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Hanna Hanses
Colchester, September 2019

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Chapter 1: Anthropogenic Climate Change

Climate change seems to be irreversible. The scientific evidence for this inconvenient truth is overwhelming and undeniable, even though a few individuals and fringe political interest groups continue to maintain that it is merely a "hoax".¹ The effects of climate change can be observed through everyday events all over the globe -- record temperatures during heat waves in Western Europe; persistent desertification in Sub-Saharan Africa; extreme weather events that occur ever more frequently across the globe; increased periods of droughts which often lead to wildfires; melting permafrost which releases additional methane gases; sea levels rising, leading to salinization of fresh waters and flooding;.... Even without being a scientist, one can observe the drastic changes in our ecosystems. The record number of wildfires in the Amazon rain forest is just another shocking example of how humans contribute to this sorry state of the world, be it through indifference, neglect or with criminal intent.²

A recent study, performed by leading environmentalists from across the world, compares the extreme weather periods observed throughout the Common Era (the past 2.000 years) with the materializing global climate change of the past 150 years.³ The essence of their research is clear. None of the previous perceived heatwaves show the same consistency over time and space as does the current threat of anthropogenic climate change. This manifests itself in the occurrence of the warmest periods over the past two millennia during the 20th century for 98 percent of the globe. Another authoritative climate report concludes that 2018 saw the highest levels ever recorded of gases heating the planet.⁴ The same report states that also sea levels were the highest on record, and the Arctic and Antarctic sea ice was near a record low, with glaciers continuing to melt and lose mass. New data collected by

¹ Donald Trump, (*Twitter*, 5 February 2014)

<<https://twitter.com/realdonaldtrump/status/431018674695442432>> accessed 5 August 2019.

² See for example Amazon Watch, 'Complicity in Destruction II: How northern consumers and financiers enable Bolsonaro's assault on the Brazilian Amazon' (2019)

<https://amazonwatch.org/assets/files/2019-complicity-in-destruction-2.pdf?fbclid=IwAR3jeHmZ2QG7dVTI66AKnYP_CRsxcP0ifsH8koVzmmw-sBhr8Z9PehLHAfD8 > accessed 25 August 2019.

³ Neukom et al., 'No evidence for globally coherent warm and cold periods over the preindustrial Common Era' (2019) 550 *Nature* 571.

⁴ Jessica Blunden and Derek S. Arndt, 'State of the Climate in 2018' (2019) 100(9) *Bull. Amer. Meteor. Soc.* <<https://www.ametsoc.org/ams/index.cfm/publications/bulletin-of-the-american-meteorological-society-bams/state-of-the-climate/> > accessed 25 August 2019.

the Geneva-based World Meteorological Organization (WMO) and the European Union's Copernicus Climate Change Programme shows that July 2019 matched, and maybe broke, the record for the hottest month since analysis began in 1880. The record was previously held by July 2016, which was partly explained by one of the strongest occurrence of the El Niño phenomenon, which contributes to heightened global temperatures. Unlike 2016, 2019 has not been marked by a strong El Niño.⁵ In response to these findings, UN Secretary General Antonio Guterres said:

“All of this means that we are on track for the period from 2015 to 2019 to be the five hottest years on record. This year alone, we have seen temperature records shattered from New Delhi to Anchorage, from Paris to Santiago, from Adelaide and to the Arctic Circle. If we do not take action on climate change now, these extreme weather events are just the tip of the iceberg. And, indeed, the iceberg is also rapidly melting.”⁶

In its Fifth Assessment Report, the Intergovernmental Panel on Climate Change (IPCC), a group of 1,300 independent scientific experts from countries all over the world founded under the auspices of the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP), concluded there's a more than 95 percent probability that human activities over the past 50 years have warmed our planet.⁷ The industrial activities that our modern civilization depends upon have raised atmospheric carbon dioxide levels from 280 parts per million to 400 parts per million in the last 150 years. The panel also concluded there's a better than 95 percent probability that human-produced greenhouse gases such as carbon dioxide, methane and nitrous oxide have caused much of the observed increase in Earth's temperatures over the past 50 years, which rose by 1.0°C since industrialization. Industrialization and the resulting released gases in the air are only one of the means by which humans contribute to climate change. Deforestation and fossil fuel production are other main contributing factors. Furthermore, the huge plastic concentration in food chains results in pollution of the oceans, and causes a loss of biodiversity. Consider as final example the livestock farming industry,

⁵ Copernicus, 'Another exceptional month for global average temperatures' (5 August 2019) <<https://climate.copernicus.eu/another-exceptional-month-global-average-temperatures> > accessed 7 August 2019.

⁶ WMO, 'July matched, and maybe broke, the record for the hottest month since analysis began' (1 August 2019) <<https://public.wmo.int/en/media/news/july-matched-and-maybe-broke-record-hottest-month-analysis-began>> accessed 7 August 2019.

⁷ IPCC, 'Climate Change 2014 Synthesis Report' (2015) <https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf > accessed 6 June 2019.

which uses up to one third of our freshwater; has deteriorating effects on water pollution; uses up to 25% of ice-free land globally; and contributes to 24% of greenhouse gases.⁸ As Yuval Noah Harari points out in his book “Sapiens”, mankind is the living creature capable of most damage.⁹

In response to the threat of climate change, UN member states adopted the United Nations Framework Convention on Climate Change (UNFCCC)¹⁰ in 1992, which established the UNFCCC secretariat (UN Climate Change). The UNFCCC’s overarching objective is to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”¹¹. More specifically, the subsequently adopted Paris Agreement in 2015 aims to keep the global average temperature well below 2°C above pre-industrial levels, with the goal of limiting it to 1.5°C.¹² The IPCC reports that if the global mean surface temperature increases further at the current rate, it is expected to reach 1.5°C between 2030 and 2050.¹³ These increases in temperatures lead to increases in environmental changes across the globe. As temperatures rise, both more slow-onset events such as sea-level rises, as well as rapid-onset events such as flooding, will occur. The difference between 1.5°C rise and 2°C temperature rise could mean that the number of people vulnerable to climate-related risks would be reduced by up to 457 million people.¹⁴

The IPCC further states that the risks for natural and human systems “depend on the magnitude and rate of warming, geographical location, levels of development and vulnerability, and on the choices and implementation of adaptation and mitigation options.”¹⁵ The UN Special Rapporteur on extreme poverty and human rights, Philip Alston, released a report on the relation between climate change and poverty. In this report, he stresses the impact climate change will have for people living in poverty, who will face

⁸ The Guardian, ‘What is the true cost of eating meat?’ (2018) <<https://www.theguardian.com/news/2018/may/07/true-cost-of-eating-meat-environment-health-animal-welfare>> accessed 6 July 2019.

⁹ Yuval Noah Harari, *Sapiens: A Brief history of humankind* (Harper, 2011).

¹⁰ UN, ‘United Nations Framework Convention on Climate Change’ (9 May 1992) FCCC/INFORMAL/84 (hereinafter UNFCCC).

¹¹ Art 2 UNFCCC (at 10).

¹² UN Climate Change, ‘Paris Agreement’ (adopted 12 December 2015, entered into force 4 November 2016) Article 2.1(a) (hereinafter Paris Agreement).

¹³ IPCC, ‘Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and offers to eradicate poverty’ (2018) Summary for Policymakers 4.

¹⁴ *Ibid.*

¹⁵ *Ibid* at 5.

“food insecurity, forced migration, disease, and death.”¹⁶ He considers that although climate change entered the human rights discourse a decade ago, too little has been done to address the causes of climate change and the impacts it has on the human rights of the most vulnerable. Climate change has not been a popular issue to tackle within politics, as it goes hand in hand with near-term expenses for long-term advantages. Additionally, as a global issue, political leaders are in most cases reluctant to take concrete action and wait until other countries take on the burden. Current UN High Commissioner on Human Rights, Michelle Bachelet, acknowledged that climate change poses an unprecedented threat to human rights and call upon governments to take action in different areas, recognising that “Today, a very uneven mosaic of environmental and human rights standards stand between human beings and environmental harm”.¹⁷

The above considerations merely serve to illustrate the gravity and urgency of the global challenge posed by climate change. Scientists are of course much better equipped to study the causes and effects of anthropogenic climate change. But there are a number of legal aspects and challenges, especially in relation to displacement of people caused by environmental degradation that are the subject of the present paper. Have climate refugees been recognised in international law? Or is there possibly a legal gap? How does the concept of climate refugees compare to the traditional concept of refugees? Would the existence of climate refugees justify new legal instruments on a European and international scale?

Regarding a possible legal gap, the first attempt to address this issue was made by the governments of Switzerland and Norway, in the form of the so-called Nansen Initiative on Disaster-Induced Cross-Border Displacement. The initiative starts from the premise that when the required responses to the adverse impacts of climate change overwhelm a communities’ resilience, a disaster might lead to

¹⁶ Human Rights Council, ‘Climate change and poverty: Report of the Special Rapporteur on extreme poverty and human rights’ (2019) A/HRC/41/39.

¹⁷ OHCHR, ‘Opening statement of UN High Commissioner for Human Rights Michelle Bachelet’ (9 Sep 2019) <
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E> >
accessed 10 September 2019.

displacement.¹⁸ It furthermore recognises environmentally-induced displacement as a subdivision within the broader category of disaster displacement.¹⁹

The United Nations Office of the High Commissioner for Human Rights (OHCHR) has elaborated on the relationship between human rights, climate change and migration in its document entitled “Key Messages on Human Rights, Climate Change and Migration”. In this document, the OHCHR stresses the importance of tackling the underlying reasons which force people to migrate due to environmental changes. Propositions include employment strategies development, adaptive capacity strengthening, and resilience building.²⁰

Although adaptation to and mitigation against the consequences of climate change are preferred in light of a human rights-based approach to climate change, this distinction is not easily made in the context of displacement. Whereas climate change is measured by the degree of its impact, such a distinction is not possible in the context of displacement: one is either displaced or not.²¹ Hence, adaptation and mitigation measures to address displacement overlap as they both seek to reduce displacement risk, which cannot possibly be eliminated altogether. Therefore, addressing displacement related to climate change includes both preparing for potential displacement, and responding to displacement by finding durable solutions once it occurs.²²

Moreover, it needs to be highlighted that migration can be a form of adaptation in and of itself. Movement in response to environmental change can result in an increase in resilience and provide ways to escape danger, even more so if it is planned appropriately. However, through national immigration laws, States restrict the entry of non-citizens into their territories. States decide whether and which non-nationals should be allowed to get access to their territories, for instance for reasons of employment, family or

¹⁸ Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (2015) para 16 < <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> > accessed 25 July 2019 (hereinafter Nansen Initiative Agenda).

¹⁹ Ibid.

²⁰ OHCHR, ‘Key Messages on Human Rights, Climate Change and Migration’, < https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf > accessed 15 August 2019.

²¹ Platform on Disaster Displacement (PDD) ‘The United Nations system’s mandates with respect to averting, minimizing and addressing displacement related to climate change: considerations for the future’ (July 2018) 4.

