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## Disasters and Displacement: Gaps in Protection

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### Abstract

Natural disasters, particularly those related to climate change, are fast becoming a leading cause of forced displacement although conceptual, normative and institutional frameworks to provide human rights protection to the environmentally displaced<sup>1</sup> are not yet in place. This article discusses the human rights and protection dimensions of disaster-induced displacement, identifies the major challenges to protecting disaster victims, and proposes ways forward. The authors argue that while most environmentally displaced persons are expected to remain within their own countries, there is a lack of clarity about the status and protection needs of those uprooted by environmental degradation and other 'slow-onset' disasters as opposed to those displaced by 'sudden-onset' disasters. By far the biggest protection gap exists for those who cross borders. These individuals do not generally qualify as refugees under the 1951 Refugee Convention, there is no normative framework to address their specific needs and vulnerabilities

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<sup>1</sup> The terms environmental displacement and disaster-induced displacement will be used interchangeably in this article, encompassing migration in response to both sudden and slow-onset disasters unless otherwise indicated; the terms will also cover those displaced within countries as well as those who flee across borders unless otherwise indicated.

and States have not been willing to commit to more than temporary protection on an ad hoc basis. The need is now critical for new approaches to be developed for the environmentally displaced, including expanded normative and institutional frameworks, comprehensive national policies, national and international monitoring, rights training, and more effective ways of dealing with governments that fail to protect their populations.

### **Keywords**

human rights and natural disasters; 'slow-onset' disasters; climate change; environmentally displaced persons; internally displaced persons; stateless persons; guiding principles on internal displacement; operational guidelines on human rights and natural disasters; Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons; UNHCR; IOM

## **Introduction**

It took one of the world's deadliest disasters, the tsunami of 2004, to bring home to governments and policymakers around the world the need to develop more effective responses to natural disasters and the people uprooted by them. Five million people were displaced and some 250,000 killed in 11 different countries in Asia and Africa. Even today, six years later, reconstruction efforts are ongoing, while the impact on infrastructure, clean water, sanitation, and livelihoods is expected to last for decades.<sup>2</sup>

The tsunami was caused by an earthquake, not climate change, but floods, hurricanes, cyclones, landslides and other 'sudden-onset' disasters are expected to become more frequent and severe in the future as a result of climate change. Over the past two decades, the number of recorded disasters has doubled from approximately 200 to over 400 per year; and nine out of 10 disasters have been climate-related.<sup>3</sup> The total number of people affected by natural disasters over the past decade has reportedly tripled to two billion people, an average of more than 200 million people directly affected each year.<sup>4</sup>

The increase in natural disasters is expected to produce massive displacement that will change the world's perception of forcibly displaced people, currently thought of primarily as refugees and internally displaced people (IDPs) uprooted by persecution and conflict.<sup>5</sup> The vast majority will be

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<sup>2</sup> United Nations Environment Program, *GEO Yearbook 2004/2005*, [http://www.unep.org/geo/pdfs/GEO%20YEARBOOK%202004%20\(ENG\).pdf](http://www.unep.org/geo/pdfs/GEO%20YEARBOOK%202004%20(ENG).pdf) (last accessed 17 February 2010).

<sup>3</sup> J. Holmes, 'The Need for Collaboration', 31 *Forced Migration Review* 4 (2008), at 4.

<sup>4</sup> IFRC, *World Disasters Report 2002: Focus on Reducing Risk*, at Introduction, <http://www.ifrc.org/publicat/wdr2002/intro.asp> (last accessed 17 February 2010).

<sup>5</sup> The overall estimated total number of IDPs uprooted by conflict is 26 million; the refugee total is 10.5 million plus 4-5 million Palestinian refugees. See Internal Displacement Monitoring Centre, *Global Overview of Trends and Developments in 2008* (April 2009), at 9; and UNHCR,

displaced inside their countries, although significant numbers will cross internationally recognized borders, especially when island States become submerged. Although estimates of the numbers of those displaced will vary,<sup>6</sup> a 2007 Christian Aid report estimates that between 2007 and 2050, “climate change-related phenomena” (floods, hurricanes, drought) will “permanently” displace 250 million people.<sup>7</sup> The United Nations and the Internal Displacement Monitoring Centre (IDMC) find that while they cannot predict whether the people involved will be permanently or temporarily displaced, in 2008 alone some 36 million people were uprooted by sudden-onset natural disasters, including 20 million displaced by disasters associated with climate change.<sup>8</sup>

If one were to add to these numbers those compelled to leave their homes by longer-term environmental problems (e.g. drought, desertification, rising sea levels, extreme temperatures, deforestation, land degradation), known as ‘slow-onset’ disasters, the total for 2008 would undoubtedly be tens of millions more. The UN/IDMC report cites a figure of 26.5 million drought-affected persons in 2008, but no overall estimate exists of those displaced by slow-onset disasters.<sup>9</sup> Traditionally, migration from such disasters has been perceived as ‘voluntary’, but increasingly such movement is also being seen as ‘forced.’ Indeed, long-standing international definitions of forced migrants and the international systems of protection for them may have to expand to accommodate the many different patterns of migration emerging.

Distinctions between disaster displaced and conflict displaced people may also blur. Climate change will likely fuel armed conflicts, some between States

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*2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (2009), at 2. For varying perspectives on the issue of environmental displacement generally, see R. Black, ‘Environmental Refugees: Myth or Reality’, UNHCR Working Paper 34 (2001); S. Castles, ‘Environmental Change and Forced Migration: Making Sense of the Debate’, UNHCR Working Paper 70 (2002); E. Piguet, ‘Climate Change and Forced Migration’, UNHCR Working Paper 153 (2008).

<sup>6</sup> See, for example, the debates between ‘alarmists’ and ‘skeptics’ in S. Martin, ‘Managing Environmentally-Induced Migration’, in F. Laczko and C. Aghazarm (eds.), *Migration, Environment and Climate Change* 353 (2009).

<sup>7</sup> Christian Aid, *Human Tide: The Real Migration Crisis* (May 2007), at 6. Other estimates are lower, 150 million, see UNGA, *Note by the Secretary-General, Protection and Assistance to Internally Displaced Persons*, A/64/214, 3 August 2009, para. 11.

<sup>8</sup> UN OCHA and IDMC, ‘Monitoring Disaster Displacement in the Context of Climate Change’, 22 September 2009, at 9. For an analysis of the connection between climate change and displacement, see V. Kolmannskog, ‘Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa’, UNHCR Working Paper 181 (2009), at 6, 10; also Norwegian Refugee Council, ‘Climate Changed: People Displaced’, 8 December 2009, [http://www.nrcfadder.no/arch/img.aspx?file\\_id=9913616](http://www.nrcfadder.no/arch/img.aspx?file_id=9913616) (last accessed 17 February 2010).

<sup>9</sup> UN OCHA/IDMC report, *ibid.*

competing for scarce resources, others within States among different ethnic and tribal groups.<sup>10</sup> Darfur, Sudan is but one recent example of how ecological degradation and water scarcity can ignite tensions between competing groups and then turn genocidal when exacerbated by the manipulations and irresponsible policies of a government like Sudan's. UN Secretary-General Ban Ki-moon has warned that "violence in Somalia grows from a similarly volatile mix of food and water insecurity. So do the troubles in Ivory Coast and Burkina Faso."<sup>11</sup>

Environmental disasters are clearly challenging many of the long-standing conceptual, legal and organizational means of dealing with displacement. The international protection regimes set up for refugees and more recently for internally displaced persons either exclude or fail to focus on environmentally displaced persons. Whether those displaced within their own countries by slow-onset disasters can be said to fit under the rubric of 'internally displaced person' and whether those forced to cross borders for environmental reasons will fit under the term 'refugee' or voluntary 'migrant' are open questions. The possible need for new terminology and systems of protection for those displaced by environmental disasters thus requires examination.

Protection of the human rights of those uprooted by disaster has received far too little attention. As Jan Egeland, former UN Under-Secretary-General for Humanitarian Affairs and Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (RSG), have aptly observed, while the international response to natural disasters "has become ever swifter and more sophisticated" in the rush to deliver life-saving aid, "little attention" has been paid "to the rights of these displaced people."<sup>12</sup> Efforts underway have focused on developing preventive and risk reduction strategies, improving rescue actions, accelerating the delivery of relief, and undertaking initiatives to 'build back better' in recovery and reconstruction processes. Identifying the human rights concerns of disaster victims and how

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<sup>10</sup> See for example International Alert, 'Climate Change, Conflict and Fragility', 28 November 2009; M.B. Burke et al, 'Warming Increases the Risk of Civil War in Africa', 106(49) PNAS (2009), at <http://www.pnas.org/content/106/49/20670.full> (last accessed 23 February 2010); E. Ferris, 'Natural Disaster-and Conflict-Induced Displacement: Similarities, Differences and Inter-Connections', Statement at Society for Applied Anthropology, 27 March 2008; and UNHCR, 'Climate Change Could Become the Biggest Driver of Displacement: UNHCR Chief', 16 December 2009.

<sup>11</sup> B.K. Moon, 'A Climate Culprit in Darfur', *Washington Post*, 16 June 2007.

<sup>12</sup> Foreword, Inter-Agency Standing Committee, 'IASC Operational Guidelines on Human Rights and Natural Disasters', Brookings-Bern Project on Internal Displacement, June 2006, at 5.

best to provide them with protection have received less focus. Yet recent disasters have exposed:

- unequal access to food and supplies, in particular by women;
- discrimination in provision of aid on ethnic, caste, racial, religious or gender grounds;
- evacuation plans that discriminate against poor and other vulnerable people;
- sexual and gender-based violence, especially in camps and shelters;
- exploitation, trafficking and military recruitment of separated children;
- neglect and exploitation of the elderly, poor, disabled and sick;
- forced relocations of people to unsafe areas with limited economic opportunity;<sup>13</sup>
- lack of safety in areas of displacement, return or resettlement; and
- inequities in addressing employment, property and compensation questions.

This article will discuss the human rights and protection dimensions of disaster-induced displacement against the background of changing conceptual, legal, institutional and practical frameworks for dealing with persons displaced by disasters, including those associated with climate change.<sup>14</sup> It will identify the challenges to protecting disaster victims, in particular the gaps in current protection systems, and propose constructive ways to move forward.

