

TABLE OF CONTENTS

ABSTRACT	2
INTRODUCTION	3
CAUSES OF DISPLACEMENT	4
SUDDEN-ONSET DISASTERS	4
SLOW-ONSET DEGRADATION	4
UNREST OR VIOLENCE STEMMING FROM THE ABOVE	5
LEGAL CONTEXT OF CLIMATE CHANGE MIGRATION	5
LEGAL FRAMEWORK FOR PROTECTION BASED ON TYPE OF DISPLACEMENT	6
<i>Internal movements of persons</i>	6
<i>Cross-border movements of persons</i>	7
GAPS IN THE PRESENT PROTECTION REGIME.....	8
<i>Lack of agreed terminology</i>	8
<i>Inapplicability of Refugee Law</i>	8
CURRENT LEGAL SOLUTIONS	10
NATIONAL LEVEL.....	10
REGIONAL LEVEL.....	10
INTERNATIONAL LEVEL.....	11
<i>Climate change and disaster displacement in the Global Compact on Refugees, 2018 by the UNHCR</i>	11
Applicability of arrangements for burden and responsibility sharing to countries affected by displacement resulting from natural disasters and environmental degradation.....	11
Prevention and root causes.....	11
Protection and assistance	12
Follow up and review	12
<i>Other international protections</i>	12
IN CONCLUSION: RECOMMENDATIONS FOR THE WAY FORWARD	13

ABSTRACT

Environmental change, rather, environmental degradation is one of the most veritable realities facing mankind today. Years of pollution and the abuse and exploitation of nature has led to this juncture where climate change and global warming are imminent catastrophes, which far-reaching and severe consequences. Climate change has given rise to phenomena such as rising levels of seawater due to melting of snow caps and glaciers, freak floods in deltaic regions of major rivers, desertification, cyclones and storms of unprecedented magnitudes which have ravaged many parts of the world. These events have rendered many parts of the world as uninhabitable and has led to scores of people being uprooted from their homelands, forcing them to migrate to either other parts of their own countries or even across national territorial borders. EssamEl-Hinnawi of the United Nations Environment Programme had coined the term “environmental refugee” to refer to such persons who been displaced from their homelands for reasons related to climate change. However, as I am about to explain in my paper, it is extremely difficult to pinpoint a certain class of people as “environmental refugee,” since there may be many variants of migration stemming from environmental reasons. In the context of the term “refugee,” such displacement is presumed to be involuntary, due to steady or sudden degradation of living conditions due to climate change. However, such migration may also be due to foreseeing of inhospitable living conditions as an effect of climate change and in such cases, such foresight leads the person to move from his place of habitation, in anticipation of the future.

The next segment of my paper aims to discuss the need for the inclusion of “environmental refugee” within the definition of a refugee, in the 1951 Convention Relating to the Status of Refugees, as amended by its 1967 Protocol. The current definition of “refugee” does not incorporate an environmental refugee within the ambit of the Convention. I aim to discuss how the current definition is worded in such a manner that it will be difficult to include “environmental refugee” as a component of refugee status. The primary reason behind this is the usage of the word “persecution,” which narrows down the scope of who can be called a refugee – after all, how can a person be persecuted by nature, which as per its traditional definition, needs human agency? Other difficulties would include the fact that in most cases, a person who is displaced due to environmental reasons ends up falling under the category of an “internally displaced person,” who are not traditionally included within the mandate of the 1951 Convention. However, there have been situations when environmental reasons have also necessitated crossing national borders. The only positive is that after the New York Declaration for Refugees and Migrants in 2016, the United Nations General Assembly adopted the Global Compact on Refugees in 2018 which has acknowledged the problem of involuntary migration caused by climate change to be a marked problem and has addressed the reality of increasing displacement in the context of disasters, environmental degradation and climate change. The Global Compact provides for measures to tackle the many challenges arising in this area, which include applicability of arrangements for burden and responsibility sharing to countries affected by displacement resulting from natural disasters and environmental degradation, preparation for natural disasters and steps to mitigate risks of climate change, protection and assistance of environmental refugees as well as for regions and countries which host environmental refugees.

INTRODUCTION

Climate change is defined in the United Nations Framework Convention on Climate Change of 1992 (UNFCCC) as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to other natural climate variability that has been observed over comparable time periods.”¹This definition has been expanded by the Intergovernmental Panel on Climate Change (IPCC) which refers to any change of climate over time as a result of human activity or due to natural variability.² There is a widespread agreement that regardless of the exact causes, climate change is a reality and that Africa, Asian mega-deltas and small island states will be the areas most affected by the change of climate.