²² Ibid.

education.²³ International law furthermore recognizes only three categories of forced migrants who are entitled to protection of a third State: “refugees”, “stateless persons”, and those eligible for complementary protection. Therefore, only persons who can demonstrate that they fall under one of these categories, or who can prove that their reasons for migration are coherent with the national laws and regulations of the recipient country, will be allowed access. In a certain sense, each time a person crosses a border, he or she jeopardizes his or her freedom and dignity as the person in question may run the risk of detention, interdiction and expulsion. Those risks are even higher if the reason behind the forced migration is not legally recognised, as is the case for the normative gap in international law with regard to climate refugees.

Exact data on the reasons for climate migration are hard to pinpoint, partly due to the complex interplay between different motivations for migration. For example, persons might decide to move to another country where they have relatives (family migration), because their land is continuously becoming dryer (climate change-induced displacement) and therefore their agricultural labour does not provide sufficient income anymore (economic migration). It becomes clear from this example that environmentally-induced displacement can be distinguished from migration by means of an evaluation as to whether the environmental hazards evolved into a disaster situation in which individuals have no other reasonable option than to leave.²⁴ Furthermore, most environmentally-induced displacement is recognised to be short distance, temporary and characterised by cyclical movements, making it hard to collect information since internal displacement is regulated so differently than cross-border displacement. According to the most pessimistic estimates, internal and external displacement caused by climate change are already reaching 22,5 million people annually.²⁵ This significant number can legitimately be expected to rise in the decades ahead, since natural disasters will become more frequent as long as the environment keeps degrading. Additionally, it should not be forgotten that human mobility has never been more accessible. Advanced technologies allow us to move faster than ever before, at lower costs.

²³ See *Chahal v United Kingdom* App no 70/1995/576/662 (ECHR, 15 November 1996) para 73.

²⁴ Platform on Disaster Displacement (PDD) ‘The United Nations system’s mandates with respect to averting, minimizing and addressing displacement related to climate change: considerations for the future’ (July 2018) 4.

²⁵ OHCHR, ‘Key Messages on Human Rights, Climate Change and Migration’; Internal Displacement Monitoring Centre (IDMC), ‘Global Report on Internal Displacement 2019’ < <http://www.internal-displacement.org/global-report/grid2019/> > accessed 12 August 2019.

The consequences of climate change for human societies are dramatic. More and more people may wish to migrate in order to find better living conditions. In this paper, I will provide a brief history of the concept of “environmental refugee” in academic literature. What follows is a clarification of the specific context in which the Refugee Convention and the Guiding Principles on Internal Displacement can rightfully be applied to people displaced by disasters. From this will become clear that most people who are displaced due to climate change are currently not protected by international refugee law. In this context, a regional approach founded upon complementary protection within the European human rights framework is presented as possible solution to the legal gap concerning environmentally-induced displaced persons.

Chapter 2: Conceptualization

1. Definitions

At the outset it is necessary to clarify a number of concepts and definitions. Firstly, a distinction must be made between a refugee, a migrant and an internally displaced person, since each one of these terms may imply a different protection framework. Secondly, a distinction should be made between environmental degradation, climate change and disaster. These terminologies are often used intertwined, but they may well represent different realities or in some cases different stages of one and the same process.

1.1. Refugee

“Refugees” are persons who can rightfully demonstrate the application of the 1951 Convention Relating to the Status of Refugees (hereinafter Refugee Convention) to their situation. By fulfilling the conditions set in article 1(A)2 of the Refugee Convention, one does not acquire the status of refugee. Instead, the recognition is declaratory, not constitutive.²⁶ This means that once a person has successfully demonstrated that he or she falls within the scope of article 1(A)2 of the Refugee Convention, the Convention applies immediately. Article 31 restricts the State’s right to penalize illegal entry or to limit the refugee’s movement within the State.²⁷ And article 33 establishes the fundamental guarantee of protection to asylum-seekers: the principle of non-refoulement.²⁸ Thus, whereas a state primarily has the discretion of regulating its own borders, this capacity is restricted by inter alia the Refugee Convention.²⁹ The burden of proof of fulfilment of the criteria as set out in the definition relies, as is customary law, on the one who makes the assertion, in this case the asylum-seeker. However, given the particularly vulnerable situation of asylum-seekers and refugees, the UNHCR proposes a shared

²⁶ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979, reprinted 1992) HCR/1P/4/Eng/Rev.2 para 28.

²⁷ UNGA, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) UNTS 189 (hereinafter Refugee Convention) article 31.

²⁸ Refugee Convention (at 27) article 33.

²⁹ Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 article 1.

burden on the decision-maker.³⁰ Finally, it needs to be highlighted that some climate displaced persons were already displaced due to reasons covered by the definition as in the Refugee Convention, and continue to be so during a second displacement driven by climate change and its consequences.³¹ Further, some climate events lead to conflict, enabling the refugee definition to be applicable since they are then (also) fleeing armed conflict or generalized violence.³² However, both those cases are separate from purely environmentally-driven displacement as dealt with in this paper.

The requirements established in article 1A(2) of the Refugee Convention read as follows:

...the term "refugee" shall apply to any person who: (1)...owing to a well-founded fear of (2) being persecuted (3) for reasons of race, religion, nationality, membership of a particular social group or political opinion, (4) is outside the country of his nationality and (5) is unable, or owing to such fear, is unwilling to avail himself of the protection of that country...".³³

1.2. Internally Displaced Person

From the Refugee Convention definition follows that a person needs to be outside his or her country of nationality to be granted refugee status. However, more frequently, conflict and other circumstances that have seriously disturbed public order will lead to internal displacement rather than cross-border displacement.³⁴ An internally displaced person is not defined in international law, but is defined in soft law, namely in the Guiding Principles on Internal Displacement³⁵:

"Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed

³⁰ UNHCR, 'The International Protection of Refugees : Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees' (April 2001) 20(3) Refugee Survey Quarterly 77, 79 (hereinafter Interpreting Article 1).

³¹ Consider, for example, Afghanis already displaced in Pakistan due to conflict and also victim of the 2015 earthquake.

³² Consider, for example, Caitlin. E. Werrell and Francesco Femia, 'Climate change raises conflict concerns' UNESCO (2018) < <https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns> > accessed 6 August 2019.

³³ Refugee Convention (at 27) article 1A(2).

³⁴ See inter alia Jane McAdam, *Climate Change, Forced Migration, and International Law* (first published 2012 OUP) 5 (hereinafter McAdam).

³⁵ OCHA, UN Guiding Principles on Internal Displacement (1998) < <https://www.unocha.org/sites/dms/Documents/GuidingPrinciplesDispl.web.pdf> > accessed 14 July 2019 (hereinafter UNGP Internal Displacement).

conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border.”

From contrasting both definitions, it becomes clear that persons who have crossed an international border for reasons of disasters, may neither be recognized as refugees, nor as internally displaced persons. Disasters have been recognised as a push factor for internally displaced persons; but not for refugees. Consequently, if one crosses a border for reasons of disaster displacement, no legal definition applies. This constitutes the essential normative gap regarding “climate refugees”, a concept that until now has not been recognized within the current frameworks of international law and its guiding principles. The UN High Commissioner for Refugees (UNHCR) is the international body charged with humanitarian assistance and application of the Refugee Convention, with an extended mandate towards internally displaced persons. Strictly speaking, its mandate does not include the protection of people who are subjected to environmentally induced displacement. Such persons are in principle left unprotected by law and international mechanisms. However, the UNHCR has addressed “climate change displacement” as an issue it is has been dealing with since the mid-2000s.³⁶

Both refugees and internally displaced persons are forced to migrate due to circumstances which are out of their hands. Nowadays the most accepted reasons are political persecution and armed conflict, however natural and man-made disasters have been more commonly accepted as a reason for displacement in the context of internal displacement. Hence, the displacement (either internal or external) is the consequence of external factors which have developed into a disaster situation that leaves affected individuals with no other option than to leave, making the migration “forced”.³⁷ This distinguishes both “refugees” and “internally displaced persons” from “migrants”.

1.3. Migrant

Similarly, to internally displaced persons, there is no formal legal definition of an international migrant. Most experts agree that an international migrant is someone who changes his or her country of usual

³⁶ UNHCR Innovation Centre, ‘Essays from the edge of humanitarian innovation : Year in review 2017’ < https://www.unhcr.org/innovation/wp-content/uploads/2018/02/InnovationYearInReview2017_web.pdf > accessed 14 July 2015, 56.

³⁷ Platform on Disaster Displacement (PDD) ‘The United Nations system’s mandates with respect to averting, minimizing and addressing displacement related to climate change: considerations for the future’ (July 2018) 4.

residence, irrespective of the reason for migration or legal status. Generally, a distinction is made between short-term or temporary migration, covering movements with a duration between three and twelve months, and long-term or permanent migration, referring to a change of country of residence for a duration of one year or more.³⁸ Migrants are generally perceived as migrating “willingly”, and thus represent a lower level of vulnerability. Therefore, fewer protection mechanisms are in place with regard to their legal status.

No legally binding international treaty applies to voluntary migration. The UN General Assembly adopted the New York Declaration for Refugees and Migrants in September 2016 with the aim to address this normative gap.³⁹ The UN member states finalized the text for the Global Compact for Safe, Orderly and Regular Migration in July 2018.⁴⁰ The Compact was subsequently adopted in Marrakech in December 2018 by 164 States. The Global Compact for Migration, which caused some controversy in several countries in the run-up to its adoption and even led to the fall of the Belgian government at the time, is the first-ever UN global agreement on a common approach to international migration in all its dimensions. The global compact is a non-legally binding pact which “comprises 23 objectives for better managing migration at local, national, regional and global levels.”⁴¹ Under its objective 2, it recognises migration caused by deteriorating environments. However, the compact currently lacks actionable commitments to control the countless anthropogenic forces which cause global mass migration.⁴² Furthermore, the term ‘migrant’ might not always be considered appropriate, since it suggests a voluntary movement.

³⁸ United Nations Department of Economic and Social Affairs, ‘Migrant’ < <https://refugeesmigrants.un.org/definitions> > accessed 14 July 2019.

³⁹ UNGA, New York Declaration for Refugees and Migrants (adopted 19 September 2016) A/RES/71/1 < https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1 > accessed 15 July 2019.

⁴⁰ UNGA, Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) A/RES/73/195 < https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 > accessed 15 July 2019.

⁴¹ IOM, ‘Global Compact for Migration’ <<https://refugeesmigrants.un.org/migration-compact> > accessed 16 July 2019.

⁴² European Parliamentary Research Service, ‘The Concept of ‘Climate Refugee’: Towards a possible definition’ < [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf) > accessed 6 June 2019 page 2.

Besides a clear distinction between 'refugees', 'internally displaced persons', and "migrants", there is also a need to clarify the differences between 'environmental degradation', 'climate change', and 'natural disaster'.