## 1. The Human Rights and Protection Dimensions of Disasters

After his visit to tsunami-affected areas in 2005, RSG Kälin concluded that, “it is no less important in the context of natural disasters than it is in cases of displacement by conflict to examine and address situations of displacement through a ‘protection lens.’”<sup>15</sup> He applied to disaster victims the protection lens provided by 1) the UN Guiding Principles on Internal Displacement; and 2) the IDP Policy of the UN Inter-Agency Standing Committee (IASC).

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<sup>13</sup> Forced evacuations and relocations may well be part of a State’s obligation to protect persons in disaster situations, but at the same time States have been known to carry out such measures in violation of human rights, see UNGA, *supra* note 7, paras. 24-30.

<sup>14</sup> The terms environmental displacement and disaster-induced displacement will be used interchangeably, see *supra* note 1.

<sup>15</sup> W. Kälin, ‘Natural Disasters and IDPs’ Rights’, Special Issue, *Forced Migration Review* 10 (2005), at 11.

The Guiding Principles, introduced into the UN in 1998, list natural disasters as one of the causes of internal displacement and describe internally displaced persons as:

[...] persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or *natural or human-made disasters*, and who have not crossed an internationally recognized State border.<sup>16</sup> (emphasis added)

The Principles affirm that IDPs are entitled to the same human rights as other people in their countries, and that governments in cooperation with international organizations are obliged to assist and protect them.<sup>17</sup> The Principles are based on international human rights and humanitarian law, as well as refugee law by analogy. They take the distinctive approach of restating and tailoring international legal standards to the special needs of IDPs. Displaced persons, for example, may need: personal documentation lost or destroyed during flight; shelter and food; protection from being returned to areas of danger; protection from physical assault, gender based violence and other human rights violations; and assistance with restitution of property or compensation. The Principles identify protection obligations in all phases of displacement – prior to displacement, during displacement and during return, resettlement and reintegration – and have been recognized by 192 governments around the world “as an important international framework for the protection of internally displaced persons.”<sup>18</sup>

The Guiding Principles form the basis of the IDP protection policy of the IASC, adopted in 1999 by the major international humanitarian, human rights and development organizations, including the Red Cross Movement. The policy broadly defines protection as: “[...] all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights, humanitarian and refugee law).”<sup>19</sup> This definition covers: defending the physical safety of

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<sup>16</sup> UN Commission on Human Rights, *Guiding Principles on Internal Displacement*, Doc. E/CN.4/2998/53/Add.2, 11 February 1998, Introduction – Scope and Purpose.

<sup>17</sup> *Ibid.*

<sup>18</sup> World Summit Outcome 2005, GA Res. 60/1, 24 October 2005, para. 132; see also W. Kälin, ‘The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool’, 24(3) *Refugee Survey Quarterly* 27 (2005).

<sup>19</sup> IASC, ‘Protection of Internally Displaced Persons’, Policy Paper No. 2 (2000), at 4. Its definition of protection was developed at the 1999 Workshop on Protection of the International Committee of the Red Cross.

IDPs; providing them with the basic necessities of life; and promoting the enjoyment of their fundamental economic, social, cultural, civil and political rights.<sup>20</sup>

In order to operationalize protection in situations of environmental disaster and assist governments, international organizations and NGOs in carrying out their responsibilities, the RSG developed Operational Guidelines on Human Rights and Natural Disasters.<sup>21</sup> The Guidelines apply to IDPs and all other people affected by disasters within their own countries. Adopted by an IASC Working Group in 2006, the Guidelines focus on what humanitarian actors should do when it comes to: 1) protection of life, security of the person, physical integrity and dignity; 2) protection of rights related to basic necessities of life; 3) protection of other economic, social and cultural rights; and 4) protection of other civil and political rights.

In the immediate aftermath of disaster, the protection of life and provision of basic necessities are the priorities while in the weeks and months that follow, the fuller range of rights must be addressed. Protection activities that fall under the first group include evacuations, relocations, protection against violence, camp security and the removal of landmines. The second group covers access to humanitarian aid and the non-discriminatory provision of adequate goods and services. The third group includes permanent housing, access to education, restitution or compensation for property lost, and livelihoods and employment opportunities, while the fourth group encompasses documentation, family reunification, electoral rights, free movement, freedom of expression and assembly and other political freedoms.<sup>22</sup>

Overall, the Guidelines emphasize that respect for human rights must underpin all humanitarian action in support of the survivors of natural disasters. The longer a displacement situation lasts, the greater the risk of violations. If humanitarian assistance is not based on a human rights framework, “it risks having too narrow a focus,” the Guidelines warn, and will not be able to “integrate all the needs of the victims.”<sup>23</sup>

Persons who are forced across borders by environmental disasters will also have protection needs. However, neither the Operational Guidelines nor the

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<sup>20</sup> See ECOSOC, Commission on Human Rights, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, Walter Kälin, E/CN.4/2005/84, 12 December 2004, para. 42.

<sup>21</sup> IASC Operational Guidelines, *supra* note 12.

<sup>22</sup> The Guidelines, currently being reviewed, will undergo some revision, for example, family reunifications will be moved from the fourth to the first group. The IASC is expected to adopt the Guidelines in 2010.

<sup>23</sup> *Ibid.*, at 9.

Guiding Principles apply to their case; nor is there any other specific normative framework tailored to their needs.

## 2. Challenges to Human Rights Protection

Many conceptual, legal, institutional, and practical problems arise when promoting protection for environmentally displaced persons. Some of the major challenges include:

### *A. Lack of Conceptual and Definitional Clarity*

People who flee, are evacuated from their homes or are forcibly uprooted by natural disasters and remain in their own countries are considered IDPs to whom the Guiding Principles apply. In fact the UN Human Rights Council in 2007 specifically requested the RSG to promote protection for those displaced by natural disasters,<sup>24</sup> and the UN General Assembly reinforced this approach by recognizing that those displaced by natural disasters within their own countries are IDPs.<sup>25</sup>

Yet not all international experts and governments agree. An expert report to the UK government in 2005 recommended that the IDP concept be limited to persons displaced by violence because the causes and remedies of conflict-induced and disaster-induced displacement were different, making it “confusing” to include both in the IDP definition.<sup>26</sup> In the case of governments, some have been reluctant to call persons uprooted by natural disasters IDPs because they basically perceive IDPs as those displaced by conflict.<sup>27</sup> In Aceh, Indonesia,

<sup>24</sup> Human Rights Council Res. 6/32, 14 December 2007, para. 6(g).

<sup>25</sup> UNGA Res. A/C.3/64/L.34/Rev.1, 10 November 2009.

<sup>26</sup> S. Castles and N. Van Hear, ‘Developing DFID’s Policy Approach to Refugees and Internally Displaced Persons, Volume I: Consultancy Report and Policy Recommendation’, Refugee Studies Centre, Oxford, February 2005, at 12.

<sup>27</sup> In Colombia, for example, the national legislation that protects conflict induced IDPs does not cover those displaced by disasters. See S. Albuja and Cavalier I. Adarve, ‘Work in Progress towards Protection in Natural Disasters: Challenges from a Conflict/Disaster Context’, Paper prepared for Refugee Studies Centre/Humanitarian Policy Group’s Conference on Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World, University of Oxford, September 2009, <http://www.rsc.ox.ac.uk/PDFs/sessionVIgroup3albujaandcavelier.pdf> (last accessed 17 February 2010). In Armenia, the government considered those displaced by the 1988 earthquake to be “ecological migrants,” but not necessarily internally displaced persons, see T. Greene, ‘Internal Displacement in the North Caucasus, Azerbaijan, Armenia, and Georgia’, in R. Cohen and F. Deng, *The Forsaken People: Case Studies of the Internally Displaced* (1998), at 270-271.

for example, the government preferred labeling those uprooted by the tsunami 'homeless,' presumably to distinguish them from the more politicized 'conflict IDPs' to whom the government had barred access.<sup>28</sup> In the United States, government officials settled on every possible description of those uprooted by Hurricane Katrina except IDPs. They described them as "refugees," "evacuees" and, finally, "disaster victims", because IDPs in their view were generally people displaced by conflict "overseas."<sup>29</sup> They did not as a result feel obliged to apply the Guiding Principles to them although several organizations dedicated to assisting those uprooted by Hurricane Katrina underlined the importance of the Principles in this case.<sup>30</sup>

It bears noting that when the Guiding Principles were first drafted in the mid 1990s, there was little consensus over whether people uprooted by natural disasters should be included. Those opposed argued that only persons fleeing persecution and violence should be considered IDPs – in other words, persons who would qualify as refugees if they crossed a border. But the majority favored including those uprooted by natural disasters because in responding to disasters, governments have been known to discriminate against or neglect certain groups on political or ethnic grounds or overlook their human rights in other ways.

Some international organizations and NGOs that do recognize disaster displaced persons as IDPs have at times preferred to focus principally on 'conflict IDPs'. The UN High Commissioner for Refugees (UNHCR), for example, did not, until the fall of 2009, propose expanding its role as lead coordinating agency for the protection of 'conflict IDPs' to include those uprooted by disaster.<sup>31</sup> The IDMC, the premier agency for statistics on IDPs, counts only those

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<sup>28</sup> M. Couldrey and T. Morris, 'Post-tsunami Protection Concerns in Aceh', Special Issue, *Forced Migration Review* 28 (2005).

<sup>29</sup> 'We're Americans, we're not Refugees', *News VOA.com*, 31 September 2005. See also R. Cohen, 'Human Rights at Home', Statement at Harvard University Kennedy School of Government, 1 November 2006, [http://www.brookings.edu/speeches/2006/1101humanrights\\_cohen.aspx](http://www.brookings.edu/speeches/2006/1101humanrights_cohen.aspx) (last accessed 27 February 2010). However, in 2010, the draft National Disaster Recovery Framework of the Federal Emergency Management Agency (FEMA) refers to "displaced populations," see [http://www.fema.gov/pdf/recoveryframework/omb\\_ndrf.pdf](http://www.fema.gov/pdf/recoveryframework/omb_ndrf.pdf) (last accessed 23 February 2010).