The exact quantum of the number of persons affected by climate change is disputed, however, it is undeniable that climate change has a steadily increasing impact on the movement of persons.³However, there are certain factors that need clarification at the outset: the fact that climate change itself does not trigger the movement of persons, but some of its effects such as natural disasters, environmental degradation, sea-level rise or conflict over resources have the potential to do so; that it is difficult and in many cases impossible to establish a direct causality between climate change and a particular climate-related event triggering the movement of persons.⁴

That said, factors such as population growth, urbanization or sub-standard housing, or generally state policies with negative impact on resilience, exposure to hazards and the like play an important causal role in addition to climate change and its effects.⁵ Thus, climate-related events may be just one push-factor triggering population movements alongside other – maybe even more important –factors. Or, as the Chairperson of the 2011 Nansen Conference in Climate Change and Displacement pointed out: ‘Climate change acts as an impact multiplier and accelerator to other drivers of human mobility.’⁶

¹Article 1(2), UNFCCC.

²IPCC, Climate Change 2007: Synthesis Report, p. 30.

³Summary for Policymakers, in: Intergovernmental Panel on Climate Change Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, 2011; draft, p. 13, available online at: http://www.ipcc-wg2.gov/SREX/images/uploads/SREX-SPM_Approved-HiRes_opt.pdf.

⁴IPCC, Climate Change 2007: Synthesis Report, p. 30, para 53.

⁵Council of Europe, Report by the Committee on Migration, Refugees and Population of the Parliamentary Assembly on Environmentally-induced migration and displacement: a 21st century challenge, Rapporteur Tina Acketoft, 23 December 2008, Doc. 11785, para. C-9.

⁶The Nansen Conference: Climate Change and Displacement in the 21st Century, Oslo, 5-7 June 2011, Chairperson’s summary, para. 5.

Thus, while a relationship between climate change, environmental events and displacement/migration does exist, current means of science do not allow establishing a direct and exclusive causality between climate change and the environmental event on the one hand, and between environmental events and the movement of persons on the other. Rather, migration and displacement due to environmental events in the context of climate change are multi-causal even where a strong relationship between them exists. It is therefore necessary to distinguish between causality and correlation as well as to take into account factors triggering population movements other than environmental events.

CAUSES OF DISPLACEMENT

Sudden-onset disasters

Sudden-onset disasters, such as flooding, windstorms (hurricanes/typhoons/cyclones) or mudslides caused by heavy rainfalls can trigger large-scale displacement: people are evacuated, or leave on their own before the disasters, or have to leave their homes in its aftermath due to the degree of destruction of houses, infrastructure and services. The success of return of the displaced people will largely depend on the timeliness and effectiveness of recovery and reconstruction efforts. Where these are insufficient, people may remain displaced for years or even decades. While the numbers of those displaced tend to be high,⁷ most of these persons will remain within their own country. Nevertheless, cases of cross-border displacement exist. For instance, persons found temporary refuge in the United States after Hurricane Mitch had destroyed vast tracts of land in Honduras, Guatemala and other parts of Central America in 1998. Bangladesh natural disasters are the main cause of long-term migration to other countries.⁸

Slow-onset degradation

Slow-onset environmental degradation caused, inter alia, by rising sea levels, increased salinization of groundwater and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification or other forms of reduced water resources, are predicted as negative long-term impacts of climate change. The dramatic decrease of water availability in some regions and recurrent flooding in others will impact upon economic opportunities and conditions of life will deteriorate in affected areas. Such deterioration may cause displacement, and prompt people to consider migration as a way to

⁷NRC-IDMC, Displacement due to natural hazard-induced disasters, Global estimates for 2009 and 2010, June 2011, 14-15.

⁸C. E. Haque, Hazards in a fickle environment: Bangladesh (Kluwer Academic Publisher, Dordrecht 1997).

adapt to the changing environment. For example, droughts in the Sahel region forced large numbers of people to leave their habitual places of residence, but in Mali the drought contributed to a reduction of cross-border movements because families no longer had sufficient resources to pay for travel to other countries.⁹ So-called low lying small island states present a special case of slow-onset disasters. As a consequence of rising sea levels and their low-lying topology, such areas may increasingly become uninhabitable, triggering emigration to other countries as people lose faith that there is a future for them in their homeland.