1.4. Environmental Degradation

Environmental degradation is the exhaustion of the world's natural resources: land, air, water, soil, etc.⁴³ Speaking about environmental degradation usually means that one stresses the causality of human activity and refers to the human action of pollution. Human waste is polluting the environment faster than the waste is able to decompose itself. Modern economies, based on mass consumption and a so-called "throw-away culture", are overusing the renewable resources faster than such resources can rebuild themselves. For this reason, the environment has a shrunken ability to withstand these devastating human impacts. As a consequence, environmental degradation became a threatening issue to mankind and biodiversity.⁴⁴

1.5. Climate Change

Climate change is defined in the first article of the UNFCCC as follows:

“‘Climate change’ means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”⁴⁵

The relationship between environmental degradation and climate change is complex, but one can observe through these definitions that environmental degradation is the act of pollution which leads to a change of climate. Climate change, in turn, is one step removed from the impacts it can manifest. These impacts include, but are not limited to, a rise in the global mean surface temperature. Hence, climate change is better understood as a threat or impact multiplier.⁴⁶ Another threat intensified by

⁴³ Dr.Salah M. El-Haggar PE, PhD, 'Sustainable development and Environmental reform', in *Sustainable Industrial Design and Waste Management: Cradle-to-Cradle for sustainable development* (2007).

⁴⁴ *ibid.*

⁴⁵ UNFCCC Art. 1.

⁴⁶ Matthew Scott, *Refugee Status Determination in the Context of 'Natural' Disasters and Climate Change: A Human Rights-Based Approach* (Lund University 2018) 120 (hereinafter Scott); McAdam (at 35) 24.

climate change is the frequent occurrence of natural disasters. Natural disasters (although the word “natural” has to be taken with a pinch of salt due to human involvement in causing or intensifying the disasters) are therefore more suited as starting point to analyse displacement caused by climate change.

1.6. ‘Natural’ Disaster

The International Law Commission held a wide consultative process which resulted in the authoritative document of the Draft Articles on the Protection of Persons in Situations in the Event of Disaster. The Commentary to the Draft Articles explains its intent to deliver a precise definition, hence its focus on events, rather than more complex processes; and on extremes rather than less dramatic events. The Draft Articles define a ‘disaster’ as follows:

“a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.”⁴⁷

Notwithstanding its authoritative status as a result of a wide consultative process, it is also highly criticised by many states. The main criticism is that the definition demonstrates key features of the hazard paradigm, whilst the social paradigm is more reflective of contemporary insights.⁴⁸ For example, the United States stated that: “... the majority of the nonbinding instruments that specifically address disasters focus on the types of hazards and social conditions of vulnerability that disrupt the normal functioning of a community or society.”⁴⁹ The second criticism, held by inter alia Germany, is that focusing on “events” (such as earthquakes, floods or tsunamis), rather than also including “processes” (such as droughts), is too narrow.⁵⁰ A third critique, expressed by inter alia the Secretariat of UNDRR, questions whether the threshold of “serious disruption of society” is met in case of small-scale disasters.⁵¹

⁴⁷ International Law Commission (hereinafter ILC), ‘Draft Articles on the Protection of Persons in the Event of Disaster, Report of the Work of the 68th Session’ (2016) UN Doc A/71/10, article 3(a), 14.

⁴⁸ Scott (at 47) 120-122.

⁴⁹ ILC, ‘Protection of Persons in the Event of Disasters: Comments and Observations Received from Governments and International Organizations’ (28 April 2016) UN Doc A/CN.4/696/Add.1, 6.

⁵⁰ *Ibid*, 14.

⁵¹ *Ibid*, 14.

In light of these critiques, a more appropriate definition of disasters is the one used by the UNDRR as presented in the 'Report of the open-ended intergovernmental expert working group on indicators and terminology relating to disaster risk reduction'.⁵² The UNDRR is the acronym for the UN Office for Disaster Risk Reduction, and is previously known as UNISDR. This organisational unit seeks to substantially reduce disaster risk and following losses. As focal point of the UN system for disaster risk reduction, the UNDRR is based on the Sendai Framework for Disaster Risk Reduction 2015-2030 (Sendai Framework).⁵³ This framework, in turn, is the first extensive agreement of the post-2015 sustainable development agenda, as it includes seven targets and four priorities for action. It was adopted by the UN General Assembly, as a result from the 2015 Third UN World Conference on Disaster Risk Reduction. The UNDRR is mandated to support the countries and societies in implementing, monitoring and reviewing the progress made upon the Sendai Framework.⁵⁴

The definition of disasters handled by the UNDRR reads as follows:

“A serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.”⁵⁵

Furthermore, the UNDRR sets out the differences between small-scale and large-scale disasters; frequent and infrequent disasters; and slow-onset and sudden-onset disasters as listed in paragraph 15 of the Sendai Framework. For the scope of this paper, the distinction in relation to frequency or scale of the disaster will not be made. Although it is certain that the difference is relevant as these factors will influence the level of vulnerability, it goes beyond the research of this paper to enter into detail about every determining factor which is involved with climate change; since the range of relevant factors is endless (consider for example a communities' proximity to organised shelter or access to pre-disaster warning information).

⁵² UNGA, 'Report of the open-ended intergovernmental expert working group on indicators and terminology relating to disaster risk reduction' (1 December 2016) UN Doc A/71/644.

⁵³ Third UN World Conference, 'Sendai Framework for Disaster Risk Reduction 2015-2030' (18 March 2015) (hereinafter Sendai Framework).

⁵⁴ Sendai Framework (at 53) 5.

⁵⁵ UNGA, 'Report of the open-ended intergovernmental expert working group on indicators and terminology relating to disaster risk reduction' (1 December 2016) UN Doc A/71/644, 13.

2. Conceptualization: from 1985 until now

The concept of “environmental refugees” came to the forefront of public discourse when El-Hinnawi provided the first definition in a 1985 UNEP paper.⁵⁶ The emergence of a tangible definition encouraged a fairly large number of researchers to undertake further studies and to document the existence of migration caused by natural disasters. A second important figure at the outset of this concept is Jacobson, who, in 1988, went as far as making an estimate about the number of existing environmental refugees. His estimate of 10 million refugees gave some initial legitimacy to the notion of environmental refugees as more than a hypothetical category.⁵⁷ He was followed by Myers, one of the last academics to address environmentally-induced displacement in the 1990’s, who upped the estimation to 25 million environmental refugees.⁵⁸ Problematic with the evolution in scholarship is the lack of empirical evidence. The neo-Malthusian links between population growth, climate change and displacement were established on the premise of Jacobson’s estimate and El-Hinnawi’s definition. For authors from the 1990s, “migration is the outcome of diminished agricultural production, reduced water availability and damage to physical infrastructure”.⁵⁹

Evidently, the ground-breaking works by El-Hinnawi, Jacobson and others provoked criticism by other scholars, the first ones being Bilsborrow, McGregor and Suhrke.⁶⁰ It is noticeable that, despite the lack of empirical evidence, no one contested the existence of environmental refugees. Instead, discussions emerged around the legal implications such a concept would have, since it refers to a broad range of migrants which respond to a comprehensive scope of events. Other criticisms included the primacy given to changes in the environment in decisions about human migration, therefore neglecting other driving factors; the denial of agency to the migrant to endure or adapt to changes in their physical environment; and the undermining of the legal terminology “refugee” as defined in the 1951 UN Refugee Convention. But also governments were critical of the concept. McNamara explains how they feared

⁵⁶ Essam El-Hinnawi, ‘Environmental refugees’ (1985) United Nations Environment Programme (UNEP).

⁵⁷ Jodi L. Jacobson, ‘Environmental refugees: a yardstick of habitability’ (1988) World Watch Institute.

⁵⁸ Norman Myers and Jennifer Kent, ‘Environmental exodus: An emergent crisis in the global arena’ (1995) The Climate Institute.

⁵⁹ James Morrissey, ‘Rethinking the ‘debate on environmental refugees’: from ‘maximalists and minimalists’ to ‘proponents and critics’ (2012) 19 *Journal of Political Ecology* 37.

⁶⁰ See R. Bilsborrow, ‘Rural poverty, migration, and the environment in developing countries: three case studies’ (1992) The World Bank; J. McGregor, ‘Climate change and involuntary migration: implications for food security (1994) 19(2) *Food Policy*; and A. Suhrke, ‘Environmental degradation and population flows’ (1994) 47(2) *Journal of International Affairs*.

that acknowledging the term would be tantamount to accepting responsibility for them. This, in turn, would be a ground to argue for compensation for displacement in the Global South by the industrialized North, which in itself could set a precedent for compensation for the impacts of climate change more generally.⁶¹

2.1. Environmentalists' portrayal of refugees as a 'problem' which takes place on a huge 'scale'

Besides the long-standing influence of the neo-Malthusian logic in the literature on 'environmental refugees', another driver behind the conceptualisation of 'environmental refugees' are politics aiming for environmental protection and conservation.⁶² Remarkable in this regard is that El-Hinnawi published his paper for UNEP; and Jacobson's paper was published by the World Watch Institute, which is a renowned environmental organization. Relying on two assertions, environmental refugees were utilised as argument in favour of early intervention in environmental protection. Firstly, human mobility was casted as a "problem", and secondly, the problem was presented as occurring on a "scale" which makes addressing it seem impossible.

The problem aspect has two sides and portrays the refugee as both a helpless victim and resourceful agent. On the one hand, the refugee is a humanitarian problem, where the focus lies on their vulnerability and incapability to respond to changes in the social context or physical environment. On the other hand, receiving areas focus on security and stability and render refugees capable of destabilizing entire nation states. The notion of the environmental refugee as security threat can be traced throughout the discourse surrounding refugees.⁶³ the problem was then presented as taking place on a "scale" which would make any intervention seem useless. Since welcoming the migrants would constitute a threat to security and mitigating the suffering refugees undergo during their movement is impossible; the only rational action left are policy regulations aiming to address the cause of the problem: environmental degradation.

⁶¹ K. McNamara, 'Pragmatic discourses and alternative resistance: Responses to climate change in the Pacific (2008) 6(2) Graduate Journal of Asia-Pacific Studies 33-54.

⁶² Morrissey (at 59).

⁶³ See, for example, UN Meetings Coverage, 'Refugees, migrants, branded 'threats', dehumanized in campaigns seeking political gain, High Commissioner tells Third Committee, appealing for return to dignity' (31 October 2018) GA/SHC/4247, <<https://www.un.org/press/en/2017/gashc4247.doc.htm> > accessed on 7 July 2019.

2.2. Maximalists and minimalists find each other

The scholarship surrounding environmental refugees is thus divided between advocates and critics of the term. Proponents seek to provide an answer to the normative gap within international law and the subsequent vulnerability which might entail from disasters, resulting from or amplified by climate change. Critics highlight the anti-immigrant sentiment provoked by the way refugees are portrayed, as a means to push climate mitigation efforts, but ultimately resulting in a anti-immigrant sentiment driven by the discursive linkages involved.

