness of environmental displacement, 9 December 2011, available online at: <http://www.norway-geneva.org/unitednations/humanitarian/UNHCR-Ministerial-meeting/>, (last accessed 12 December 2011).

³⁰¹ Above, 41-42.

³⁰² See ‘Migration in an interconnected world: New directions for action’; Report of the Global Commission on International Migration, October 2005; available online at: <http://www.gcim.org/en/finalreport.html> (last accessed 16 October 2011).

as a non-binding policy framework.³⁰³ The Initiative conducted a series of regional consultations and was supported by an international organization (IOM) as secretariat.

A similar approach could be used in the present context. It would need to include a strong research component as well as in-depth consultations in regions with some experience on cross-border movements of persons in the context of climate change, because overall knowledge about the dynamics of such movements and reactions by states, including good practices, is still very thin. Regional consultations would also help to build consensus bottom-up. UNHCR could serve as secretariat or otherwise facilitate the process.

5.3.3.2 *The regional level*

The regional level is also important. First, as mentioned above,³⁰⁴ there are already several regional initiatives underway, particularly in Africa. However, all these initiatives are at the very early stages and up to now do not go beyond commitments to do ‘something’.

It is a fact that regional and sub-regional organizations are often more coherent in terms of interests of member states and thus more likely to reach a consensus on issues. They are also able to better tailor approaches and solutions to the particular context of a region, something that is particularly important in light of the fact that different regions are and will be differently affected by climate change and have different capacities to adapt to these changes.

While regional and sub-regional organizations may also primarily opt for soft law, treaty law – particularly on cross-border displacement – may also be a real possibility due to reciprocal interests between and among states.³⁰⁵ Some already have agreements on economic migration within the region (e.g. SADC and ECOWAS in Africa) that could provide a basis for new norms on regional migration as an adaptive response to the negative effects of climate change.

As regards the Council of Europe, it seems that unlike the Parliamentary Assembly, the Council of Ministers is not ready to actively engage in developing a regional approach or solution,³⁰⁶ despite the fact that the UN Secretary-General has identified Europe as one region to be particularly affected by climate-related security implications, including cross-border displacement and migration.³⁰⁷

³⁰³ IOM, The Berne Initiative: A Global Consultative Process for Inter-State Cooperation on Migration Management, available online at: <http://www.iom.int/jahia/Jahia/pid/1491> (last accessed 16 October 2011).

³⁰⁴ Above, Part 3, Section 3.1.2.

³⁰⁵ E.g. in the African Union where the Kampala Convention already covers internal displacement.

³⁰⁶ See above, 37.

³⁰⁷ See Report of the Secretary-General on Climate change and its possible security implications, above note 6, para. 70.

5.3.3.3 *The domestic level*

Hard law is important at the domestic level. States should be encouraged – including through soft law instruments – to adopt, amend or interpret national laws on the issues outlined above, and should be supported in this endeavor if they lack the necessary capacity and resources. Where states support or implement adaptation projects, they should be encouraged to include a protection dimension.

6. CONCLUSIONS

The key points made in this paper can be summarized as follows:

- While a relationship between climate change, environmental events and displacement/migration does exist, current means of science *do not allow a direct and exclusive causality to be established* between climate change and the environmental event on the one hand, and between environmental hazards and the movement of persons on the other hand. Migration and displacement in the context of environmental events are *multi-causal*, even where a strong relationship between them exists.
- Because of the complex relationship between climate change and the movement of persons, directly linking obligations to admit, protect and assist persons moving across borders to the issue of *legal responsibility* under international law based on the ‘polluter pays’ principle would be detrimental to the interests of affected persons: it would be extremely difficult to establish sufficient causality between a specific climate-related event triggering the cross-border movement of a specific person or group of persons, and the specific greenhouse gas emissions of particular country of refuge.
- The complexity of identifying factors triggering the movement of persons also makes it impossible to make predictions about the *numbers* of people migrating voluntarily as a way to adapt to the negative effects of climate change or becoming displaced by these effects. Nevertheless, it is safe to say that (1) the number of persons is significant and likely to increase, and (2) most of the movement will take place inside countries. Nevertheless, the potential for substantial cross-border movements, as well as the clear protection needs this may trigger, are important enough to address it.
- In this context it is possible to identify *five key scenarios* that can trigger adaptive migration and/or displacement: (1) Sudden-onset hydro-meteorological disasters; (2) Slow-onset environmental degradation; (3) Small island states being destroyed in large parts or as a whole by rising sea levels; (4) Areas becoming unfit for human habitation either as a consequence of mitigation or adaptation measures (e.g., planting forests to serve as carbon sinks) or because they have been identified as high risk zones in case of

hydro-meteorological disasters; (5) Violence and armed conflict caused by shrinking natural resources.