Unrest or violence stemming from the above

Finally, unrest seriously disturbing public order, violence or even armed conflict may be triggered, at least partially, by a decrease in essential resources due to climate change (such as water, arable land, or grazing grounds). This is most likely to affect regions that have reduced water availability and cannot easily adapt due to poverty (e.g., by switching to economic activities requiring less water). In such situations, there is little room for equitable sharing of the limited resources, making it difficult to reach peace agreements as long as resource scarcity continues. However, in practice it is difficult if not impossible to establish a clear link and causality between climate change and unrest, violence or armed conflict. Rather, such events are multi-causal.

LEGAL CONTEXT OF CLIMATE CHANGE MIGRATION

According to international law, in the context of climate change, states have the obligations to mitigate the degree of climate change, in particular by reducing greenhouse gas emissions, and secure the rights and address the humanitarian needs of people affected by negative effects of climate change.¹⁰ In light of mitigating the degree of climate change, State parties to the UNFCCC and its Kyoto Protocol have committed themselves to reducing the emission of greenhouse gases.¹¹ These measures have an important preventive effect on displacement and other forms of population movements. International human rights law reinforces states' duties to protect their people against dangers emanating from disasters.¹² Reduction of disaster risks

⁹T. Hammer, 'Desertification and Migration', in J. D. Unruh, M. S. Krol, and N. Kliot (eds.), *Environmental Change and Its Implications for Population Migration* (Kluwer, Dordrecht 2004); S.E. Findley, 'Does drought increase migration? A study of migration from rural Mali during the 1983-85 drought', *International Migration Review* 28(3) 1994, 539-553.

¹⁰UNHCR, Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, Legal and Protection Policy Research Series, February 2012, PPLA/2012/01.

¹¹UNFCCC and Kyoto Protocol.

¹²This is reflected in Nansen Principle II: 'States have a primary duty to protect their populations and give particular attention to the special needs of the people most vulnerable to and most affected by climate change

and vulnerabilities has been defined by the European Court of Human Rights as a human rights obligation, of the right to life.¹³

Mitigation measures are often insufficient to protect individuals from the impacts of climate change. In this context, states as primary duty bearers are bound by human rights law to protect the rights of those affected.¹⁴ In this light, Heads of Organizations of the United Nations Inter-Agency Standing Committee (IASC) – the coordinating body of the UN humanitarian agencies and big international humanitarian civil society consortia asked the Executive Secretary of the UNFCCC to acknowledge and address the humanitarian consequences of climate change in the envisaged successor agreement to the Kyoto Protocol. Heeding this call, the Cancún outcome agreement on long-term cooperative action under the UNFCCC now invites states to enhance their action on adaptation to climate change, including ‘measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.’¹⁵ Humanitarian consequences of climate change, including internal and cross-border displacement alongside migration, are therewith recognized as an adaptation challenge and will become part of national adaptation plans.

Legal Framework for Protection based on type of displacement

Internal movements of persons

The character and the territorial scope of the movement of persons triggered by climate-related events may vary, i.e. be either forced or voluntary, and internal or cross-border. While it is easy to distinguish between internal and external movements, the distinction between forced and voluntary movement will become increasingly blurred with new forms and patterns of movements emerging.¹⁶ The majority of those displaced by the effects of climate

and other environmental hazards, including the displaced, hosting communities and those at risk of displacement.’

¹³ ECtHR, *Budayeva and others v. Russia*, App. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008.

¹⁴ UNHCR, Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, Legal and Protection Policy Research Series, February 2012, PPLA/2012/01.

¹⁵ Article 14(f), Cancun outcome document of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention; The Nansen Conference: Climate Change and Displacement in the 21st Century, Oslo, 5-7 June 2011, Chairperson’s summary.

¹⁶ UNHCR, ‘Climate change, natural disasters and human displacement: A UNHCR perspective’, 23 October 2009, 3.

change is not crossing borders but is likely to become internally displaced.¹⁷ Internally displaced persons are entitled to protection under applicable provisions of human rights law, as well as national laws and policies on internal displacement covering climate-related displacement.¹⁸

Cross-border movements of persons

Cross-border displacement and migratory movements in the context of climate change, however uncertain in scale at the current stage, is already taking place and will likely increase over time,¹⁹ but unlike for IDPs no comprehensive normative framework exists.