Nonetheless, some consensus can be found amongst academics. They agree that not all migrants are refugees; that the natural environment is linked to the social, political and economic context; and that most environmental displacement is short distance, temporary and characterised by cyclical movements.⁶⁴

Starting from these premises, this paper seeks to provide an answer to the protection gap resulting from the lack of definition on environmentally-induced migrants. What follows is the provision of an analysis which demonstrates the (albeit restricted) use of international refugee law *sensu lato* (including internal displacement and the over-crossing role of the UNHCR), and a brief outset of the different entities within the United Nations which are charged with the intersection between climate change and migration. Finally, answers will be found in the jurisprudence of the European Court of Human Rights, more specifically in its application of the non-refoulement principle.

⁶⁴ Morrissey (at 59) 43.

Chapter 3: Engaging with the refugee mechanism and internally displaced UN system

Law is constructed in a way that enables it to transform according to the modern society's needs. After decades of creating norms and setting standards, it is time to acknowledge the rich resources presented and to allow them to evolve. Where definitions ensure legal certainty for both the rights holders and the duty bearers who are identified within them, they also need to show a certain degree of flexibility. Without this flexibility, the danger erupts that the law becomes irrelevant in its task of addressing the society's ever-evolving needs.

This reasoning is also valid in relation to climate refugees. Whereas this is a relatively new concept, which is not currently recognized internationally, this chapter argues that the level of vulnerability experienced by a disaster victim determines whether they are protected as a refugee under the existing refugee framework. This framework consists mainly in the 1951 Refugee Convention and its 1967 Additional Protocol, which were created to fulfil the needs of the 20th century, a century marked by war and resulting displacement. The Refugee Convention was adopted in the aftermath of World War II and aims at protecting those who were forced to flee their home country due to conflict, violence and persecution⁶⁵. The consequences of the Cold War and the split of Yugoslavia led to the adoption of the Guiding Principles on Internal Displacement in 1998, which recognises natural disasters as a driver of displacement.⁶⁶

A new threat emerged since then and needs to be addressed appropriately, by making use of the existing frameworks within international law. Putting aside the above mentioned two categories of climate displaced persons who are already being granted protection under the current framework of the Refugee Convention⁶⁷, this section addresses the role of the UNHCR and other UN institutions in

⁶⁵ UNHCR, 'The 1951 Refugee Convention and its 1967 Protocol' 1 < <https://www.unhcr.org/uk/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html> > accessed 3 July 2019.

⁶⁶ UNGP Internal Displacement (at 36) principle 6.2(d).

⁶⁷ Some climate displaced persons are already being granted protection under the current framework. For instance, one might already have been displaced within the UNHCR's mandate and continue to be so during the second – environmentally-induced – displacement (eg Afghanis in Pakistan after the earthquake). Moreover, some climate events are leading to conflicts and therefore those affected might qualify as refugee if they flee armed conflict or generalized violence. (cf refugee definition) See also OCHA, 'Understanding the climate-conflict nexus from a humanitarian perspective: a new

addressing this normative gap faced by most of the persons forcedly displaced due to environmental degradation.

1. Refugee framework

Temperatures are rising on a global scale, which causes droughts and famines; floods and slides; cyclones, hurricanes and waves; sea level rises; heat waves; and other disasters. The adaptive capability of mankind to this change in nature's patterns should not be underestimated. Most people will be able to re-organise themselves and prepare for these changes or mitigate the consequences of slow or onset disasters.⁶⁸ The capability to do so depends on various economic, political and social factors which determine the level of vulnerability of a specific person. Whereas climate change is expected to cause unseen migration patterns, not all migrants qualify as climate refugees. Only those migrants who are part of a particular social group and therefore experience a well-founded fear of being persecuted will fall under article 2 of the Refugee Convention and be granted refugee status.

In order to be recognised as a refugee under the Refugee Convention, a person needs to establish that each element of the definition provided in article 1A(2) applies to him or her. This article reads as follows: "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".⁶⁹ The core elements which must be satisfied once the applicant resides outside of their country of nationality or former residence, are 1) a well-founded fear 2) of being persecuted 3) for reasons of 4) race, religion, nationality, membership of a particular social group or political opinion.⁷⁰ The Office of the UNHCR oversees and guides the interpretation of the Refugee Convention. It furthermore established a Handbook for Refugee Status Determination, along with a document "Interpreting Article 1A(2)".⁷¹ In

quantitative approach' (May 2016) <
<https://www.unocha.org/sites/unocha/files/Understanding%20the%20climate-conflict%20nexus.pdf> >
accessed 26 August 2019.

⁶⁸ McAdam (at 35).

⁶⁹ Refugee Convention (at 27) article 1A(2).

⁷⁰ Interpreting Article 1 (at 31).

⁷¹ UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Reissued April 2019) HCR/1P/4/ENG/REV.4 (hereinafter UNHCR Handbook).

this document, it states that “the key to characterisation of a person as a refugee is risk of persecution for a Convention reason”.⁷² In relation to environmental displacement, the scholarship is divided in mainly two camps. One side argues that climate refugees are not included in the Refugee Convention since disasters and climate change don’t amount to “persecution”, and they are indiscriminate by nature, since disasters hit an entire population at once. The other side claims a broader interpretation of “persecution” which leaves space to include climate refugees in the Convention, and establish that disaster relief response has the potential to act discriminatory against the most vulnerable.⁷³ What follows is an analysis of these two most contested concepts in the refugee definition. Firstly, we will establish the meaning of persecution. Secondly, we will point out the difference between the indiscriminate disaster and the potential discriminate state response to the disaster.

1.1. Well-founded fear of being persecuted

“Persecution” can be interpreted in different ways, since international law does not provide a definition. The reason for the absence of a definition is disputed and unclear. Some commentators argue that a definition is unnecessary as its meaning was self-evident through previous instruments and experience, while others propose it was left undefined so that future types of persecution would be encompassed by the term.⁷⁴ This latter view is supported by the UNHCR, the leading body for interpretation of the Refugee Convention.⁷⁵ Also in light of the Vienna Convention, a treaty is supposed to be interpreted by taking into account the context of the treaty.⁷⁶ From the preamble of the Refugee Convention, it follows that it is based on the humanitarian purpose of guaranteeing human rights to persons who find themselves impelled to leave their country.⁷⁷ However a binding definition is unwelcome, as it restricts modern interpretations of the term, it is helpful to highlight the authoritative statement made by Hathaway and Foster (Refugee Status) on this account. In their latest work on the human rights-based approach to the refugee definition, they have defined persecution as “a sustained or systemic denial of

⁷² Interpreting Article 1 (at 31) para 7.

⁷³ Scott (at 47).

⁷⁴ Atle Grahl-Madsen, *The Status of Refugees in International Law* (AW Sijthoff's Uitgeversmaatschappij NV 1966) 193.

⁷⁵ UNHCR Handbook (at 72).

⁷⁶ UN, ‘Vienna Convention on the Law of Treaties’ (adopted 23 May 1969, entered into force 27 January 1980) UNTS 1155, article 31.

⁷⁷ Refugee Convention (at 27), preamble.

human rights demonstrative of a failure of state protection”.⁷⁸ This definition allows the Refugee Convention to encompass all state actions and omissions which target and endanger the refugee applicant. Being persecuted is interpreted with reference to the international human rights instruments which are ratified by a “super-majority of states across a politically and geographically diverse range of states”.⁷⁹ Consequently, persecution is to be understood as a denial of rights protected under the international bill of rights⁸⁰ and other widely ratified instruments, such as the CRC⁸¹. There is broad consensus amongst scholars that being persecuted consists in being exposed to serious harm, which includes deprivation of civil and political as well as economic and social rights, from which the state is unable or unwilling to protect.⁸² Also case law has established that persecution is the sum of serious harm and the failure of state protection.

It is widely recognised that international law provides a protection mechanism where national law is insufficient to provide answers in the modern era of globalisation and environmental disasters.⁸³ More specifically, the failure of state protection is inherently linked to the purpose of the Refugee Convention, namely substitute international protection of refugees where their home state fails to provide the necessary protection.⁸⁴ The interpretation of state protection proposed here, and in numerous other literature, is that of *effective* protection. This interpretation is in opposition to the highly criticised “due diligence” approach where it is sufficient for a state to merely have a protection mechanism in place.⁸⁵ Therefore, when a state fails to effectively protect its population against a systemic denial of human rights ensuing from a natural disaster, this amounts to persecution as in article 1 of the Refugee Convention. Research confirms that disasters and disaster relief accentuate previous inequalities within societies. Whereas general environmental management is not aimed at particular groups of people, they will influence different layers of society differently. It is in this instance that persecution might occur.

⁷⁸ James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2014 CUP 2nd ed.) 334.

⁷⁹ Hathaway and Foster (at 79) 205.

⁸⁰ Consisting in: UNGA, ‘Universal Declaration of Human Rights’ (10 December 1948) 217 A (III) (UDHR); UNGA, ‘International Covenant on Civil and Political Rights’ (adopted 16 December 1966, entered into force 23 March 1976) UNTS 999 171 (ICCPR); and UNGA, ‘International Covenant on Economic, Social and Cultural Rights’ (16 December 1966, 3 January 1976) 993 UNTS 3 (ICESCR).

⁸¹ UNGA, ‘Convention on the Rights of the Child’ (20 November 1989, 2 September 1990) 1577 UNTS 3 (CRC).

⁸² Scott (at 47) 54.

⁸³ UNGA, ‘A more secure world: our shared responsibility’ (2 December 2004) UN Doc A/59/565.

⁸⁴ Refugee Convention (at 27) art 1.

⁸⁵ Hathaway and Foster (at 79) 315-20 for exhaustive references to academics and cases.

1.2. Vulnerability

The living situation of a person will be influenced by social structures on the one hand, and individual agency on the other hand. In the context of disaster and climate change, the individual capabilities to respond to distress of those referred to as vulnerable should not be overlooked. Also economic choices might be at the source of the decision to inhabit regions which are susceptible to climate change. For example, regions with a higher risk of flooding are more fertile and thus generate more wealth.

Nevertheless, social structures influence a great deal of those individual capabilities. Scholars identify economic, political and social reasons for a difference in vulnerability to disaster within a society. This theory is referred to as the “social paradigm of disasters”.⁸⁶ For example, people who find themselves in a superior economic position will have the means to mitigate the damage done by the disaster by themselves and won’t need to rely on humanitarian assistance. Those in a superior political position can rely on their networks to receive favourable treatment whilst the relief programmes take place. Finally, discrimination during distribution of aid towards different social groups such as women, children and marginalized groups puts them in a disadvantaged position.

It becomes clear that not all victims of a disaster will fulfil the refugee definition and be granted refugee status. In order to determine how vulnerability affects the recognition of a refugee, one needs to consider the factual circumstances. The applicant will have to demonstrate that they experience discrimination inherent to the “for reasons of race, religion, nationality, membership of a particular social group or political opinion” requirement of the refugee definition.