<sup>30</sup> See, for example, C. Kromm and S. Sturgis, 'Hurricane Katrina and the Guiding Principles on Internal Displacement', Institute for Southern Studies, January 2008.

<sup>31</sup> UNHCR, *Internally Displaced People: Questions and Answers*, September 2007. For UNHCR's 2009 position, see Opening Statement by Mr. Antonio Guterres, UN High Commissioner for Refugees, at the 60<sup>th</sup> Session of the Executive Committee of the High Commissioner's Programme (Excom), Geneva, 28 September 2009, <http://www.unhcr.org/4ac314009.html> (last accessed 17 February 2010).

uprooted by conflict in its annual report but in 2009 for the first time undertook with the UN a major study on IDPs uprooted by natural disasters which may lead to an expansion of its monitoring.<sup>32</sup>

Excluded, however, from the UN/IDMC study were persons uprooted by slow-onset disasters because of the difficulty in determining at what point voluntary migration from an area beset by rising sea levels, drought or desertification constitutes forced flight, requiring international attention. It should be recalled that when the IDP definition was first developed, what made internally displaced persons of concern to the international community was the *coercion* that impelled their movement, the human rights abuse they suffered as a result of their displacement, and the lack of protection for them within their own countries.<sup>33</sup> Persons migrating for economic reasons were not included because the element of coercion was not so clear.

For the RSG, most persons in areas of environmental deterioration who decide to move to regions with better income opportunities can not really be said to be forcibly displaced “in the strict sense of the word.”<sup>34</sup> But “if the areas become uninhabitable because of complete desertification or sinking coastal zones, then population movements amount to forced displacement.”<sup>35</sup> In short, inhabitants who “no longer have a choice but to leave” can be viewed as IDPs.<sup>36</sup>

When it comes to persons who cross borders, there is far less definitional clarity regarding their status.<sup>37</sup> Environmentally displaced people may leave their countries for a variety of reasons: it may be their only escape route; the disaster response capacities of their own government may be exhausted; or they may hope to find better protection and assistance outside their country of origin.<sup>38</sup> In addition, a significant number may be outside their country when a disaster strikes, making it impossible for them to return. A wide range of terms have been used to denote those who find themselves in such

<sup>32</sup> See UN OCHA and IDMC, *supra* note 8.

<sup>33</sup> R. Cohen and F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (1998), at 17–18.

<sup>34</sup> W. Kälin, Background Paper, ‘Displacement Caused by the Effects of Climate Change: Who will be Affected and what Are the Gaps in the Normative Frameworks for their Protection?’, 10 October 2008, [www.brookings.edu/papers/2008/1016\\_climate\\_change\\_kalin.aspx?p=1](http://www.brookings.edu/papers/2008/1016_climate_change_kalin.aspx?p=1) (last accessed 11 January 2010).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> UNHCR, ‘Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective’, 2009, at 4.

<sup>38</sup> Kälin, *supra* note 34.

predicaments, from environmental displacee and ecological migrant to, most controversially, ‘environmental refugee’.

The most widespread definition of an ‘environmental refugee’ was offered by Essam el-Hinnawi of the UN Environment Programme in 1985:

[...] 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.<sup>39</sup>

Although the term is widely used, it has been criticized as “poorly defined and legally meaningless.”<sup>40</sup> Arguably, the term “oversimplifies the multi-causality of social, economic and political factors which underpin environmentally-forced migration,” and was invented “at least in part to depoliticize the causes of displacement, so enabling states to derogate their obligation to provide asylum.”<sup>41</sup>

As the guardian of international refugee law, UNHCR has, not surprisingly, been outspoken in its opposition to the term ‘environmental refugee’. UNHCR’s concerns are rooted in the fact that the term does not accord with the refugee definition set out in the 1951 Convention Relating to the Status of Refugees, which defines a refugee as a person who,

[...] owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>42</sup>

The environmental factors that prompt or compel displaced persons to cross international borders do not represent *prima facie* grounds for refugee status according to this definition. However, there are limited instances in which those who have fled for environmental reasons may fit the treaty definition of a refugee. For example, when governments intentionally destroy the environment

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<sup>39</sup> E. El-Hinnawi, ‘Environmental Refugees’, UNEP (1985), at 4.

<sup>40</sup> G. Kibreab, ‘Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate’, 21(1) *Disasters* 21 (1997).

<sup>41</sup> C. Boana, R. Zetter and T. Morris, ‘Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration’, Refugee Studies Centre Forced Migration Policy Briefing 1, 2008, at 1; Kibreab, *ibid.*, at 21.

<sup>42</sup> Convention Relating to the Status of Refugees, art. 1A (2), as modified by the 1967 Protocol (entered into force 4 October 1967).

as a tool of persecution (e.g., Saddam Hussein's draining of the marshes in Iraq), or when they purposefully and discriminatorily withhold assistance from their citizens, the displaced may qualify for refugee status under the 1951 Convention.<sup>43</sup>

The refugee definitions found in regional instruments such as the 1969 Organization for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees are potentially more open to including those displaced due to natural disasters. The OAU Convention defines refugees not only in terms of individualized persecution, but also as individuals who have had to flee "owing to external aggression, occupation, foreign domination or events seriously disturbing public order."<sup>44</sup> Given the propensity of natural disasters to seriously disturb the public order, environmentally displaced persons who have crossed international borders could potentially be counted as refugees under this definition.<sup>45</sup> Similarly, the 1984 Cartagena Declaration states that a refugee may be displaced due to "events seriously disturbing the public order," or "massive violations of human rights."<sup>46</sup> Although the International Conference on Central American Refugees (CIREFCA) report interpreting the Cartagena Declaration indicates that victims of natural disasters are not entitled to protection under the provisions on events seriously disturbing the public order, some scholars have argued that the victims of "human-made" disasters associated with climate change could qualify as refugees under the Declaration. Alternatively, those forced to cross borders due to natural disasters could be covered under the Cartagena Declaration's provisions on massive violations of human rights.<sup>47</sup>

So while there is some potential for defining environmentally displaced persons who have crossed international borders as refugees under these regional instruments, the drafters of these agreements did not envision their inclusion in the refugee definition.<sup>48</sup> It therefore remains questionable whether these provisions may be effectively used in practice to ensure protection for those

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<sup>43</sup> M. Stavropoulou, 'Drowned in Definitions', 31 *Forced Migration Review* 11 (2008), at 12; UNHCR, 'Climate Change' *supra* note 37, at 7-9.

<sup>44</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, (entered into force 20 June 1974), art. 1(2).

<sup>45</sup> G.S. McCue, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration', 6 *Geo. Int'l Envtl. L. Rev.* 151 (1993), at 153.

<sup>46</sup> Cartagena Declaration on Refugees, Section III(3), 1984.

<sup>47</sup> A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Env. L. Rev.* 365 (2007), at 390-391.

<sup>48</sup> *Ibid.*, at 390; and McCue, *supra* note 45, at 153-154.

displaced across international borders by natural disasters. At present, the International Organization for Migration (IOM), UNHCR and other members of the IASC are correct to argue that the term ‘environmental refugee’ has no firm basis in international refugee law, and should not be used, owing to the risk of creating confusion and undermining the refugee protection regime.<sup>49</sup> In the absence of new international legal agreements or normative frameworks clarifying this definitional quagmire, it is preferable to refer to this group simply as environmentally displaced persons who have crossed an international border.

There is also a lack of definitional clarity regarding those who will likely be displaced from small island States such as Tuvalu and Kiribati that are predicted to be completely inundated by rising sea levels. In particular, there is ambiguity over whether the displaced citizens of inundated States may be considered ‘stateless persons’ under international law. The 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as an individual “who is not considered a national by any State under the operation of its law.”<sup>50</sup> However, as noted by the RSG, “statelessness means to be without nationality, not without State.”<sup>51</sup> Small island States may continue to exist as legal entities even after being submerged if other countries do not officially withdraw recognition of their Statehood.<sup>52</sup> This would leave the former inhabitants of completely inundated countries *de facto* stateless, as they would be unable to exercise their rights as citizens.<sup>53</sup> However, accessing the modest protections international law affords to stateless persons will depend on their being able to demonstrate *de jure* statelessness.<sup>54</sup> Whether or not those displaced from inundated island States will be considered *de jure* stateless remains uncertain given that these cases have hitherto not been foreseen in international law.

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<sup>49</sup> As an alternative to this problematic term, IOM has advanced its own definition of ‘environmental migrant’-- “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”. For a discussion of this definition, which informs IOM’s engagement with environmentally displaced persons, see section C., Gaps in Institutional Arrangements.

<sup>50</sup> 1954 Convention Relating to the Status of Stateless Persons (entered into force 6 June 1960), art. 1.

<sup>51</sup> Kälin, *supra* note 34.

<sup>52</sup> *Ibid.*

<sup>53</sup> I. Goris, J. Harrington and S. Köhn, ‘Statelessness: What it Is and why it Matters’, 32 *Forced Migration Review* 4 (2009), at 4; C.A. Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’, 10(1/2) *IJRL* 156 (1998), at 171.

<sup>54</sup> Batchelor, *ibid.*, at 172.

### B. Limited Legal Protection

The problems of definitional clarity and limited legal protection are closely linked. In the case of IDPs displaced by *sudden-onset* disasters, international human rights law (HRL) provides a sound legal basis for protection, as set forth in the Guiding Principles on Internal Displacement.<sup>55</sup> But for persons uprooted by *slow-onset* disasters, there is no specific normative framework since it is generally assumed that they have no specific protection needs other than those covered by HRL. Unless their movement can be said to be forced, they will not be afforded the special attention given to IDPs, and the Guiding Principles will not apply. At present, there are no criteria for establishing at what point voluntary movement becomes forced, which would bring some of those displaced by slow-onset disasters under the IDP umbrella.<sup>56</sup> Because of this disparity, the Parliamentary Assembly of the Council of Europe (CoE) has called for the Guiding Principles to be extended to cover persons uprooted by slow-onset as well as sudden-onset disasters.<sup>57</sup> However, many of the persons uprooted by slow-onset disasters may move voluntarily and not need the protection intended for the forcibly displaced.