International human rights law and humanitarian law are the laws applicable in times of peace and of armed conflict. The non-refoulement provisions of refugee law may prove particularly significant in this regard. The legally non-binding Universal Declaration of Human Rights provides in Article 14 for the right to seek and enjoy asylum, but not to receive it, as this remains a sovereign decision of the state. In contrast, Article 18 of the EU Charter of Fundamental Rights guarantees the right to asylum but limits it to cases of persecution as defined by the 1951 Refugee Convention and its 1967 Protocol.²⁰ Also important is the International Convention on the Protection of the Rights of All Migrant Workers and Their Families, as it may offer protection to some who have crossed borders in the context of climate change. However, it only applies if the individual concerned is a 'migrant worker', i.e. a 'person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national' and his or her family members.²¹

International refugee law applies to persons who have been compelled to flee across borders and provides for a specific status and ensuing status rights. As such, refugee law exclusively protects non-nationals of a state and stateless persons. 'Refugee' is a legal term defined in the 1951 Convention on the Status of Refugees and its 1967 Protocol as a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'²² The Convention on the Status of

¹⁷UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement, 11 February 1998, UN Doc E/CN.4/1998/53/Add.2.

¹⁸R. Cohen and M. Bradley, 'Disasters and Displacement: Gaps in Protection', *International Humanitarian Legal Studies*, Vol. I 2010, pp. 102-103.

¹⁹V. Kolmannskog, 'Climate change, disaster, displacement and migration: initial evidence from Africa', *New Issues in Refugee Research*, Research Paper No. 180, December 2009.

²⁰Convention relating to the Status of Refugees of 28 July 1951, 189 UNTS. 137; Protocol relating to the Status of Refugee of 4 October 1967, 660 UNTS 267.

²¹Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, 2220 UNTS 93.

²²Article 1 (A)(2), Convention relating to the Status of Refugees of 28 July 1951, 189 UNTS. 137.

Stateless Persons may become important in the case of loss of territory and the end of statehood.²³ Article 1 of the Convention defines stateless person as ‘a person who is not considered as a national by any State under the operation of its law.’

Gaps in the Present Protection Regime

Lack of agreed terminology

In the absence of terminological clarity for those having crossed borders in the wake of climate change impacts, terminological invention has begun early on: such persons have often been referred to as ‘environmental refugees’, ‘climate refugees’ or subsumed under a notion of ‘environmental migrants.’ In 1985, the UN Environmental Programme proposed to call ‘environmental refugees’ ‘people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life’.²⁴ This terminology has been contested by, inter alia, UNHCR which has expressed serious reservations as it has no basis in international refugee law and could potentially undermine this legal regime. A more recent notion of ‘environmental migrant’ referring to ‘persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their homes or choose to do so, either temporarily or permanently, and who move either within their country or abroad’²⁵ as offered by the International Organization of Migration (IOM) is even more problematic. This notion risks undermining existing protection frameworks, particularly for internally displaced persons, as it does not distinguish between internal and cross-border movements of persons. It also obfuscates the distinction between forced and voluntary movements that is important from a legal protection perspective.

Inapplicability of Refugee Law

International refugee law provides strong protection for people fleeing abroad insofar as it contains the prohibition of non-refoulement, that is, it prevents the forcible return to a country of persecution and provides refugees with a legal status with attributed status rights. However, international refugee law was not conceived to protect persons displaced across borders by the effects of climate change, even though they flee particular dangers and therefore may find themselves in a refugee-like situation. The refugee definition of Article 1A(2) of the 1951 Refugee Convention¹²⁸ contains three key elements, namely (i) presence outside the country of origin, (ii) because of persecution on account of specific reasons (race, religion, nationality, membership of a particular social group or political opinion), and (iii) inability or unwillingness to avail oneself of the protection of one’s country. People

²³Convention relating to the Status of Stateless Persons of 28 September 1954, 360 UNTS 117.

²⁴Essam El-Hinnawi, ‘Environmental Refugees’, UNEP 1985, p. 4.