The Nansen Initiative on Disaster-Induced Cross-Border Displacement acknowledges that: “(...) disasters exacerbate pre-existing vulnerabilities. Sick and wounded persons, children, particularly when orphaned or unaccompanied, women headed households, people with disabilities, older persons, migrants, and members of indigenous peoples are often among the most seriously affected survivors

⁸⁶ See Ben Wisner et al, *At Risk: Natural Hazards, People’s Vulnerability and Disasters* (2nd ed Routledge 2004) chapter 2 (hereinafter Wisner et al).

of disasters”.⁸⁷ Similarly, the Intergovernmental Panel on Climate Change (IPCC) recognises that: “More marginal and less wealthy areas will be less able to adapt; thus, without appropriate policies of response, climate change may lead to greater inequities.”⁸⁸ Wisner et al provide an example of how discrimination plays a role in engendering differential vulnerability and exposure to disaster risk. He refers to flooding in Alice Springs, Australia, in 1985: “Aboriginal people did not receive flood warnings and lived in flimsy accommodation on low-lying land. The radio broadcasts that alerted the white people were not on channels which were customarily used by the Aborigines...”.⁸⁹ More generally, one can observe around the globe the difference in accommodation between the poorer and richer segments of society. For example, in Lomé, Togo, the most poor people have their accommodations on lower grounds, which are frequently target of flooding, whereas the more richer people live on higher grounds where they are protected from the consequences of heavy rainfalls.

Only in cases where the refugee’s state of nationality or habitual residence fails to address these underlying inequalities when mitigating disaster consequences, will they fall under the definition provided in art 1 of the Refugee Convention.

2. Internally Displaced Persons framework

Compared to the refugee framework, the framework on Internal Displaced Persons (hereinafter IDP) is more straightforward in addressing disasters. The Guiding Principles on Internal Displacement recognises disaster-induced displacement as a form of internal displacement.⁹⁰ As noted before and following from the concept in and of itself, the application of the Guiding Principles is however restricted to internal displacement. Consequently, it does not provide answers for people who are forced to cross an international border due to the consequences of climate change. Furthermore, it is a non-binding agreement which therefore does not provide the necessary protection. However, the IDP framework provides lessons to be learned and taken away in the context of the wider environmentally-induced displacement nexus, namely a response mechanism and research centre.

⁸⁷ Nansen Initiative Agenda (at 18) 2.

⁸⁸ Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, ‘Impacts, Adaptation, and Vulnerability’ (CUP 2014) accessed 6 July 2019, 67.

⁸⁹ Wisner et al (at 87) 238.

⁹⁰ UNGP Internal Displacement (at 36) principle 6.

2.1. Response mechanism

The primary responsibility to provide relief and other necessary responses lies upon the national governments. Only when they lack resources to respond, the international community can, at their request, provide support and humanitarian assistance.⁹¹ The body charged with the coordination of humanitarian assistance for IDPs is the Inter-Agency Standing Committee (IASC)'s cluster approach. The IASC forms part of the UN Offices for Coordination of Humanitarian Affairs (OCHA) Services. Under its "cluster approach", the UNHCR leads the Global Protection Cluster. However, at the country level, the three protection-mandated agencies (UNHCR, UNICEF and OHCHR) consult and agree which agency among them will assume the role of Cluster Lead Agency for protection.⁹² The decision depends on which agency is best placed in a particular context to undertake this responsibility. Factors which are taken into account include their respective expertise and established presence in the country, as well as the availability of resources than can promptly be employed, and their ability to scale up.⁹³

However, the Cluster system deals with significant shortcomings. For example, the Real-Time Evaluation Report of 2011 on the Pakistan floods stresses the lack of strong leadership and strategic prioritization within the cluster system. The report explains that the UN and national authorities showed diverging views on how to approach the emergency situation, and as to the leadership and accountability assignment. It also states that cluster leads generally favoured their own agencies' interests rather than the priorities in addressing the emergency.⁹⁴ Local agencies are not ready to deviate from their mandates and, although they might be best connected in a certain region, they have been observed to protect only the target group they usually work with.⁹⁵ In an attempt to address these

⁹¹ This follows from state sovereignty.

⁹² UNHCR, 'UNHCR, The Environment & Climate Change' (UNHCR 2015, updated October 2018) <<https://www.unhcr.org/uk/540854f49> > accessed 16 July 2019.

⁹³ IASC, 'Guideline: Cluster coordination at national level' (July 2015 IASC Sub-Working Group on the Cluster Approach and the Global Cluster Coordinators' Group <https://interagencystandingcommittee.org/system/files/reference_module_for_custer_coordination_at_country_level_2015.pdf > accessed 16 July 2019.

⁹⁴ OCHA and IASC, 'Real Time Evaluation of the International Humanitarian Community's response to the 2010 Floods in Pakistan' (March 2011) <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/IA%20ORTE_Pakistan%20Floods_Final%20Report.pdf> accessed 17 July 2019, page 57

⁹⁵ Roberta Cohen, 'An institutional gap for disaster IDPs' <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/statelessness/cohen.pdf> > accessed 2 August 2019.

deficiencies, the IASC elaborated the Transformative Agenda, which focuses on three areas: leadership, coordination and accountability. However this effort is important in the work towards a more consistent approach to displacement, its most promising actions are only activated when an emergency reaches a high threshold of severity.⁹⁶ No new evaluation reports have followed since the adoption of the Transformative Agenda, and it is therefore unclear if the clusters are now more capable to effectively protect internally displaced persons and refugees in contexts of disasters.

2.2. Research centre

Nonetheless, the IDP framework provides some essential tools to deal with disaster-induced displacement. The International Displacement Monitoring Centre (IDMC), for example, is a research platform under the auspices of the Norwegian Refugee Council, which provides segregated data on internal displacement caused by conflict and violence on the one hand, and disasters on the other hand.⁹⁷ The IDMC released a Research Agenda titled “No matter of choice: displacement in a changing climate”, which “explores the scale, patterns, drivers and impacts of internal displacement associated with slow-onset environmental change and disasters to inform policies and practices for managing and reducing displacement risk”.⁹⁸ More generally, their Global Report on Internal Displacement 2019 (GRID 2019) provides a comprehensive analysis of disasters and slow-onset environmental changes in relation to displacement. They furthermore recognize the interplay that can exist between conflict and disaster displacement.⁹⁹

Nevertheless, as stated before, the framework on internal displacement only concerns displacement within a country’s borders and does not compromise the situations where environmental changes force people to leave their country. Additionally, even within the internal displacement framework, conflict is generally given more attention and priority as compared to disasters as a displacement drivers. Consider, for example, the UNHCR which states that although “they have fled for similar reasons as

⁹⁶ UNHCR, Key Point of the Transformative Agenda (‘TA’) < https://emergency.unhcr.org/entry/41612?lang=en_US > accessed 2 August 2019.

⁹⁷ For more information, visit <<http://www.internal-displacement.org/about-us>> accessed 3 August 2019.

⁹⁸ For more information, visit <<http://www.internal-displacement.org/research-areas/displacement-in-a-changing-climate>> accessed 3 August 2019.

⁹⁹ IDMC, Global Report on Internal Displacement 2019 (10 May 2019) < <http://www.internal-displacement.org/global-report/grid2019/>> accessed 3 August 2019.

refugees (armed conflict, generalized violence, human rights violations) IDPs legally remain under the protection of their own government".¹⁰⁰ In this understanding, the environmental dimension is not being considered. Also in the Strategic Directions 2017-2021, the term "conflict" occurs 19 times, whereas "disaster" is only mentioned 3 times.¹⁰¹

3. UNHCR and their over-crossing humanitarian role

From refugees...

The UNHCR was established by a UN General Assembly Resolution¹⁰² following the adoption of the Refugee Convention, and was mandated with the protection of international refugees who fall within the scope of the Refugee Convention. It furthermore supports governments in finding durable solutions for those forcibly displaced due to war, political persecution, or violence.¹⁰³

... to internally displaced persons due to conflict...

Although thus initially set up in the context of refugee protection, the UNHCR became aware of the growing number of internally displaced persons, who face similar challenges and are marked by similar vulnerabilities as refugees. The UNHCR's first direct engagement in IDP situations was a result of its mandate to seek permanent solutions for refugees, in cooperation with governments.¹⁰⁴ With the adoption of the 2007 "Policy Framework on the role of the UNHCR in support of an enhanced humanitarian response to situations of internal displacement", the UNHCR recognised its experience in humanitarian response to crisis situations and thus its ensuing evolving role towards the protection of IDPs. However, in the same document, the UNHCR explicitly refrains from getting involved in the

¹⁰⁰ UNHCR, 'Internally Displaced People' (2015) <<http://www.unhcr.org/pages/49c3646c146.html>> accessed 3 August 2019.

¹⁰¹ UNHCR, 'UNHCR'S Strategic Directions 2017-2021' (16 Jan 2017) <<https://data2.unhcr.org/en/documents/download/53367>> accessed 3 August 2019 (hereinafter UNHCR Strategic Directions).

¹⁰² UNGA RES 319(IV) (3 December 1949).

¹⁰³ UNHCR, 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 December 1950) UNGA Res 428(v) para 1 <<https://www.unhcr.org/uk/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html>> accessed 3 August 2019.

¹⁰⁴ UNHCR, 'Operational review of UNHCR's engagement in situations of internal displacement' (September 2017) page 10 (more precisely in the 1970s in Sudan) <<https://www.unhcr.org/protection/idps/5a02d6887/operational-review-unhcrs-engagement-situations-internal-displacement.html>> accessed 3 August 2019 (hereinafter UNHCR Operational Review).

operations addressing environmentally-induced displacement. Nonetheless, it also states that “the Office may, in consultation with affected states and partner organizations, lend immediate support to such populations when it is in a position to do so.”¹⁰⁵

... to displacement caused by environmental degradation?

Recent developments in a growing recognition of environmentally-induced displacement and the urging need to address both the root causes *and* the inevitable need for humanitarian relief for those affected by the consequences of the changing climate, led to a change of direction within the UNHCR. As for addressing the causes, the UNHCR in its current mandate is not empowered to get involved before the conflict or disaster occurs.¹⁰⁶ With regard to the required humanitarian relief following the occurrence of a disaster or displacement forced by slow-onset changes in the environment, UNHCR recognizes the role it needs to play in providing assistance and relief.¹⁰⁷ The Strategic Directions 2017-2021, which provides an overview of the challenges and opportunities characterising forced displacement, and the approach the UNHCR seeks to follow for these five years¹⁰⁸, states the following:

“We will (...) contribute to any inter-agency response to emergencies resulting from natural disasters, with a particular focus on providing protection leadership, where the three criteria of field presence, a government request and inter-agency agreement are met”.¹⁰⁹

Unfortunately, a coherent approach is thus not yet achieved, since the priority currently lies on providing exclusively protection leadership, only in those cases where the three criteria are fulfilled. This means that the UNHCR does not commit to an engagement to coherently address the issue of environmental

¹⁰⁵ UNHCR, ‘Policy Framework on the role of the UNHCR in support of an enhanced humanitarian response to situations of internal displacement’ (4 June 2007) EC/58/SC/CRP.18 para 16 <<https://www.unhcr.org/46641fff2.html>> accessed 5 August 2019.