Sometimes, limited State usage of the Guiding Principles may interfere with their potential to provide legal protection to disaster IDPs. At least 20 countries have adopted national laws and policies on displacement based on the Guiding Principles;<sup>58</sup> however some of these laws and policies extend only to those uprooted by conflict. Other governments have raised questions about the non-binding nature of the Principles.<sup>59</sup> In Pakistan, in 2005, the government opposed applying international principles of protection to IDPs uprooted by the earthquake, claiming that such principles applied only to refugees uprooted by conflict and persecution.<sup>60</sup>

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<sup>55</sup> See Kälin, *supra* note 34.

<sup>56</sup> *Ibid.*

<sup>57</sup> Council of Europe Recommendation 1862, para. 6.5 (2009), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/EREC1862.htm> (last accessed 17 February 2010).

<sup>58</sup> E. Ferris, 'Assessing the Impact of the Principles: An Unfinished Task', GP10 *Forced Migration Review* 10 (2008).

<sup>59</sup> See W. Kälin, 'The Future of the Guiding Principles', GP 10 *Forced Migration Review* 38 (December 2008), at 39; and R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10(4) *Global Governance* 459 (2004), at 472-475.

<sup>60</sup> A. Wilder, 'Perceptions of the Pakistan Earthquake Response', Humanitarian Agenda 2015 Pakistan Country Study (February 2008), at 40-1.

The United States also avoided applying the Guiding Principles to Hurricane Katrina. Local authorities reportedly rejected using “United Nations principles” out of a negative attitude toward international standards.<sup>61</sup> Even the US Agency for International Development’s 2004 policy on IDPs, which expresses support for the Guiding Principles, qualifies that support. While it says that the Guiding Principles “offer a useful tool and framework for dealing with IDPs,” and that the US “will encourage its partners and host governments to use them as a practical reference,” it also says in a footnote that “the United States does not accept the UN Guiding Principles as an expression of governing international law.”<sup>62</sup> According to NGOs working in Louisiana with disaster victims, US local and federal officials expressed discomfort with a “rights-based approach” toward disaster victims, presumably out of fear that the victims might sue the government for failure to address those rights.<sup>63</sup>

Nor are all governments aware of the Guiding Principles or their provisions, even though General Assembly and Human Rights Council resolutions regularly call for their wide dissemination and application.<sup>64</sup> In the Philippines, for example, when Typhoon Durian struck in 2006, the authorities, according to Oxfam, “had no awareness of minimum standards of assistance or of the obligations to, and rights of, displaced communities.” Partly as a result, there were reports of “discrimination and abrupt relocations.”<sup>65</sup>

The adoption by the African Union in 2009 of a legally binding Convention for the Protection and Assistance of Internally Displaced Persons in Africa (hereinafter ‘the Kampala Convention’) should help increase governments’ awareness of their obligations to IDPs. The Convention is largely based on the Guiding Principles and specifically obligates States to “protect and assist persons who have been internally displaced due to natural or human-made disasters, including climate change.”<sup>66</sup> At the same time, the Convention has not yet come into force and its enforcement machinery is weak.

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<sup>61</sup> Interview with Advocates for Environmental Human Rights, 24 September 2009.

<sup>62</sup> USAID Assistance to Internally Displaced Persons Policy, PD-ACA-558, October 2004, at 6.

<sup>63</sup> Interview with Advocates for Environmental Human Rights. The US does not accept food and health care as rights and has therefore not ratified the International Covenant on Economic, Social and Cultural Rights, on which the Guiding Principles are in part based.

<sup>64</sup> See Human Rights Council Res. 6/32, 14 December 2007, para. 7(c); and UNGA Res. A/C.3/64/L.34/Rev.1, 10 November 2009, paras. 11–12.

<sup>65</sup> S. McHattie, ‘Guiding Principle 27 and Philippine Typhoon Response’, GP10 *Forced Migration Review* 30 (December 2008).

<sup>66</sup> African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 22 October 2009.

In the case of environmentally displaced persons who cross international borders, they enjoy, just like IDPs, the protection of international HRL. However, in the countries where they seek shelter, they lack clear legal status and often face a “legal and operational limbo.”<sup>67</sup> There is no clear right to remain even temporarily in countries where they have sought refuge. They cannot generally claim protection under the terms of the 1951 Refugee Convention, and while those uprooted in Africa and Central America may qualify for protection under the 1969 OAU Convention and the 1984 Cartagena Declaration, this interpretation has not been accepted by the majority of signatories to these agreements. Although the IASC Operational Guidelines make an important contribution towards clarifying the rights of persons uprooted by environmental disasters, they do not take up the difficult questions of status and obligations when environmentally displaced persons cross international borders. Indeed, the situation of those who have crossed an international border represents a major gap in the protection framework for those uprooted by natural disasters.

The International Convention on the Protection of the Rights of All Migrant Workers and their Families may contribute very modestly towards filling this gap, as environmentally displaced persons who have found employment in another country may be able to access a limited degree of protection under the Convention. However, it is important to recognize that this Convention specifically excludes “Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned.”<sup>68</sup> The Convention has been ratified by only 42 countries; no developed countries have ratified the agreement. Its utility for strengthening the protection framework available to those who have crossed borders is therefore limited.

In the absence of a robust international agreement clarifying the status of environmentally displaced persons who cross international borders, a small number of European States have amended their asylum laws to include those displaced by natural disasters, including the effects of climate change. For example, in Sweden and Finland those displaced by environmental factors may claim protection as refugees under national asylum laws, and may

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<sup>67</sup> Kälin, *supra* note 34.

<sup>68</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNGA Res. 45/158, 18 December 1990 (entered into force 1 July 2003), art. 3(d). Art. 2.1 of the Convention defines the term ‘migrant worker’ as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

potentially gain permanent citizenship.<sup>69</sup> Other countries have suspended deportation proceedings or extended *temporary* protection to those who have crossed international borders due to natural disasters. For example, temporary protection has been granted to the victims of flooding in different parts of Southern Africa.<sup>70</sup> After the tsunami, Canada, the United Kingdom and Switzerland temporarily suspended deportations to Sri Lanka, India, the Maldives, Somalia, Seychelles, Thailand and Indonesia.<sup>71</sup>

In the 1990s, the US enacted legislation to assist persons already in the US “who are temporarily unable to safely return to their home country because of ongoing armed conflict, and environmental disaster, or other extraordinary temporary conditions.”<sup>72</sup> Under this legislation, an environmental disaster may include “an earthquake, flood, drought, epidemic, or other environmental disaster in the State resulting in a substantial, but temporary, disruption of living conditions in the area affected.”<sup>73</sup> The government of the affected country must request temporary protection status (TPS) for its citizens, who must be in the US at the time of the crisis. If the disaster has permanent repercussions, TPS may be revoked. For example, in 1997 the US granted TPS to 292 persons from the eastern Caribbean island of Montserrat, where volcanic eruptions made significant portions of the island uninhabitable. It was extended six times but revoked in 2005, when the US concluded that the eruptions would be ongoing rather than temporary. TPS in the US is awarded on a discretionary basis, with the decision made by the Secretary of Homeland Security. Currently, it is in effect for nationals of Honduras, Nicaragua and El Salvador, but was not for Haitians until a massive earthquake struck that country in 2010.<sup>74</sup>

In general, the efficacy of temporary protection models has been limited, from a rights-based standpoint, by their ad hoc basis and by the requirement that States must request TPS for their citizens, as there may be cases where States are unwilling or simply unable to advocate for their citizens.<sup>75</sup> Their efficacy has been further limited by their inability to respond to the concerns of those for whom return is not a secure or viable option, such as the citizens

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<sup>69</sup> Martin, *supra* note 6.

<sup>70</sup> Kälin, *supra* note 34.

<sup>71</sup> Martin, *supra* note 6.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*; N. Bernstein, ‘US is Ending Haven for Those Fleeing a Volcano’, *New York Times*, 9 August 2004; and M. B. Farrell, ‘TPS: Haiti’s Illegal Immigrants Given Temporary Protection in US’, *Christian Science Monitor*, 15 January 2010.

<sup>75</sup> UNHCR, *supra* note 37, at 6; Kälin, *supra* note 34.

of small island States that will disappear due to rising sea levels. These islanders face a particularly precarious future because it remains unclear whether they will be recognized as stateless persons under international law. Even if they are recognized as stateless, the legal protections available to them are minimal, as international support for the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness has been modest: only 63 States have ratified the 1954 Convention, and a mere 34 have ratified the 1961 Convention. Currently, stateless persons are at risk of falling through a “genuine normative gap in international law.”<sup>76</sup> The core of the problem is that while the positive right to citizenship is recognized in international law, the decision to grant citizenship is left to the discretion of States.<sup>77</sup> The upshot for the citizens of island States facing inundation is that even if they are recognized as *de jure* stateless, there are no States with a clear legal duty to extend citizenship rights to them.

Despite the absence of a legal duty to do so, New Zealand has already taken in a group of people from Tuvalu through its Pacific Access Category program, which enables 75 citizens of Tuvalu, 75 from Kiribati and 250 from Tonga to immigrate to New Zealand each year. Although some have applauded the program as a model of international cooperation, it was not designed to respond to the protection needs of the citizens of small island States struggling with the impacts of climate change. Indeed, the New Zealand government considers the initiative a “migration program,” and has not publicized it in order to avoid incurring criticism from conservative groups.<sup>78</sup> Access to the program requires that workers be 18–45 years old, have a job offer, speak English, pass a health check, and have no criminal record. It is therefore ill-suited to provide protection to those who may be the most vulnerable like children, persons with disabilities or the elderly, or to offer a solution to an island State like Tuvalu that will likely be completely submerged in 90 years.<sup>79</sup> In light of these shortcomings, it is clear that these ad hoc measures cannot

<sup>76</sup> Goris, Harrington and Köhn, *supra* note 53, at 6.

<sup>77</sup> *Ibid.*; M.J. Gibney, ‘Statelessness and the Right to Citizenship’, 32 *Forced Migration Review* 50 (2009), at 50; T.L. Lee, ‘Refugees from Bhutan: Nationality, Statelessness and the Right to Return’, 10(1-2) *IJRL* 118 (1998), at 138; Batchelor, *supra* note 53, at 156.