- In the context of climate change, states, according to present international law, have *three sets of obligations* namely *mitigation*, i.e. the task of mitigating the degree of climate change, in particular by reducing greenhouse gas emissions; *adaptation*, i.e. the challenge of how best to adapt to the threats caused by the impacts of climate change; and *protection*, i.e. the obligation to secure the rights and address the (humanitarian) needs of people affected by the negative effects of climate change.
- As regards protection, several sets of *hard or soft international law instruments* are relevant, in particular the Guiding Principles on Internal Displacement and general human rights law. Refugee law, with the exception of scenario 5 outlined above, is only applicable in exceptional cases, particularly if the denial of protection and assistance by the country of origin to particular persons affected by effects of climate change contains an element of discrimination based on race, religion, nationality, membership of a particular social group or political opinion and amounts to persecution.
- The present international protection regime regarding population movements in the context of climate change is marred by several *gaps*: There is a lack of agreed terminology, weak implementation of the Guiding Principles on Internal Displacement in many countries, and a substantial lack of rules and guarantees regarding admission, stay and status of persons displaced across internationally recognized borders by effects of climate change or other sudden-onset natural disasters. There is also a gap in international law as regards the fate of persons leaving submerged small island states. The law on stateless persons does not provide sufficient protection for such persons, in particular because they are unlikely to become stateless persons in the legal sense. Finally, there is a lack of institutional arrangements to effectively address the protection and assistance needs of persons migrating or being displaced in the context of climate change.
- Looking at *existing approaches*, some states provide for temporary or subsidiary protection of persons displaced across borders by effects of climate change (in particular sudden-onset disasters) at the *domestic level* that could serve as models for other states or a regional or international agreement. At the *regional level*, the 2009 Kampala Convention covers persons internally displaced by effects of climate change in Africa. Other regional organizations have stressed the relevance of protection of persons migrating or being displaced in the context of climate change, but have not yet developed specific instruments in this regard. However, regional approaches seem to be particularly promising given that cross-border displacement and migration is likely to remain a

regional challenge. At the *international level*, the adoption of Article 14(f) of the Cancún Outcome Agreement on Long-term Cooperative Action Under the UN Framework Convention on Climate Change is an important initial achievement putting the issue of displacement and migration in the context of climate change firmly on the international agenda. Article 14 invites states to enhance action on adaptation 'by undertaking, inter alia, (...) (f) Measures to enhance understanding, co-ordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels' UNHCR's Bellagio expert meeting and the Oslo Nansen Conference were important contributions to the discussion in 2011. Finally the current project of the International Law Commission on 'Protection of Persons in the Event of Disasters' would offer a chance to address the issue of cross-border movements of persons in such situations, even though the work is still at an early stage and the Commission does not seem ready to take up the issue at the present time. There are also several *private initiatives* but they all seem too ambitious for the time being.

- A *comprehensive strategy* to address the issue of movement of persons in the context of climate change would have to comprise four elements: (1) preventing displacement through disaster risk and vulnerability reduction and other adaptation measures; (2) managing migration as an adaptation measure; (3) providing temporary protection status for persons displaced to other countries and permanent admissions in cases where return turns out to be impermissible, impossible or cannot be reasonably expected over time; and (4) organizing resettlement/relocation for populations of low-lying small island states and other states losing substantial amounts of their territory.
- As regards the third element, *people in need of protection abroad* would be those whose return would be impossible, inadmissible under international law because of imminent risks to their lives and physical integrity, or unreasonable on the basis of humanitarian grounds.
- For these persons, *new international or regional instruments* are needed that would define the conditions under which temporary (or permanent) admission and stay should be granted, the rights admitted persons would enjoy during their stay as well as the modalities of cooperation with the country of origin and international support/burden-sharing mechanisms. Preferably, such instruments would have a soft law character, not only due to the risk that relevant states would not ratify a treaty on this, but also because knowledge about the dynamics of population movements in the context of climate change is still rather limited.

- However, presently, no *forum* is available to start negotiating such an instrument. Several options are possible, but the process initiated by UNHCR within the framework of the 60th anniversary of the Refugee Convention and 50th anniversary of the Statelessness Convention has not led to a commitment by the Ministerial Meeting in this regard, indicating that the majority of states are not ready yet to embark on such a project. In this situation, a states-owned consultative process organized by a group of states from the North and the South could be a realistic option that may later feed into a more formal process. This process could have the goals of obtaining a better understanding of cross-border movements of people in the context of climate change at regional and sub-regional levels, identifying good practices in this regard and developing consensus on key principles on how to best protect and assist affected people. The pledges by Norway and Switzerland made during the 2011 Ministerial Meeting to cooperate with interested states and other relevant actors, including UNHCR, in this regard³⁰⁸ is a promising proposal.

³⁰⁸ See above note 300.