¹⁰⁶ The next section will elaborate further on the actors responsible for early intervention. In the case of disaster-induced displacement, this pre-disaster intervention takes place in the need to efficiently enable technologies to prevent the largest causes of climate change-induced displacement. In Japan, for example, the houses are constructed in a way that earthquakes don’t destroy them. In other places, dams are built to reduce the size and effects of large scale events. The possibilities are endless and underexplored.

¹⁰⁷ UNHCR Strategic Directions (at 102) page 21; UNHCR, ‘Climate Change and Disaster Displacement’ (May 2017) <<https://www.unhcr.org/591d46907.pdf>> accessed 9 August 2019.

¹⁰⁸ UNHCR Strategic Directions (at 102) page 5.

¹⁰⁹ UNHCR Strategic Directions (at 102) page 21.

displacement, but rather (in cases where the three criteria are fulfilled) merely commits to provide some leadership to the inter-agency response, which is activated after the disaster reached a threshold. The fact that it waits to get organised until the disaster reaches a certain degree of extremeness, leads to an approach that can at least be called unsuited. A review process report released in 2017 observed that the UNCHR is not sufficiently prepared to take on this leadership in cases where it did not previously lead the sector working group.¹¹⁰ The review blames this on a failure to engage in country-level preparedness and in the early stages of a crisis.

Intervention by the UNHCR in internal displacement is traditionally seen as complementary to state sovereignty. As the primary responsibility for assistance and protection lies upon the government of the country affected by the natural disaster, it will be through capacity building and training with the aim of strengthening national institutions that the UNHCR can most appropriately and effectively fulfil its protection mandate.¹¹¹

Although the UNHCR is already overwhelmed with its current mandate being informally extended towards internal displacement caused by conflict, it forms a good basis for transferring the vast knowledge it has generated over the years towards the emerging issue of environmentally-induced displaced. In this regard, it needs to be mentioned that the UNHCR cannot be expected to appropriately address the needs of all 70.8 million forcibly displaced people worldwide. With regard to the yearly 25 million people displaced due to the consequences of climate change, the UNHCR elaborated on their role and more importantly, the role that other international institutions can play to address the current protection gap.¹¹² The next section therefore explores the bodies incorporated within the UN system which can be engaged to put the right interactions in place to address climate change and migration in a consistent way.

4. Streamlining UN response to environmentally-induced displacement

¹¹⁰ UNHCR Operational Review (at 105) page 10.

¹¹¹ Guy S Goowin-Gill and Jane McAdam, 'Climate change, disasters and displacement (UNHCR 2017) page 24 <<https://www.unhcr.org/596f25467.pdf>> accessed 16 August 2019.

¹¹² UNHCR, 'Climate Change and Disaster Displacement' (at 108).

While the UNHCR plays a key role with regard to displacement issues, it is far from being the only UN agency that deals with the broader issues of environmentally-induced displacement. A recent UN mapping exercise on displacement, performed by the Platform on Disaster Displacement, listed no less than 40 UN entities that, in one or the other way, can be involved in or contribute to activities in this field.¹¹³ The list includes entities that are specifically concerned with displacement and migration (UNHCR, IOM, UNOCHA, UNICEF, WFP), others that are more concerned with action and research on climate change (UNFCCC, WMO), some key development actors (UNDP, World Bank, WHO, UNCTAD) and a number of entities that are working on issues related to human rights and peace and security (OHCHR, UN Women, UN Volunteers, UN University for Peace). Of course, there is a task division and specialization among these entities. In many cases, an agency's mandate may only touch the periphery of disaster risk management. There may also inevitably be some overlaps or redundancies in this plethora of agencies, but basically it reflects a growing recognition within the UN system that disaster displacement cannot be resolved by humanitarian or climate change actors alone. Instead, and depending on the circumstances, it makes sense to build a comprehensive disaster risk management that also involves actors from the angles of development, human rights, peace and security. Arguably "all efforts to achieve the sustainable development goals contribute to building more resilient societies that are thus less vulnerable to the impacts of climate change, including displacements".¹¹⁴

The UN system is particularly vast and the contributions made by each of its entities are not always easy to define. But broadly speaking, in its strategic approach on climate change, the UN system addresses displacement and migration in the following areas:

- normative guidance,
- data and observations and
- the nexus of climate change, sustainable development, peace and security, human rights and humanitarian issues.

¹¹³ Platform on Disaster Displacement, 'The United Nations system's mandates with respect to averting, minimizing and addressing displacement related to climate change: considerations for the future' (July 2018) < <https://disasterdisplacement.org/wp-content/uploads/2019/06/UN-system%E2%80%99s-mandates-with-respect-to-averting-minimizing-and-addressing-displacement-related-to-climate-change-compressed.pdf> > accessed 16 July 2019.

¹¹⁴ Ibid page 6.

In addition to the UNHCR, the role of which we already explained above, the IOM stands out in its commitment to addressing environment and human mobility issues. In organizational terms, this commitment was clearly shown in 2015, when the IOM formally established a Division on Migration, Environment and Climate Change. The mandates of UNHCR – centred on displacement – and IOM – centred on migration – are quite distinct, but also complementary. Importantly, in practice neither the UNHCR nor the IOM work alone, but in the wake of fundamental UN reforms in the 1990s, both organizations are part of a broader humanitarian response system led by the UN Emergency Relief Coordinator (ERC). The ERC (Mr Mark Lowcock, since September 2017), who has the rank of Under-Secretary General is responsible for the oversight of all emergencies requiring UN humanitarian assistance. He also acts as the central focal point for governmental, inter-governmental and non-governmental relief activities. The ERC also chairs the Inter-Agency Standing Committee (IASC), a unique inter-agency forum for coordination, policy development and decision-making involving the key UN agencies and non-UN partners.

As impressive and wide-ranging as the UN set up may be, none of its many agencies (aside from the UNFCCC Secretariat) was specifically created to address climate change, let alone displacement related to climate change. For many years, international policy discussions on climate change occurred in parallel to those addressing displacement and migration. But it is safe to assume that the individual UN agencies' mandates will continue to evolve to the same extent as research and advocacy will reveal the vast and diverse implications of environmentally-induced displacements on virtually all of the UN's work.

Chapter 4: Regional human rights protection by the European Convention on Human Rights

1. Ratio

Environmentally induced displacement is a reality and can be expected to increase over the coming decades. Displacement is traditionally dealt with by the UNHCR. Protection takes place on the basis of the application of definitions to either refugees (crossed an international border) or internally displaced persons (no border was crossed). Both definitions emerged in a specific historic context, which focused on the humanitarian consequences of conflict and violence.¹¹⁵ Nonetheless, the rich experience of the UNHCR is undeniably a great opportunity to draw lessons from for the future of environmentally displaced persons. This expertise could build further upon and strengthen the Platform for Disaster Displacement, which in practice already connects climate change and migration. Within the UN, the role of the Coordinator should be strengthened so that a common policy throughout the UN system can be put into place.

However, given that environmentally displaced persons are currently not defined in international law, no international body is charged with supporting third state individuals suffering the consequences of climate change,¹¹⁶ and the duties and responsibilities related to them are scattered over the UN institutions; a lot of people remain invisible in the current state of international refugee law. A large number of States have reached out to those in need by granting access to their territories to people displaced as a result of natural disasters.¹¹⁷ This protection is based on humanitarian grounds, which means that it takes place on a voluntary basis and is a matter of political will. As a result, there is absolutely no certainty for a person who is forcibly displaced that he or she will be granted refugee status or another form of protection in the host country. The host State holds the discretionary power to decide whether or not it will protect the displaced individual.

¹¹⁵ Although the IDP definition does include natural and man-made disasters, those are often overlooked, see Chapter 3.B.

¹¹⁶ Besides the two specific categories of people who are either previously displaced due to conflict and will continue to be protected during a second displacement caused by a natural disaster; and those who are fleeing conflict incited by climate events, see Chapter 2.A.1.

¹¹⁷ Nansen Initiative Agenda (at 18) para 30.

Therefore, I propose an approach which is based on fundamental human rights common to all. A human rights-based approach offers the certainty of a legal framework upon which the displaced individual can rely. An important figure in the connection between human rights and climate displacement is Walter Kaelin¹¹⁸, who is currently the Envoy of the Chair of the Platform on Disaster Displacement. He recognizes at least three different levels of displacement on which human rights should play a significant role.¹¹⁹ First, he elaborates on the role of human rights in reducing and managing displacement risks in countries of origin. A second dimension is the human rights protection of people affected by disasters while they are on the move. A third and final level is the added value of a human rights-based approach to help affected people to gain admission to and stay in a third country and to find durable solutions. In light of this paper, the aim of which is to map the different protection mechanisms available once people have reached a host country, the third avenue will be explored further.

For this purpose, a shift will be made to the regional system of the Council of Europe. Whereas international human rights law is basically anchored in the UN system, the regional systems offer a different approach to the legal gap faced by people displaced by the effects of anthropogenic climate change. Furthermore, regional systems are more coherent since they represent a smaller community with a common history and shared values. For this reason, a common understanding is easier reached.

The European Court of Human Rights, more specifically, offers the opportunity of extensive case law on a diverse range of issues. Although its mandate is restricted to the application and interpretation of the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹²⁰, it regularly refers to other treaties of international law, thus making them part of its binding jurisprudence. In this regard, it has incorporated large parts of the soft law elaborated by the European Committee of Social Rights (ECSR), hence also covering more than the political and civil rights laid out in the ECHR. As a

¹¹⁸ Prof. Walter Kaelin, Envoy of the Chair, profile < <https://disasterdisplacement.org/about-us/the-envoy-of-the-chair> > accessed 24 June 2019.

¹¹⁹ Walter Kaelin, 'Human rights, migration and cross-border displacement in the context of adverse effects of climate change' <<https://docs.google.com/document/d/1jNHV2UTYzJyBJrk9NyvJ0dkaxx1aQRgJ/edit#heading=h.gjdgxs>> accessed 24 June 2019.

¹²⁰ Council of Europe, European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (hereinafter ECHR).

permanent court, it produces outcomes which are binding upon the member states of the Council of Europe through its individual complaints mechanism.