<sup>78</sup> F. Gemenne, ‘Climate Change and Forced Displacements: Towards a Global Environmental Responsibility? The Case of the Small Island Developing States (SIDS) in the South Pacific Ocean’, <http://www.cedem.ulg.ac.be/m/cdc/12.pdf> (last accessed 17 November 2009), at 9–18; Boana et al., *supra* note 41, at 29; M. Loughry and J. McAdam, ‘Kiribati - Relocation and Adaption’, 31 *Forced Migration Review* 51 (2008).

<sup>79</sup> Lopez, *supra* note 47, at 372–372; R.E. Jacobs, ‘Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice’, 14 *Pacific Rim Law and Policy Journal* 103 (2005), at 103–107; Martin, *supra* note 6.

compensate for the lack of effective legal protections for those who will be forced to cross internationally recognized borders due to natural disasters and the effects of climate change.

### C. Gaps in Institutional Arrangements

The lack of legal and definitional clarity for the environmentally displaced is often reflected in the weak institutional arrangements for protecting their human rights. Indeed, laws, policies and implementation machinery that integrate human rights concerns into disaster response are largely non-existent at the national level.<sup>80</sup>

The results can be life threatening. In the US, the Federal Emergency Management Agency (FEMA) rescue and evacuation plans carried out in the Gulf Coast did not include transport arrangements for poor people without private vehicles, or for people in hospitals or prisons. Most were African-Americans, leading to charges of “racism and classism.”<sup>81</sup> The UN Human Rights Committee, which monitors State compliance with the International Covenant on Civil and Political Rights, drew attention to these inequities and called upon the US to ensure that the rights of the poor and in particular African-Americans will be “fully taken into consideration” in reconstruction plans.<sup>82</sup>

In China, the 2008 earthquake in Sichuan province revealed that schools for children of poor families and migrant workers were not built with the same high quality materials that were used for schools for children of the elite and for government buildings. As a result, 7,000 of the schools with students from the lower classes collapsed and more than 5,300 students died with hundreds more disabled. As one parent commented upon seeing the rubble, “this is not a natural disaster.”<sup>83</sup>

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<sup>80</sup> See for example, Brookings-Bern Project on Internal Displacement, ‘Protecting and Promoting Rights in Disasters in South Asia: Prevention and Response’, Summary Report, 9-10 April 2009; and Brookings-Bern Project on Internal Displacement et al., Regional Workshop on Protection and Response in Situations of Natural Disaster, Guatemala City, 28-29 May 2009.

<sup>81</sup> See C. McKinney, ‘Supplementary Report to the Findings of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina’, US House of Representatives, Washington DC, 6 February 2006, as cited in E. Snyder, ‘Build Back Better: Hurricane Katrina in Socio-Gender Context’, 31 *Refugee Watch* 94 (June 2008).

<sup>82</sup> Human Rights Committee, Doc. CCPR/C/USA/CO/3/Rev.1, para. 26, 18 December 2006.

<sup>83</sup> J. Yardley, ‘Chinese Are Left to Ask Why Schools Crumbled’, *New York Times*, 25 May 2008; see also R. Cohen, ‘Disaster Standards Needed in Asia’, Brookings Northeast Asia Commentary, June 2008. See also J. Drew, ‘In China Quake Survivors Must Swallow Grief

At the regional level, organizations do not yet have a consistent or proactive rights-based approach in dealing with disasters. The Association of Southeast Asian Nations (ASEAN), in response to Cyclone Nargis in Burma, did become actively involved in diplomatic initiatives to open up international access to survivors, which assuredly saved many lives. But it did not engage in advocacy efforts for the rights of those being forcibly evicted from temporary shelters or pushed back into ruined villages without supplies. Nor did it call for inquiries into aid distribution on the basis of political loyalties in certain villages or seek to prevent the forcible recruitment of orphaned or separated children into the military. It is to be hoped that the Kampala Convention, once in force, will help promote more rights based approaches in Africa for those displaced by disasters. The Parliamentary Assembly of the CoE has begun to encourage its Member States to assume “a pioneering role” in the field of standard setting and in increasing the “protection of people compelled to leave their homes mainly or exclusively for environmental reasons.”<sup>84</sup>

At the international level, the RSG upon assuming office in 2004 expeditiously added to the concerns of his mandate the rights of those uprooted by disasters and he has been visiting different parts of the world to examine how best to promote the protection of IDPs in the context of natural disasters. However, he is but a single individual with limited resources and staff, whose mandate also covers the 26 million persons uprooted by conflict, in addition to the 36 million displaced by disasters in 2008 alone.

Of the many international humanitarian and development agencies that become involved with disasters, only recently have they begun to consider the human rights and protection dimensions of these crises. When in 2005 the UN assigned to UNHCR the role of lead agency for coordinating protection for IDPs,<sup>85</sup> UNHCR made clear that its role would not extend to those uprooted by disaster except “in extraordinary circumstances.”<sup>86</sup> The UN Resident or Humanitarian Coordinator (RC/HC) in the field therefore must consult with the protection-mandated agencies – the United Nations Children’s Fund (UNICEF), the Office of the High Commissioner for Human Rights

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and Anger’, *Washington Post*, 3 May 2009; K.B. Richburg, ‘Chinese Rights Activist Given 3-year Sentence’, *Washington Post*, 24 November 2009; and ‘Chinese Advocate of Quake Victims Sentenced Over E-Mails’, *New York Times*, 9 February 2010.

<sup>84</sup> Council of Europe Recommendation 1862, para. 3.

<sup>85</sup> J. Egeland, ‘Towards a Stronger Humanitarian Response System’, Supplement, *Forced Migration Review* (2005), at 4-5.

<sup>86</sup> UNHCR, ‘Internally Displaced People Questions and Answers’, September 2007.

(OHCHR) and UNHCR – to determine which one, if any, will take the lead in protection in each new disaster.

In most cases, UNICEF has volunteered but its protection role and skills are largely limited to child protection. When it comes to the elderly, disabled, ethnic or religious minorities, or those with HIV/AIDS, evaluations have found UNICEF less engaged.<sup>87</sup> UNHCR as a result announced in September 2009 that it would be willing to fill “the protection gap” by assuming the lead protection role.<sup>88</sup> However, donor governments have not been encouraging on the grounds that UNHCR can hardly fill its role toward ‘conflict IDPs’.<sup>89</sup>

If UNHCR does assume the ‘lead’ role in future it will not necessarily mean that UNHCR will lead *in the field* in every disaster.<sup>90</sup> Rather, it will act as “coordinator” and ensure an international protection response, in consultation with the RC/HC and other agencies.<sup>91</sup> It will no doubt engage in greater advocacy for disaster victims and design protection strategies that include “registration, documentation and response to sexual and gender-based violence”;<sup>92</sup> it will also make investments in early warning and preparedness programs in response to the displacement associated with climate change.<sup>93</sup> But UNHCR will face many challenges, namely the absence of adequate staff in the field to develop and lead protection strategies; limited resources;<sup>94</sup> and insufficient training in human rights and disasters.

UNHCR will therefore need the support of other agencies, but it will find that protection concerns tend to be overlooked by most agencies in

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<sup>87</sup> See IASC, ‘Inter-Agency Real-time Evaluation of the Response to the February 2007 Floods and Cyclone in Mozambique’, May 2007, as cited in R. Cohen, ‘An Institutional Gap for Disaster IDPs’, 32 *Forced Migration Review* 58 (2009), at 58-59; and IASC, ‘Child Protection Coordination within Cluster Approach: An Inter-Agency Survey’, March 2008. After acknowledging its protection limitations, UNICEF undertook an evaluation but decided not to expand its focus, see ‘Should UNICEF Take on Leadership of the Protection Clusters in Natural Disasters? – External Assessment of the Implications for UNICEF’, 9 May 2008 Executive Summary, [http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Protection/UNICEF\\_Ext%20Ass%20on%20Rol%20of%20Unicef\\_08.pdf](http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Protection/UNICEF_Ext%20Ass%20on%20Rol%20of%20Unicef_08.pdf) (last accessed 17 February 2010).

<sup>88</sup> Opening Statement by Mr. Antonio Guterres, *supra* note 31.

<sup>89</sup> Interview with UN staff, 5 April 2010. In Haiti’s earthquake in 2010, OHCHR assumed the lead role even though its protection experience with uprooted populations is limited.

<sup>90</sup> Opening Statement by Mr. Antonio Guterres, *supra* note 31.

<sup>91</sup> Interview with Claudine Haenni Dale, Interim UN Focal Point for Protection in Natural Disasters for the Protection Cluster, 5 December 2009.

<sup>92</sup> *Ibid.*

<sup>93</sup> UNHCR, *supra* note 37, at 11.

<sup>94</sup> See, for example, NGO Statement on US IDP Policy, signed by 22 organizations, 19 December 2008.

disaster response.<sup>95</sup> A study of the 2005 Pakistan earthquake found UN officials speaking with different voices on the usefulness of international protection principles, with some ready to agree (from fear of expulsion) that the law of Pakistan “trumps international law.”<sup>96</sup> UN agencies also did not push hard because of competing interests: UNICEF was preoccupied mainly with children, UNHCR did not want to jeopardize its Afghan refugee program, and the Office for the Coordination of Humanitarian Affairs (OCHA) did not want to undermine its negotiations with the government over an early recovery fund-raising document.<sup>97</sup>

Although UNHCR has now indicated interest in becoming involved with persons internally displaced by natural disasters, it has remained aloof from persons who cross borders because of environmental reasons.<sup>98</sup> To be sure, when people flee across borders because of *both* conflict and environmental disaster, UNHCR is prepared to respond, as it did during the Ethiopian famine of 1984–85 when it aided Ethiopians who crossed into Sudan because of drought, famine and civil war. But the extent to which UNHCR will become involved with environmentally displaced persons who feel compelled to cross borders is as yet unclear. Given its mandate to protect and assist stateless populations, UNHCR has recognized that it may need to support the protection and resettlement of those from inundated small island States, but it also admits that it is not yet prepared to discharge this role effectively.<sup>99</sup>

While clarifying the role of international organizations such as UNHCR is essential to ensuring a coordinated and predictable response to cross-border displacement due to disasters, ultimately it is States that will have to be persuaded to strengthen the protection available to those forced to cross international borders. International organizations will have to encourage States to allow entry to such people and persuade States of origin to advocate for their

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<sup>95</sup> Interview with Haenni, *supra* note 89. OHCHR, for example, has only exceptionally applied its protection skills to natural disasters. The UN Development Programme (UNDP) and the World Bank are not strong on protection during recovery. The UN Population Fund and UNAIDS have been criticized for slow protection response as well, see R. Cohen, ‘For Disaster IDPs: An Institutional Gap’, Brookings Institution, 8 August 2008. For the IOM’s limited protection response, see below note 106.