²⁵IOM, Discussion Note: ‘Migration and the Environment’, 94th Session of the IOM Council, Doc. No. MC/INF/288, 2007, para. 6.

displaced across borders by the effects of climate change obviously fulfil the first criterion of having crossed an international border. However, in most cases, they do not fulfil the criterion of being persecuted on account of any of the aforementioned grounds. Qualifying main polluters or even the international community as a persecutor would create substantial difficulties, because one would have to establish the causality between their action/inaction and the respective climate change impact in each individual case, something that is virtually impossible at the present stage of scientific knowledge. It would also – as Jane McAdam puts it – reverse the refugee paradigm: ‘This de-linking of the actor of persecution from the territory from which flight occurs is unknown to refugee law. Whereas refugees within the Refugee Convention definition flee their own government (or actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from — yet within — states that have contributed to climate change. This, in turn, poses another problem in terms of the legal definition of ‘refugee’ as in such cases the government does not turn against its citizens but rather wants to protect them’.²⁶ Thus, the narrow legal notion of refugee in the 1951 Convention cannot generally guarantee protection to persons displaced across borders due to climate change impacts. Nevertheless, similar to persecution, climate change-related disasters and the unavailability of adequate food, drinking water or health services in their aftermath may constitute serious threats to life, limb and health. Thus, in a broader sense, those displaced by the effects of climate change may face similar dangers as refugees, albeit for different reasons. Still, from a legal perspective, there is an intrinsic difference between the two categories: international refugee law is rooted in the notion of the surrogate nature of international protection, i.e. the idea that persons persecuted by the state of origin can by definition no longer turn to its authorities to get protection, and thus depend on protection provided by the country of asylum in particular and by the international community in general. Persecution means that the country of origin of the refugee is unwilling, or in the case of persecution by non-state actors unable, to fulfil its basic duty of guaranteeing peace and security to its citizens thus destroying the ‘bond of trust, loyalty, protection, and assistance between the citizen and the state [that] constitutes the normal basis of society’²⁷ and is severed in the case of refugees.

The elements of the refugee definition contained in the 1951 Refugee Convention may, however, be fulfilled in certain cases: Situations of sudden- or slow-onset disasters if authorities deny any kind of assistance and protection to certain people because of their race, religion, nationality, membership of a particular social group or political opinion and as a consequence expose them to treatment amounting to persecution. The same is true where a climate-related impact meets the threshold of a persecution because it is the consequence of a respective governmental policy with a discriminate impact on a specific group of persons possessing such attributes, or where the destruction of the environment is

²⁶J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, UNHCR Legal and Protection Policy Research Series, May 2011, 10-11.

²⁷Andrew E. Shacknove, ‘Who is a Refugee?’ 95 Ethics 1985, p. 275.

intended to persecute a particular group of persons.²⁸ Situations of violence, serious human rights violations or armed conflict triggered by disputes over shrinking natural resources if persecutory measures are based on the race, religion, nationality, membership of a particular social group or political opinion of affected persons.

CURRENT LEGAL SOLUTIONS

National Level

At the domestic level, many countries have included provisions regarding assistance and protection for persons affected by natural disasters in their country, including internally displaced persons, in their disaster management legislation. For example, the US Immigration and Nationality Act provides for the possibility to grant Temporary Protection Status (TPS) for nationals of a foreign state if there has been an environmental disaster in the foreign state resulting in a substantial, but temporary, disruption of living conditions.²⁹ Some states that are or fear being particularly affected by climate change have been calling for steps going beyond these approaches. Maldives, in 2006, proposed amending the 1951 Convention relating to the Status of Refugees to include 'climate refugees', a demand supported by Bangladesh. Kiribati has advocated for agreements with Australia and New Zealand allowing people to migrate there early on in order to build up Kiribati communities there that would be able to keep cultural traditions alive.

Regional Level

At the regional level, there are some instances of affirmative action. In Europe, the Parliamentary Assembly of the Council of Europe adopted Resolution 1862(2009) on environmental migration and displacement,³⁰ which invited the Committee of Ministers to 'set up a working group, in co-operation with other European institutions, to carry out a comprehensive legal study on the gaps in existing international law and normative regulations with a view to an eventual elaboration of a European framework convention for the recognition of the status of environmental migrants, should this be deemed necessary,' and to 'consider adding a new protocol to the European Convention on Human Rights, concerning the right to a healthy and safe environment.' Africa has taken an active but also rather recent approach in addressing the many effects and impacts of climate change at the regional and sub-regional levels in various forums and through a number of bodies. The explicit inclusion of climate change as a cause of internal displacement in the African Union's 2009 Kampala

²⁸Panel on Internal Displacement and the Marsh Arabs of Iraq, available online at: http://www.brookings.edu/events/2006/0301_iraq.aspx; C. Marcs, 'Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm within the Meaning of the Refugee Convention', 24 Am.U.Int'l.L.Rev 2008, 32-71.