Furthermore, the European Union has ratified the Convention, thus making it binding upon this international institution in itself as well. In the context of the fight against climate change, the EU has the ambition to play a leading role in world wide efforts to combat climate change and to alleviate its consequences. For example, the incoming president of the European Commission, Ursula von der Leyen, has announced to propose to EU member States a new 'Green Deal', which should make it possible that the EU economy will be carbon neutral by 2050.¹²¹ In the context of this thesis, the main question that derives from this ambitious policy goal is whether the EU is also willing and able to deal with the effects of climate change in the area of migration. Predictably, this will be even more difficult than making the new Green Deal an economic reality. As a matter of fact, the EU and its Member States have never been able in recent years to achieve a consensus on how their migration policy should look like. Viewpoints are wide apart: some Member States are in principle ready to allow for a certain degree of migration, as long as it does not disturb the social fabric of their society. Other Member States, especially those on the southern border, have become increasingly hostile towards migration and request a fairer distribution of the case load across all member states of the European Union. A third group, especially Eastern European countries have no tradition of migration from outside Europe and, for political reasons, do not wish to have migration at all. Nevertheless, it is important to recall that the EU has ratified a number of legal instruments on which a migration policy can, and must, be build, in particular the ECHR. Even though this convention has been adopted in the framework of the Council of Europe, the EU is a full member of the convention and is therefore bound by its stipulations and the European Court of Human Right's caselaw. Furthermore, article 1 of the ECHR establishes an obligation on all member states to respect the human rights of everyone within their jurisdiction.¹²² Therefore, protection is granted irrespective of nationality. In order to know what opportunities human rights law offers to protect people who are currently undefined in international law, the next section will draw analogies from related cases by the European Court of Human Rights.

¹²¹ Ursula von der Leyen, 'A Union that strives for more – My agenda for Europe' <
https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf
> Accessed 9 August 2019.

¹²² Art. 1 ECHR (at 120).

2. Non-refoulement

2.1. General theory and article 3

The term non-refoulement is predominantly associated with international refugee law. However, the term has also been applied in the context of human rights law, in the context of which relevant provisions of the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child; along with the ECHR, are identified as imposing non-refoulement obligations on host states.¹²³

The non-refoulement principle essentially protects people from the infringement of two rights, namely the right to life as laid down in article 2 of the ECHR, and the prohibition of torture as provided in article 3 ECHR. Furthermore, some qualified rights as laid down in articles 8-11 ECHR have been considered as grounds for the application of non-refoulement. It is activated when a member state of the Council of Europe seeks to expulse or to extradite someone to a third country, where there is a real risk that this person will be subjected to any treatment contrary to one of these articles.¹²⁴ The ECtHR takes two elements into account in its assessment as to whether a person will be protected by the non-refoulement principle.

First, the Court assesses the 'foreseeable consequences' of a proposed removal. For this, it will base its decision on credible human rights reporting.¹²⁵ For example, in the case *MSS v Belgium and Greece*, the Court found that Belgium ought to have known that the applicant would be subjected to torture in Greece.¹²⁶ In this case, the Court considered the 'living and detention conditions' as amounting to degrading treatment. Therefore, general living conditions have already been considered as a potential ground of negative consequences of removal which need to be taken into account. Tracing this back to

¹²³ ICCPR (at 80); UNGA, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 December 1984) UNTS 1464 85 (CAT); CRC (at 81); ECHR (at 120).

¹²⁴ *Soering v United Kingdom* App no 14038/88 (ECtHR 7 July 1989).

¹²⁵ Fundamental Rights Agency and Council of Europe, 'Handbook on European law relating to asylum, borders and immigration' (2014) < https://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf > page 83 (hereinafter Handbook Asylum).

¹²⁶ *MSS v Belgium and Greece* App no 30696/09 (ECtHR 21 Jan 2011).

disasters, the link is easily made. Disasters amount to unviable living conditions for those affected by them, and this is reasonably foreseeable.

Secondly, the court assesses whether the applicant will be exposed to a 'real risk' of treatment contrary to either article 2 ECHR (i.e. a virtual certain prospect of death) or article 3 ECHR (i.e. substantial grounds that there is a real risk of subjection to torture).¹²⁷ When evaluating whether such a 'real risk' exists in a given case, the Court takes both the personal circumstances and the general condition of the country into account. Only when the applicant is a member of a group which is systematically ill-treated, will there be no need to demonstrate further personal circumstances.¹²⁸ Thus, the violence in a country either needs to be of a sufficient level of intensity; or the combination of personal risk factors and a risk of general violence need to be demonstrated.¹²⁹ Both violence and disasters are recognised as causes for displacement within the IDP framework. Since both violence and disasters lead to forced displacement, it can be argued that both causes should be treated in the same vein. With this in mind, two situations can be distinguished.

Firstly, a disaster might amount to "a sufficient level of intensity" in and of itself. Consider the example of flooding which may destroy entire regions, leaving the affected populations with no other option than to leave their places of residence. Secondly, a risk of "general" violence can be forged by disasters. The Court has already recognized the humanitarian conditions caused by droughts in Somalia in the case *Sufi and Elmi versus the United Kingdom*¹³⁰. In this case, the ECtHR found that the applicants were likely to find themselves in refugee camps in Somalia and neighbouring countries where the extreme poverty and destitute living conditions breached article 3 of the ECHR.¹³¹ The Court effectively took into account the naturally occurring phenomena, (in this case the ongoing droughts) as a contributing factor to a possible threat to the applicants' human rights. However, it combined these natural events with the actions or inactions of state parties to the conflict in Somalia. The question

¹²⁷ *NA v United Kingdom* App no 25904/07 (ECtHR 6 Aug 2008) and *Sufi and Elmi v United Kingdom* App nos 8319/07 and 11449/07 (ECtHR 28 Jun 2001) (hereinafter *Sufi and Elmi*).

¹²⁸ *Salah Sheekh v The Netherlands* App no 1948/04 (ECtHR 11 Jan 2007).

¹²⁹ Handbook Asylum (at 125) p 76.

¹³⁰ *Sufi and Elmi* (at 127)

¹³¹ See also Council of Europe, 'COURTalks: Asylum' page 3 < https://www.echr.coe.int/Documents/COURTalks_Asyl_Talk_ENG.PDF > accessed 28 August 2019.

therefore remains if a case built on only humanitarian conditions would amount to the application of the non-refoulement principle.

2.2. No state or non-state actors involved

The abovementioned cases deal with situations where there is a certain involvement of the State, albeit in a negative or positive manner. Generally, harm is involved that is intentionally inflicted by State or non-State actors.¹³² However, natural disasters are seen as occurring without any State interference.¹³³ In cases involving solely naturally occurring harm, such as harm resulting from an illness, the prohibition of refoulement is way more contested. The ECtHR has however applied the non-refoulement principle in one case involving a HIV patient. The ECtHR noted in this case that “the Court must reserve itself sufficient flexibility to address the application of that Article in other contexts which might arise”¹³⁴, therefore opening the doors to application of article 3 in situations which do not involve harm caused by State or non-State actors, such as disasters and other consequences of climate change.

The case in question is *D versus the United Kingdom*, where the Court found that the UK would breach article 3 if it expelled the terminally-ill man to Saint Kitts and Nevis. The risk *in casu* consisted in “his removal” which would “expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment”¹³⁵. It therefore established that socio-economic rights might be taken into account in the assessment whether a contracting state breached article 3 ECHR, going beyond the traditional jurisprudence where only intentional harm inflicted by the receiving State is considered.

The Court has however set a higher threshold by requiring both “very exceptional circumstances” and the presence of “compelling humanitarian conditions”. D’s exceptionality derives from the fact that he “was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with

¹³² UNHCR, ‘The case law of European regional courts: the Court of Justice of the European Union and the European Court of Human Rights – Refugees, asylum-seekers and stateless persons’ (June 2015) 195.

¹³³ Although the anthropogenic nature of climate change shows differently, cf Chapter 1.

¹³⁴ *D v United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) (hereinafter *D v UK*) para 49.

¹³⁵ *D v UK* para 53.

even a basic level of food, shelter or social support”.¹³⁶ Whereas this progressive approach to socio-economic rights must be applauded and could have formed the basis for a human rights-consistent treatment of asylum seekers, the Grand Chamber has failed to elaborate upon it in the subsequent case of *N versus the United Kingdom*.¹³⁷ This case concerned an applicant who also suffered from HIV, with the difference that, in case of expulsion, she would face a significantly reduced life expectancy, but not imminent death. The high threshold was emphasized and further restricted. The majority ruled that:

“... inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see *Soering v the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 89). Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting state and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.”¹³⁸

The Grand Chamber hereby inserted a balancing exercise in determining whether expulsion would breach article 3 ECHR. With regard to the absolute nature of article 3, this approach can at least be called controversial. It is therefore welcome that a strong dissenting opinion was joined to the case, submitted by judges Tulkens, Bonello and Spielmann. The judges reject the reasoning of the Grand Chamber, as its main concern is that a ruling in favour of the applicant would open Europe to medical migration. They argue that not only does this ‘floodgates’ argument offend the absolute nature of article 3 ECHR, but it is also unfounded when one takes into account the statistics of HIV-related claims.¹³⁹

¹³⁶ *N v United Kingdom* App no 26565/05 (EctHR, 27 May 2008) para 42.

¹³⁷ *Ibid.* para 43.

¹³⁸ *Ibid.* para 44.

¹³⁹ *N v UK* (at 136) Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para 8.

2.3. Article 8

In the context of migration, whether forced or voluntary, it is common for those seeking refuge to go to countries where they have relatives. Consequently, the ECtHR has extensive caselaw dealing with non-refoulement in connection to article 8 ECHR, which is a qualified right of the Convention.¹⁴⁰ Article 8 requires Member States to respect family life and provides that interference with it must be justified.¹⁴¹ Consequently, article 8 can protect individuals who have established family links in the host Member State. Applicants with minor children will be able to rely heavily on this provision, as well as on the CRC.¹⁴²

However, an applicant invoking article 8 without these family ties will have more difficulty. Article 8(2) provides that any state action must be “necessary in a democratic society”, which takes place in a proportionality assessment, balancing the individual and State interests.¹⁴³

In the case *Bensaid v United Kingdom*, a case concerning an Algerian who suffered from schizophrenia, the applicant argued that he would not be able to access the same treatment as in the United Kingdom.¹⁴⁴ The Court decided that the necessary threshold for a breach of article 3 was not met, and therefore proposed that the private life article 8, in the form of “adverse effects on physical and moral integrity”, could potentially be engaged extraterritorially.¹⁴⁵ It is within these “adverse effects on physical and moral integrity” that one can see the relevance for claimants seeking to avoid expulsion to disaster affected receiving countries. The aftermath of a disaster brings about an increase in diseases, as well as devastating psychological impacts. Also significantly multiplied risks of already insecure livelihoods as consequence of climate change bring about negative impacts in the physical and moral integrity, for example in forms of increased hunger and fear of survival.

¹⁴⁰ See Council of Europe, ‘Guide on Article 8 of the Convention’ – Right to respect for private and family right’ (updated 30 April 2019) < https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf > accessed 12 July 2019.

¹⁴¹ Article 8 ECHR (at 120)

¹⁴² Committee on the Rights of the Child, General Comment no. 6: ‘Treatment of Unaccompanied and Separated Children outside Their Country of Origin’ (2005); Jane McAdam, ‘Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection’ (2006) 14 International Journal of Children’s Rights 251-74.