<sup>96</sup> Wilder, *supra* note 60, at 40–41 (box 6); and Earthquake Rehabilitation and Reconstruction Authority (ERRA), ‘Social Impact Assessment: 8 October 2005 Pakistan Earthquake’, May 2007.

<sup>97</sup> *Ibid.*

<sup>98</sup> Interview with Haenni, *supra* note 91.

<sup>99</sup> UNHCR, *supra* note 37, at 7; IASC Informal Group on Migration/Displacement and Climate Change, ‘Climate Change, Migration and Displacement: Who Will Be Affected?’, Working Paper, 31 October 2008, at 3.

nationals who depart. Just as States bear primary responsibility for their internally displaced populations, they must be reminded that they also retain major responsibilities toward their nationals who cross borders because of environmental disasters. For example, States of origin have the responsibility to request temporary protected status for them, urge that attention be given to their protection needs, and that conditions be created for their safe and sustainable return (unless their displacement is permanent).

Because climate change is a transnational problem rooted in the practices of developed and now developing countries, it is sometimes argued that particular States, or more broadly the international community, have a responsibility to contribute to the protection of environmentally displaced persons, such as by providing shelter to those who have had to flee across borders.<sup>100</sup> No firm commitments, however, have been made. In the 2010 Haitian earthquake, the Dominican Republic and the US largely closed their borders to Haitians who might flee although they provided substantial support to Haitians inside the country in cooperation with the international community.<sup>101</sup>

To deal with the challenge of protecting those who cross borders, the UN IASC Informal Working Group on Migration, Displacement and Climate Change has been active in fostering international dialogue on the issue. It has attempted to identify appropriate terms to structure discussion on migration and climate change, and IASC members have pledged to “launch a dialogue among [UN] Member States on how to fill existing legal, operational and capacity gaps associated with climate change and human mobility, and to allocate sufficient additional funding to this issue.”<sup>102</sup>

Some advocates have argued that in order to tackle the gaps in institutional arrangements for those who cross borders, a binding international agreement needs to be concluded on their status,<sup>103</sup> or at a minimum a set of guidelines.<sup>104</sup> But even without an agreed framework, IOM has expressed readiness to increase its involvement, and it is likely that the organization will play a key role in working alongside States to improve national and international

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<sup>100</sup> Boana *et al.*, *supra* note 41, at 25.

<sup>101</sup> See J.C. McKinley Jr., ‘Homeless Haitians Told Not to Try to Flee to U.S.’, *New York Times*, 19 January 2010.

<sup>102</sup> IASC Informal Group on Migration/Displacement and Climate Change, *supra* note 99, at 1.

<sup>103</sup> See, for example, Refugees International, ‘Forced Displacement Must Be Included in Copenhagen Climate Agreement’, 4 December 2009.

<sup>104</sup> Boana *et al.*, *supra* note 41, at 26. For discussion of these options, see below, The Way Forward, Section C., Strengthened Legal Protection for Environmentally Displaced Persons.

responses to environmental migration. The organization began conducting research and convening symposia on environmental displacement in the early 1990s, and by 2008, a quarter of its funding through the UN joint appeals process was for its work in disaster scenarios. Today IOM serves as the “global cluster lead” for camp management and coordination in natural disasters.<sup>105</sup>

IOM has advanced its own definition of ‘environmental migrant’ to structure its engagement on this issue. ‘Environmental migrants,’ according to IOM,

are 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.<sup>106</sup>

The definition is purposefully broad, encompassing both voluntary and forced movement; internal and external migration; and long and short term displacement.<sup>107</sup> As an alternative to the problematic concept of ‘environmental refugee,’ this definition has been recognized by institutions such as the Council of Europe.

However, the definition is contestable, for it is important from a protection standpoint to distinguish between truly voluntary economic migrants and those who are forced to move and should be able to claim protection, shelter and assistance from the international community. While IOM correctly highlights the difficulty of differentiating between ‘forced’ and ‘voluntary’ migration, it gives insufficient attention to human rights protection in its work. It recognizes the need for “measures to ensure adequate assistance and protection for people on the move,”<sup>108</sup> but in a profile of 17 IOM projects on natural disasters, only three project descriptions mention protection, and in passing.<sup>109</sup> Too often the vulnerability of different social and economic groups is unconnected to explicit recognition of their human rights, and the need for

<sup>105</sup> IOM, ‘Migration, Climate Change and the Environment: Policy Brief’, 2009, at 6.

<sup>106</sup> IOM, ‘Discussion Note: Migration and the Environment’, 94<sup>th</sup> Session of the IOM Council, MC/INF/288, 1 November 2007, para. 6. For earlier discussion of definitions, see section A., Lack of Conceptual and Definitional Clarity, and *supra* note 49.

<sup>107</sup> *Ibid.*, para. 7.

<sup>108</sup> IOM, ‘Migration, Climate Change and the Environment’, *supra* note 105, at 7. The principles that IOM says should underpin these measures are “proactive policy and early action”; “comprehensive and coherent policies”; “bilateral and regional cooperation”; and “multi-stakeholder partnerships”. See IOM, ‘Migration and the Environment’, *supra* note 106, paras. 40–43.

<sup>109</sup> IOM, ‘A Sample of IOM’s Activities in Migration, Climate Change and Environmental Degradation’, 2009.

strategies to improve their protection. To be sure, IOM has come up with a number of creative ideas to respond to the challenges posed by environmental migration. For example, it has stressed the need to “minimize forced displacement and facilitate the role of migration as an adaptation strategy to climate change by [...] developing temporary and circular labor migration schemes with environmentally-vulnerable communities.”<sup>110</sup> However, in the absence of a stronger focus on the protection of uprooted populations, critical gaps will remain in institutional arrangements. Agreement between UNHCR and IOM on a division of labor in providing protection to environmentally displaced persons who fall through the gaps in the current response system remains to be achieved.

#### *D. Inadequate Consultation with Disaster Victims*

The effectiveness of national, regional and international institutional arrangements will largely depend on adequate consultation with the affected populations. When the RSG and the UN Special Rapporteur on Adequate Housing Miloon Kothari visited tsunami affected countries in 2005, they found insufficient consultation with survivors, which constituted a clear gap in their protection and recovery.<sup>111</sup> In Indonesia, for example, lack of consultation led to the setting up of temporary housing for displaced people far from their livelihoods and transport.<sup>112</sup> It also produced camp designs that failed to protect women.<sup>113</sup> Indeed, large portions of the government’s master plan for Aceh’s reconstruction had to be modified because it was developed with little input from local communities. Although the Reconstruction Agency for Aceh and Nias (BRR) did affirm the importance of a participatory approach, and the Women’s Empowerment Bureau of Aceh, the World Bank and others sought to establish consultation mechanisms,<sup>114</sup> a study published in October 2005 found “a dearth of community involvement in policy making” and insufficient

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<sup>110</sup> IOM, *supra* note 105, at 7.

<sup>111</sup> ‘Relief and Rehabilitation Efforts Remain Problematic One Year after Asian Tsunami, Say UN Experts’, [http://www.brookings.edu/speeches/2005/1219tsunami\\_kalin.aspx](http://www.brookings.edu/speeches/2005/1219tsunami_kalin.aspx) (last accessed 25 January 2010).

<sup>112</sup> See R. Cohen, ‘Measuring Indonesia’s Response to the Tsunami’, *One Year after the Tsunami: Policy and Public Perceptions*, Asia Program Special Report, Woodrow Wilson International Center for Scholars, May 2006, at 14.

<sup>113</sup> For example, there were no separate toilet facilities for men and women, see T. Bacalla, ‘Women and Disaster: Resilience amid Ruin’, 4 *The Investigative Reporting Quarterly* (November 2005), <http://www.pcij.org/i-report/4/aceh-women.html> (last accessed 3 March 2010).

<sup>114</sup> Cohen, ‘Measuring Indonesia’s Response’, *supra* note 112, at 14.

numbers of local people in key positions in the organizations and international agencies working on reconstruction in Aceh.<sup>115</sup>

Insufficient consultation and its unfortunate consequences have been documented in other parts of the world as well, whether in India, the US or Central America.<sup>116</sup> Too often governments find it easier to take a “top down” rather than a “bottom up” approach in their dealings with displaced people. One-time events are often passed off as a consultative process rather than establishing ongoing consultative mechanisms as an integral part of the planning process. The costs can be significant since reconstruction and development projects have a better chance at sustainability if the views of the displaced are taken into account.

### *E. Insufficient Attention to the Special Needs of Vulnerable Groups*

In disaster situations, just as in conflicts, certain groups are more vulnerable to human rights abuse, in particular poor people, single women and women heads of household, separated children, elderly people, the sick and disabled, and socially marginalized groups (e.g. minorities, indigenous people). Despite international standards that seek to protect such groups, governments and aid providers often overlook their special needs.

In the case of women, it is reported that in natural disasters more “tend to die or suffer injury than men because they are not warned, cannot swim or cannot leave the house alone.”<sup>117</sup> During the tsunami, three times as many women perished as men, and a rise in sexual and gender-based violence was reported. In Indonesia, lack of attention to privacy in relocation centers combined with the presence of untrained military forces made for heightened

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<sup>115</sup> D. Cohen *et al.*, ‘Indonesia’ in L.E. Fletcher *et al.* (eds.), *After the Tsunami: Human Rights of Vulnerable Populations* (2005), at 39.