²⁹Immigration and Nationality Act (USA) 8 USC§ 244.

³⁰Council of Europe, Parliamentary Assembly Recommendation 1862 (2009) on 'Environmentally induced migration and displacement: a 21st century challenge', (Reply adopted by the Committee of Ministers on 8 July 2009 at the 1063rd meeting of the Ministers' Deputies), Doc CM/AS(2009)Rec1862 final, 15 July 2009.

Convention,³¹ with its explicit obligation ‘to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change,’ is an important step which, however, is limited to internal displacement. In Asia, the Association of Southeast Asian Nations (ASEAN) has identified the response to climate change and its adverse impacts as one of its priority areas of regional importance. Under this umbrella, the development of an ASEAN climate change initiative is envisaged which includes policy and strategy formulation as one component.

International Level

Climate change and disaster displacement in the Global Compact on Refugees, 2018 by the UNHCR

The UNHCR considers that the Global Compact on Refugees adopted by the UN General Assembly on 17 December 2018 effectively acknowledges and addresses the reality of increasing displacement in the context of disasters, environmental degradation and climate change, and provides a basis for measures to tackle the many challenges arising in this area.³²

Applicability of arrangements for burden and responsibility sharing to countries affected by displacement resulting from natural disasters and environmental degradation

The compact recognizes that ‘external forced displacement may result from sudden onset natural disasters and environmental degradation’. It notes that States ‘may seek support from the international community to address’ complex challenges that arise from such situations. This has been carefully crafted to ensure that the Compact applies not only to large refugee situations, but also to countries affected by environmental degradation and natural disasters. It allows such countries to draw on the arrangements for burden and responsibility sharing.

Prevention and root causes

The Compact also recognizes that ‘while not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.’ The words ‘increasingly interact’ make clear the growing nature of this challenge. The text also references the need to reduce disaster risks; for preparedness measures to take into account global, regional and national early warning and early action mechanisms, and measures to enhance evidence based forecasting of future movements and emergencies (including in situations of forced internal displacement); and to include refugees in disaster risk reduction strategies.

³¹ A. M. Abebe, ‘The Kampala Convention and environmentally induced displacement in Africa’, IOM Intersessional Workshop on Climate Change, Environmental Degradation and Migration, 29-30 March 2011, Geneva, Switzerland, available online at: <http://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change2011/SessionIII-Paper-Allehone-Mulugeta-Abebe.pdf>.

³² UNHCR, Global Compact on Refugees, UN doc A/73/12 (Part II) (2 August 2018).

Protection and assistance

The Compact calls for ‘stakeholders with relevant mandates and expertise to provide guidance and support for measures to address other protection and humanitarian challenges. This could include measures to assist those forcibly displaced by natural disasters, taking into account national law and regional instruments as applicable, as well as practices such as temporary protection and humanitarian stay arrangements.

Follow up and review

The Compact states that, ‘A periodic Global Refugee Forum, at ministerial level, will be convened for all United Nations Member States, together with relevant stakeholders, to announce concrete pledges and contributions towards the objectives of the global compact, and to consider opportunities, challenges and ways in which burden and responsibility sharing can be enhanced.’ Moreover, the Compact also calls for the creation of a ‘digital platform’ to enable the sharing of good practices, including those related to climate change and disaster displacement, by States and all relevant stakeholders. The text also calls for the establishment of ‘A global academic network on refugee, other forced displacement, and statelessness issues, involving universities, academic alliances, and research institutions, together with UNHCR and other relevant stakeholders, to facilitate research, training and scholarship opportunities which result in specific deliverables in support of the objectives of the global compact.’ The global academic network has the potential to address knowledge and data gaps relating to the provision of international protection in the context of cross border disaster displacement, including in nexus situations where conflict or violence interact with the effects of climate change or disaster.

Other international protections

At the international level, Article 14 of the Cancún Outcome Agreement on Long-term Cooperative Action under the UN Framework Convention on Climate Change invites states to enhance action on adaptation. This agreement is relevant in several regards.³³ First, the international community recognizes for the first time the humanitarian consequences of climate change-related population movements as an adaptation challenge. Second, displacement can be expected to become part of national adaptation plans foreseen by the agreement, thus providing an entry point for protection and assistance issues. Finally, the agreement recognizes that efforts addressing displacement need to be undertaken not only at the national but also regional and international levels, thus putting climate-related internal as well as cross-border displacement on the international agenda.