¹⁴³ *C v Belgium* App no 21794/93 (ECtHR, 7 Aug 1996).

¹⁴⁴ *Bensaid v United Kingdom* App no 44599/98 (ECtHR, 6 Feb 2001).

¹⁴⁵ *Ibid.* para 46.

In another case involving expulsion and article 8, the Court held that “On a purely pragmatic basis, it cannot be required that an expelling Contracting state only return an alien to a country which is in full and effective enforcement of all rights and freedoms set out in the Convention”.¹⁴⁶ Consequently, the ECtHR installed a different threshold in extraterritorial cases than in domestic cases. However, environmentally-induced displacement claims are different than other article 8 extraterritorial cases because of the shared responsibility of the host state in creating the situation which the applicant is fleeing.¹⁴⁷

Moreover, article 8 ECHR has been established as the primary article within the jurisprudence of the Court when it comes to environmental degradation within the Member States of the Council of Europe. In *Moldova*, the Court reaffirmed that article 8 entails not only a negative obligation to refrain from interfering in the private life of those within its jurisdiction; but also a positive duty to protect in case their rights might be endangered.¹⁴⁸ With relation to environmental degradation, the Court ruled in *López Ostra v. Spain* that pollution could potentially affect individuals’ well-being and prevent them from enjoying their homes, thus adversely affecting their private and family life.¹⁴⁹ More recently, the Court has reaffirmed that an individual’s well-being may be negatively impacted by unsafe or disruptive environmental conditions in the case *Cordella and Others v Italy*.¹⁵⁰ Conclusively, whereas the Court explicitly refrains from establishing a right to a healthy environment¹⁵¹, and allows its Member States a wide margin of appreciation, article 8 plays a major role in providing relief in cases of environmental degradation.

2.4. Shared responsibility for the ‘natural’ disasters

The difference between the above mentioned ‘non-refoulement cases’, and displacement caused by climate change, is that the host State is, albeit partly, responsible for the forced migration.¹⁵² It can

¹⁴⁶ *F v United Kingdom* App no 17341/03 (ECtHR, 22 June 2004) para 3.

¹⁴⁷ Cf chapter 1 and industrialisation as a contributing factor to climate change.

¹⁴⁸ *Moldovan and Others v. Romania* App nos 41138/98 and 64320/10 (ECtHR 12 July 2005) para 93.

¹⁴⁹ *López Ostra v. Spain* App no 16798/90 (ECtHR 9 Dec 1994) para 51.

¹⁵⁰ *Cordella and Others v Italy* App nos 54414/13 and 54264/15 (ECtHR 24 Jan 2019) paras 157-160.

¹⁵¹ *Dubetska and Others v Ukraine* App no 30499/03 (ECtHR, 10 Feb 2011) para 105.

¹⁵² Cf Chapter 1 which demonstrates the impact of industrialisation on climate change and its role as impact multiplier.

roughly be measured in how far the host state contributed to the harm from which the person seeks refuge, in terms of greenhouse gases.¹⁵³ Since the host state contributed to a certain extent to the harm, the context is closer to a domestic scenario than the above-mentioned cases. Recalling *Sufi and Elmi*, the conclusion that expulsion would amount to inhuman treatment was reached by culminating the actions of the parties to the conflict, as well as the presence and refusal of al-Shabaab to allow humanitarian aid into their controlled areas. The Court did not see the drought as the predominant cause of the crisis. In the same vein, greenhouse gas emissions of developed countries have contributed to the disasters. Similar to the different actors in Somalia (Ethiopian forces, Somalian forces and Al-Shabaab), climate change is also caused by a range of different actors. Where climate change is essentially a failure of the entire international community, developed countries have contributed to a larger extent than others.¹⁵⁴ It is therefore not the disaster in itself which led to the displacement, but rather the impact of the industrialisation which took place in the host countries. Since the host state is therefore implicated and partly responsible for the displacement because of its role in emitting greenhouse gases, any high threshold for extraterritorial cases should be avoided.¹⁵⁵

The impacts of climate change are unequally distributed between those countries who caused it, and those who suffer the consequences; as well as between those people who benefit from industrialisation, and the poorest populations. In relation to article 8 ECHR, (and other qualified rights) where a balancing test between the individual and State interests is made, such a balance needs to take into account the previous augmented State interests which followed industrialisation and the ensuing economic benefits for its population. The balance should therefore install more importance on this previously accumulated wealth, which indirectly caused the horrible situation in which the applicant found him- or herself forced to leave his or her home. If the balance seeks to be 'fair', it necessarily needs to include the conscious decision of industrialised states to continue to emit unsustainable levels of greenhouse gases.

3. Lessons Learned and Duty to Protect

¹⁵³ See Paris Agreement (at 12).

¹⁵⁴ UNFCCC and IPCC, cf Chapter 1.

¹⁵⁵ See also Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What scope for resisting expulsion under articles 3 and 8 of the European Convention on Human Rights?' 26 *International Journal of Refugee Law* 3 (2014) 404-432.

The European Court of Human Rights its caselaw on environmental degradation, and more specifically concerning the right to life and the right to privacy, has recently been taken up by the Human Rights Committee, the UN institution charged with supervision of the International Covenant on Civil and Political Rights (ICCPR). In the case *Portillo Cáceres v. Paraguay*, the Committee considered, for the first time, the States' duty to protect individuals from environmental degradation under articles 6 (right to life) and 17 (protection of the family) of the ICCPR.¹⁵⁶ Besides referring to several of the above-mentioned cases, the Committee also considered the Inter-American Court of Human Rights' (IACtHR) Advisory Opinion in which it goes so far as to recognize an autonomous right to a healthy environment.¹⁵⁷ Additionally, the IACtHR recognizes the extraterritorial scope of State responsibility for environmental damage, stating that "a person is subject to the jurisdiction of the State of origin, if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory."¹⁵⁸

Whilst referring to the right to life as enshrined in article 6 ICCPR, the Human Rights Committee stressed the inclusion of the right to enjoy a life with dignity within this article.¹⁵⁹ Making reference of its General Comment no. 36, the Committee hereby strengthens its broad interpretation of the right to life, encompassing the right to enjoy a life with dignity and the threat posed by environmental degradation and climate change to the enjoyment of the right to life.¹⁶⁰ In its conclusions, the Committee recalls the positive obligation placed on States to protect the rights recognized in the Covenant, and handles the criterium that a threat needs to be "reasonably foreseeable".¹⁶¹ As for the protection of the home and private and family life, the Committee again makes reference to the ECtHR's jurisprudence, but, contrary to the restrictive interpretation handled by the ECtHR, based its conclusion of a breach of article 17 ICCPR on only two criteria: that the pollution has a direct impact on an individual's private and family life, and that the impact is serious.¹⁶²

¹⁵⁶ *Portillo Cáceres v. Paraguay* Comm no 2751/2016 (Human Rights Committee, 9 Aug 2019) UN Doc CCPR/C/126/D/2751/2016.

¹⁵⁷ Inter-American Court of Human Rights, 'Environment and Human Rights' (Advisory Opinion 15 Nov 2017) OC-23/17 at 2.

¹⁵⁸ *Ibid* at 4.

¹⁵⁹ *Portillo Cáceres v. Paraguay* (at 156) para 7.3.

¹⁶⁰ Human Rights Committee, General Comment no. 36 (30 Oct 2018) UN Doc CCPR/C/GC/36 paras 26 and 62.

¹⁶¹ *Portillo Cáceres v. Paraguay* (at 156) paras 7.3 and 7.5.

¹⁶² *Portillo Cáceres v. Paraguay* para 7.8; see also Greta Reeh, 'Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect' (*EJIL: Talk!* 9 Sep 2019) <

<http://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/> accessed 9 September 2019; and Unknown, 'UN Human Rights Committee recognizes environmental harm as rights violation' (*IJRC* 22 August 2019) < *<https://ijrcenter.org/2019/08/22/un-human-rights-committee-recognizes-environmental-harm-as-rights-violation/>* > accessed 25 August 2019.

Chapter 5: Conclusion

The gravity and urgency of the global challenge posed by climate change constituted the starting point for the present paper. We then set out to look at a number of legal aspects relating to the displacement and migration of people, when this occurs as a result of circumstances that are caused by anthropogenic environmental degradation. In order to study these legal issues, it was necessary to clarify certain concepts and definitions, such as the notions of environmental refugees as opposed to migrants and to establish the relation between climate change and natural disaster. We then looked at the response provided at present by the international community, especially the United Nations and the European Union, and at the legal framework that constitutes the basis for this response.

In both cases, UN and EU, we see a strong political commitment and practical engagement to assist people in need, including those who are uprooted as a result of anthropogenic environmental degradation. Nonetheless, it has also become clear that up until now neither the United Nations nor the European Union have developed a consistent legal basis that would specifically cover climate change related displacement and migration. Instead, the legal basis for international assistance remains anchored in humanitarian law, refugee law and migration law.

From a strictly legal viewpoint this is not entirely satisfying, because for good reasons these legal frameworks and the protection offered by them are specific, concise and limited to well-defined situations. For instance, refugees and asylum seekers would normally expect protection, because in their home country they were the subject of political prosecution, human rights violations etc. Internally displaced people usually get access to humanitarian relief operations by either the United Nations or the European Union (or other humanitarian actors), but they do of course not fall under the category of refugees or migrants, as they do not cross national borders. As to migrants, they are distinct from refugees in the sense that their migration is thought to be a voluntary act; yet this is hardly the case, when one considers people that are uprooted in the context of climate change and serious environmental degradation.

Arguably, the climate change and the environmental degradation that goes with it are so profound that a shift of paradigm will be necessary throughout our political, economic and social systems. It is safe to assume that the magnitude of these changes will also induce an evolution of the legal system. One promising path for such an evolution is probably the notion of "shared responsibility". As a matter of fact, in humanitarian law and human rights law as it stands today, the responsibility for people fleeing their home country can usually be traced back to the country of origin, more specifically to failure in the policies and behaviour by those in power (violent conflict, human rights violations, bad governance, etc.). The host country for its part, that is the country which takes in uprooted people and assists them, can in principle not be made responsible for these policy failures in another state. The perspective may change, however, when we look at climate change as a cause for displacement and migration. There can be no doubt that the main root causes for climate change are industrial production, mass consumption and the excessive exploitation of natural resources. In this sense, there can be a certain logic to speak of "shared responsibility", for instance partial and at least indirect responsibility of a far-away industrialized country for natural disasters occurring in a distant place as a result of climate change.

Any future changes in the international law system, including in humanitarian law and human rights law, can of course only be made slowly and as a result of international negotiations among sovereign states. Further research and advocacy may contribute to such an evolution. As a first step, it would be useful to overcome the silo-mentality and to encourage more interplay and cooperation between environmental law, international humanitarian law and international human rights law.

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