<sup>116</sup> In India, limited consultation reportedly resulted in temporary shelters built too far from schools, markets and fishing grounds and houses built on wetlands that could go underwater during the rainy season. See Brookings-Bern Project, ‘Protecting and Promoting Rights in Disasters in South Asia’, *supra* note 80, at 11. See also R. Mathai-Luke, ‘HIV and the Displaced: Deconstructing Policy Implementation in Tsunami Camps in Tamil Nadu’, 32 *Refugee Watch* (December 2008), at 46-47. In the US, FEMA was criticized for doing a poor job of communicating with Katrina survivors about procedures for compensation and deadlines for leaving trailer parks. See Brookings-Bern Project, ‘Moving Beyond Rhetoric, Consultation and Participation with Populations Displaced by Conflict or Natural Disasters’, October 2008, at 39-40, 31-32. In Central America, few fora have been found in which human rights groups and governmental agencies can discuss the human rights concerns of disaster victims See Brookings-Bern Project, Regional Workshop Guatemala City, *supra* note 80, at 15.

<sup>117</sup> Women’s Environment and Development Organization, ‘What it Means for Women’, 31 *Forced Migration Review* 56 (2008).

sexual abuse.<sup>118</sup> Domestic violence also came to the fore as well as forced marriages of young women survivors to older men, given the shortage of women. As the Women's Environment and Development Organization has emphasized, climate change "is not gender neutral."<sup>119</sup> In slow-onset disasters, like drought or deforestation, women's workloads increase, leaving less time for earning income or receiving education or training.

Long standing cultural patterns of discrimination make tackling these problems more difficult. In India, during the tsunami, government officials in some areas would distribute compensation and relief packages only to male heads of households and not provide compensation payments, relief funds or pensions to women.<sup>120</sup> Indeed, women's exclusion from policy design and programming in some areas "severely limited the effectiveness of the relief programmes."<sup>121</sup> In Indonesia, long standing discrimination against women impeded the restitution of their homes and land.<sup>122</sup>

Sometimes, discrimination against socially marginalized groups becomes reinforced during disasters. The Dalits (or 'untouchables') in India reported that their homes were not as quickly restored as others affected by the tsunami and that in some districts, officials refused to register them or provide them with adequate supplies in camps. As a result, a Supreme Court hearing had to be called to ensure food security for Dalits.<sup>123</sup>

Other vulnerable groups like children separated from their families do not always receive the special attention they require. Nor do elderly and disabled people necessarily receive the help they need in reaching food distribution centers, while persons with HIV/AIDS have trouble accessing essential medication and have been reported to be expelled from camps and shelters in some countries.<sup>124</sup>

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<sup>118</sup> M. Casey, 'Charity Reports Rising Abuse of Female Tsunami Survivors', *Washington Post*, 27 March 2005.

<sup>119</sup> Women's Environment and Development Organization, *supra* note 117, at 56.

<sup>120</sup> Mathai-Luke, *supra* note 116, at 47; and Brookings-Bern Project, 'Protecting and Promoting Rights in Natural Disasters in South Asia', *supra* note 80, at 11-12.

<sup>121</sup> Mathai-Luke, *ibid.*, at 55. See also the Pakistan Government-World Bank study, 'Earthquake Rehabilitation and Reconstruction Authority, Social Impact Assessment: 8 October 2005 Pakistan Earthquake', May 2007, which found that women, especially women heads of household, were insufficiently involved in the planning and recovery process after the earthquake.

<sup>122</sup> Cohen, 'Measuring Indonesia's Response', *supra* note 112, at 14.

<sup>123</sup> Mathai-Luke, *supra* note 116, at 47; see also Brookings-Bern Project on Internal Displacement, 'Protecting and Promoting Rights in Disasters in South Asia', *supra* note 80, at 10.

<sup>124</sup> See Brookings-Bern Project, *ibid.*

*F. Tensions between Disaster Affected and other Communities*

When those displaced by disasters relocate to other areas of their countries, tensions inevitably develop with 'host communities,' especially when relocations last for long periods and competition arises over resources and livelihoods. In the Maldives, for instance, where permanent evacuations have taken place as a result of rising sea levels, there have been reports of outbreaks of violence in relocation areas.<sup>125</sup> Sometimes, tensions arise when temporary shelters are placed too close to local housing or when displaced persons receive assistance and host communities do not.

Resentments have also developed between disaster victims and those displaced by conflict. Because governments and donors may be more inclined to help disaster victims than those uprooted by civil wars, they can create disparities in treatment between the two groups. This became evident during the tsunami when far larger amounts of international aid were collected for the survivors than for those uprooted by conflict in the same countries. In Sri Lanka, those displaced by the tsunami reportedly received higher monthly rations than those displaced by conflict and were awarded housing and rehabilitation aid much more rapidly.<sup>126</sup> In Aceh, Indonesia, it took a 2005 peace agreement between the government and the Free Aceh Movement (GAM) before the government announced a comprehensive policy to address inequities and tensions between conflict and tsunami-affected populations.<sup>127</sup>

*G. Government Failure to take Preventive Measures and Protect Victims*

The failure to take preventive steps and provide protection is often not deliberate State policy but rather the result of negligence, discrimination or lack of attention and can be remedied. India's Supreme Court hearing, for example, with regard to the Dalits, helped reverse inequities in the tsunami aid response. In the US, a 2009 court ruling held the Army Corps of Engineers responsible for building weak infrastructure, thereby causing some of the worst flooding during Katrina. The ruling could lead to compensation payments to survivors and changes in government flood protection efforts.<sup>128</sup> In many other countries,

<sup>125</sup> *Ibid.*, at 12.

<sup>126</sup> Calcutta Research Group, *Voices of the Internally Displaced in South Asia* (2006), at 78.

<sup>127</sup> Even so, disparities continued in the reconstruction process, in part because many international humanitarian organizations earmarked their funds only for those uprooted by the tsunami, see Cohen, 'Measuring Indonesia's Response', *supra* note 112, at 12-13.

<sup>128</sup> C. Robertson, 'Elation, and Uncertainty, Over Katrina Liability', *New York Times*, 20 November 2009; and Editorial, 'A Win for New Orleans', *Washington Post*, 23 November 2009.

however, such remedies do not exist, creating a challenge for the international community of how to respond when governments fail to take preventive measures, deliberately neglect disaster survivors and put large numbers at risk.

A textbook case is the Burmese government's response to Cyclone Nargis. By all accounts, the government failed to provide adequate early warning of the severity of the cyclone, and in the aftermath of the disaster provided only minimal aid to survivors, obstructed the delivery of international aid, and for almost a month restricted the entry or movement of most relief workers, in particular non-Asians who sought to bring in supplies.

It took a diplomatic campaign led by the UN Secretary-General, ASEAN and an array of Asian and Western governments as well as the stationing of Western naval vessels along the shore, and the 'carrot' of recovery aid to persuade General Than Shwe to cooperate with the international community. But ASEAN's and the UN's achievement of access came only after considerable delay and the loss of countless lives. A significant number of the more than 140,000 Burmese who perished appeared to have been preventable deaths.

Calls for stronger action against Burma under the doctrine of the responsibility to protect (R2P) did not, however, succeed.<sup>129</sup> China and other states blocked such a possibility in the Security Council while the international humanitarian community opposed coercive measures on the ground that negotiation and cooperation with the authorities were the most effective means of gaining access to affected areas.<sup>130</sup> UN Secretary-General Ban Ki-moon also ruled against R2P's application to situations of natural disaster:

Extending the principle to cover other calamities, such as HIV/AIDS, climate change, or response to national disasters, would undermine the 2005 consensus and stretch the concept beyond recognition for operational utility.<sup>131</sup>

Others, however, argued that Burma's "reckless indifference" to its population could constitute crimes against humanity which should have activated the R2P doctrine.<sup>132</sup> Massive suffering and crimes, it was said, could be committed

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<sup>129</sup> According to the World Summit Outcome document of 2005, there is an international responsibility to take "collective action" when governments are unwilling or unable to protect their own populations from genocide, crimes against humanity, war crimes, and ethnic cleansing, see UNGA Res. A/RES/60/1, 24 October 2005.

<sup>130</sup> J. Holmes, Under Secretary-General for Humanitarian Affairs, as quoted in World Federalist Movement Institute for Global Policy, 'The Responsibility to Protect and its Application', 9 May 2009.

<sup>131</sup> Ban Ki-moon, Address of the UN Secretary-General at conference on Responsible Sovereignty: International Cooperation for a Changed World, Berlin, 15 July 2008.

<sup>132</sup> See G. Evans, 'Facing Up to Our Responsibilities', *The Guardian*, 12 May 2008; L. Axworthy and A. Rock, 'Responsibility to Protect? Yes', *Globe and Mail*, 9 May 2008;

in the course of a natural disaster, turning it into a human-made disaster. In Ethiopia, in the mid 1980s, under the pretext of responding to drought and famine, the government forcibly and brutally relocated tens of thousands of highland Tigreans whom it considered political opponents into lowland malaria-infested areas.<sup>133</sup> Large numbers died as a result. In Sudan, during the same period, the government refused to request international aid during drought-related famines resulting in widespread sickness and death.<sup>134</sup> The UN's ruling out of R2P's application to Cyclone Nargis and all future disasters thus remains questionable. Furthermore, the mere invoking of R2P may prove valuable to protecting those at risk in disasters. Its mere mention at the time of Cyclone Nargis is said to have made the Burmese government more responsive and the international community more actively engaged.<sup>135</sup>

The Burmese government's initial reluctance to accept outside aid workers, in particular from the West, highlighted another critical problem for disaster relief efforts more broadly – whether it is acceptable for governments to refuse aid on political grounds when lives are at stake. Like Burma, other countries have refused aid in time of disasters. In the 2008 earthquake in China, in which up to 90,000 people perished, China barred available rescue workers from Western countries with the skills and equipment required to pull people from the rubble rapidly. 'Neighboring' countries were considered more acceptable although it was three to six days after the quake before some 200 search-and-rescue experts came in from China's neighbors.<sup>136</sup> Similarly, in India during the tsunami, the government initially denied foreign aid groups entry to the Andaman and Nicobar islands even though it took the government four days to bring in food.<sup>137</sup> Of course, the national capacity and level of development of countries such as China and India made extensive international aid

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R. Cohen, 'The Burma Cyclone and the Responsibility to Protect', 1(2) *Global R2P* 253 (2009), at 255; J. Wong, 'Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism', 84 *Tul. L. Rev.* 219 (2009). For a contrary viewpoint, see Asia Pacific Centre for the Responsibility to Protect, 'Cyclone Nargis and the Responsibility to Protect', Myanmar/Burma Briefing No.2, 16 May 2008.