The Office of the UN High Commissioner for Refugees (UNHCR) has highlighted the legal gap for cross-border movers for several years. The existence of such a gap was again recognized at the 2010

³³K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations, UNHCR Legal and Protection Policy Research Series, May 2011.

Dialogue of the High Commissioner on Protection Challenges.³⁴ Participants favoured ‘regional arrangements and regional preparedness, particularly with regard to sudden onset disasters’ and recommended to ‘consider how to fill normative gaps at the international level, based on existing good national and regional practices and drawing on other relevant bodies of international law’ as well as to ‘explore whether the approach taken in the Guiding Principles on Internal Displacement could be useful in addressing normative gaps’. UNHCR was also addressing the protection gap in the area of cross-border movement in the context of the 2011 commemorations of the 1951 Refugee Convention and 1961 Statelessness Convention.

IN CONCLUSION: RECOMMENDATIONS FOR THE WAY FORWARD

There is no single approach that provides the solution to current challenges. Approaches must be multifaceted. As regards cross-border movements of persons, such a strategy should comprise four elements: 1. Preventing displacement through disaster risk and vulnerability reduction and other adaptation measures; 2. Managing migration as adaptation measures; 3. Providing temporary protection status for persons displaced to other countries and permanent admission in cases where return turns out to be impermissible, impossible or cannot be reasonably be expected over time; and

As identified above, cross-border displacement is the area with the most important gaps in international law. New instruments to close these gaps should contain the following elements: People in need of protection should be defined as those whose return to the country of origin would be (i) legally impermissible; (ii) not feasible; or (iii) unreasonable in terms of humanitarian considerations. Beneficiaries should be entitled (i) to enter countries of refuge, (ii) to stay there temporarily, i.e. as long as the obstacles to their return exist; (iii) to protection against refoulement as well as expulsion to other countries; and (iv) to permanent admission if after a prolonged period of time (some years) it becomes clear that return is unlikely to become an option again. Beneficiaries should be entitled to such rights as (i) access to the labor market, (ii) access to housing, health services and education, (iii) protection against discrimination; (iv) freedom of conscience, religion and opinion; (v) property rights; (vi) the right of persons belonging to an ethnic, religious or linguistic minority to enjoy, together with the other members of their group, their own culture, to profess and practice their own religion, or to use their own language; and be allowed (vii) to enjoy other relevant rights. The respective roles and responsibilities of national authorities and the international community, particularly with regard to financial and, where appropriate, operational support for receiving countries with limited means, need to be clarified.

³⁴High Commissioner’s Dialogue on Protection Challenges, ‘Protection Gaps and Responses’ (8-9 December 2010), Breakout Session 1: Gaps in the International Protection Framework, and in Its Implementation, Report by the Co-Chairs: H.E. Ambassador Darlington Mwape, Permanent Representative, Zambia, Mr. Volker Türk, Director, Division of International Protection, UNHCR, 4, available online at <http://www.unhcr.org/4d09e47a9.pdf>.

The general distinction made by international law between voluntary and forced movements of persons becomes essential to determine who should be protected by these new instruments. Law must always draw clear lines, and must therefore necessarily qualify movement as either voluntary or forced. Thus, it is necessary to define criteria relevant for distinguishing between those who voluntarily leave their homes or places of habitual residence because of the effects of climate change, and those who are forced to leave owing to such effects or—even if they left voluntarily in the first place—can no longer return and should therefore be entitled to protection abroad because their initial voluntary movement has turned into forced movement. Inspiration for protection of such migrants can be drawn from refugee law and in particular the three key elements of the refugee definition in Article 1A(2) of the 1951 Refugee Convention. These elements are: (i) being outside the country of origin, (ii) because of persecution on account of specific reasons (race, religion, nationality, membership of a particular social group or political opinion), and (iii) being unable or unwilling to avail oneself of the protection of one's country. People displaced across borders by the effects of climate change and other environmental disasters obviously fulfil the first criterion of having crossed a border. Similar to persecution, climate change-related disasters and the unavailability of adequate food, drinking water or health services in their aftermath may constitute serious threats to life, limb and health. Both refugees and those displaced across borders by the effects of climate change face similar dangers, albeit for different reasons.