<sup>133</sup> D.A. Korn, *Ethiopia, the United States and the Soviet Union* (1986), at 129-30.

<sup>134</sup> F. Deng and L. Minear, *The Challenges of Famine Relief: Emergency Operations in the Sudan* (1992).

<sup>135</sup> See J. Haacke, 'Myanmar, the Responsibility to Protect, and the Need for Practical Assistance', 1(2) *Global R2P* 156 (2009), at 169.

<sup>136</sup> Cohen, *supra* note 83, at 1.

<sup>137</sup> M. Devi *et al.*, 'First Open letter to the President of India', 3 January 2005, at [http://www.andaman.org/BOOK/news\\_tsunami/2005\\_01Jan/05\\_jan.htm](http://www.andaman.org/BOOK/news_tsunami/2005_01Jan/05_jan.htm) (last accessed 17 February 2010); see also S. Sengupta, 'Pride and Politics: India Rejects Quake Aid', *New York Times*, 19 October 2005.

unnecessary, but it remains unknown how many people would have been saved in both countries if restrictions on rescue workers on the basis of their nationality had not been introduced.

In the US, the same restrictive approach became evident in response to Hurricane Katrina although the US might well have benefited from outside aid and ideas given its lackluster performance.<sup>138</sup> According to a 2006 study the US initially refused aid offered by foreign countries because being on the receiving end of international aid was considered intolerable by a country priding itself “on being the [...] wealthiest and most technologically advanced.”<sup>139</sup>

In all these instances, it can be argued that saving lives should have taken priority over political considerations. International humanitarian principles, moreover, make clear that governments that reject aid deliveries when they are unable to provide the required assistance are acting arbitrarily.<sup>140</sup> Yet there has been no international objection to this failure to live up to international standards.

### 3. Addressing the Gaps

Promoting greater protection for environmentally displaced persons will require new approaches by governments, international organizations, NGOs and local communities. To facilitate such change, the following recommendations are offered. They pertain to both policy and law but policy is particularly highlighted since initially it is important to raise awareness to the subject.

#### *A. Recognition of Environmentally Displaced Persons as People in Need of Human Rights Protection*

Although awareness has grown of the protection needs of disaster victims, national and local authorities need to be regularly reminded of their responsibility to take preventive steps to protect their populations and ensure that they

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<sup>138</sup> See A Failure of Initiative: U.S. House of Representatives, ‘Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina’, February 2006; and Snyder, *supra* note 81, at 91-101.

<sup>139</sup> A.C. Richard, *Role Reversal: Offers of Help from Other Countries in Response to Hurricane Katrina* (2006), at 42.

<sup>140</sup> See The Guiding Principles on Internal Displacement, No. 25(2), and W. Kälin, *Guiding Principles on Internal Displacement: Annotations* (2000), The American Society of International Law and the Brookings Institution Project on Internal Displacement, at 64-65.

receive assistance and protection during and after disasters. The seminars the RSG has been holding around the world with governments and civil society have explored the protection dimensions of disaster displacement and the primary responsibility of governments to take preventive measures and to assist and protect the rights of those affected. Many more such meetings will need to be convened by the successor to the RSG (September 2010) and by UN agencies and NGOs. More often than not, as Kälin has pointed out, human rights problems result from “inadequate or inefficient policies,” due to a lack of awareness of the human rights dimension of the problem.<sup>141</sup>

Ignoring rights and failing to take steps to reduce disaster risks can prove costly to governments, as a number are beginning to discover. The European Court of Human Rights, for example, found the Russian government negligent in preventing mud slides in the northern Caucasus and ordered it to pay compensation to the surviving relatives. The Court based its decision on the failure of the government to live up to its duty to “safeguard” lives and take preventive measures against the consequences of a disaster.<sup>142</sup> In the US, law suits are also in progress against the government for “monumental negligence” in failing to take sufficient preventive measures in New Orleans.<sup>143</sup> As a result, governments may begin to think twice about failing to adopt a rights-based approach toward their population with regard to disasters. The Kampala Convention, which is to become binding on African States, asserts that governments “are liable to make reparations” to IDPs when they refrain from protecting and assisting them in natural disasters.<sup>144</sup> Regional and national court decisions in different parts of the world may in time change perceptions and even shame governments like China, which did offer small cash payments for the children who died during the Sichuan earthquake but has harassed or imprisoned those who have sought to file petitions or law suits requesting investigations into the faulty construction of the schools.<sup>145</sup> Without accountability it will be difficult to ensure that governments act to reduce risks, engage in early warning and overall protect their populations.

<sup>141</sup> UNGA, Note by the Secretary-General, *supra* note 7, para. 12.

<sup>142</sup> W. Kälin and C. Haenni Dale, ‘Disaster Risk Mitigation – Why Human Rights Matter’, 31 *Forced Migration Review* (2008) at 38–39.

<sup>143</sup> See *supra* note 128.

<sup>144</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 (entered into force 20 June 1974) (hereinafter the Kampala Convention), art. 12(3).

<sup>145</sup> See E. Wong, ‘Parents of Schoolchildren Killed in China Quake Confirm Lawsuit’, *New York Times*, 23 December 2008; A. Jacobs and E. Wong, ‘China Releases its toll Of Students in ‘08 Quake’, *New York Times*, 6 May 2009; and *supra* note 83.

Heads of government should also be reminded that they could face serious political consequences if they fail to protect their citizens from disasters. The Bush Administration's response to Katrina contributed to the loss of the 2008 presidential election by the Republican Party whereas in Ethiopia in the 1970s, Emperor Haile Selassie's failure to deal with widespread drought and famine contributed to his government's downfall.<sup>146</sup>

### *B. Greater Definitional Clarity Regarding Environmentally Displaced Persons*

Because the term internally displaced person is often thought of as applying only to those uprooted by conflict, it bears repeating that those uprooted by disasters are also IDPs, and that this is confirmed by the Guiding Principles on Internal Displacement, the Operational Guidelines on Human Rights and Natural Disasters, resolutions of the UN Human Rights Council and General Assembly, and most recently, the legally binding Kampala Convention.

Criteria, however, are needed to determine at what point displacement by gradual environmental degradation can be considered coerced and the people involved recognized as IDPs in need of national and international attention. The Kampala Convention appears to consider persons uprooted by slow-onset disasters to be IDPs, and the Parliamentary Assembly of the CoE also has recommended that they be considered IDPs. However, there is no international agreement that explicitly includes migrants from slow-onset disasters in definitions of *forced* migrants.<sup>147</sup> The RSG and a group of international experts would be the best qualified to develop criteria. Undoubtedly they will have to consider stretching the meaning of forced displacement to include those who have no choice but to leave their homes because of slow-onset environmental factors. They may also have to include persons who can no longer return to their homes because of a deteriorating environment even though their initial movement was voluntary. Further, they may be pressed to include all those displaced by slow-onset disasters since it will often not be possible to do individual status determinations. But here, care will need to be taken not to cast the net too widely so as to return appropriate focus on the special protection needs of forced migrants. After all, many people will move voluntarily as part of adaptation strategies. If they are deemed to have "a privileged claim on the

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<sup>146</sup> See Korn, *supra* note 133, at 4. For the political impact of the failure to uphold the human rights of disaster victims in Nicaragua, see Ferris, *supra* note 10.

<sup>147</sup> See J. Wood, J. Korreborg and A.-M. Linde, 'What Humanitarians Need to Do', *31 Forced Migration Review* 42 (2008).

international community,” then why shouldn’t people who migrate because of “grinding rural or urban poverty?”<sup>148</sup>

Environmental migration is also challenging the cogency of the categories of the current forced migration regime for persons who cross borders. As discussed above, disaster victims who flee to other countries cannot typically claim protection as refugees under the 1951 Refugee Convention, although there is some possibility that they may qualify for refugee status under the OAU Convention and the Cartagena Declaration. Similarly, uncertainty remains regarding whether the citizens of inundated small island States will be recognized by governments as *de facto* or *de jure* stateless under the 1954 Convention Relating to the Status of Stateless Persons. Governments and legal bodies must begin to clarify their interpretations of these agreements with a view to expanding their coverage or creating new agreements with the express purpose of protecting environmentally displaced persons who cross borders.

### *C. Strengthened Legal Protection for Environmentally Displaced Persons*

No new international standards or law are required for those forcibly uprooted by disasters within their own countries. The Guiding Principles apply to those uprooted by disaster and if some (or even many) displaced by slow-onset disasters come to be considered forcibly displaced, the Principles will apply to them as well. International HRL, the Operational Guidelines and the Kampala Convention already apply to those uprooted by slow-onset disasters.

What is needed instead is greater dissemination and usage of the Guiding Principles and Operational Guidelines. Both constitute excellent checklists for ensuring that human rights concerns are integrated into early warning and risk reduction strategies as well as disaster response. Indeed, the RSG has urged States to incorporate the Principles into their domestic law as the most effective way of strengthening legal protection for those displaced by disasters. And he has developed a Manual for Law and Policymakers to guide governments on what specifically to include in national legislation.<sup>149</sup> Africa’s 2008 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons is the first binding instrument to oblige States to incorporate the Guiding Principles into their domestic law.<sup>150</sup>

<sup>148</sup> E. Ferris and D. Paul, ‘Protection in Natural Disasters’, Paper presented at Refugee Studies Centre, Oxford University, September 2009.

<sup>149</sup> Brookings-Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, October 2008.

<sup>150</sup> Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, paras. 76-79 (entered into force June 2008) (hereinafter ‘Great Lakes Protocol’).

For those who cross borders, however, there is no normative framework to rely upon. A number of options are possible in response to this gap:

*Hard law approach.* Some scholars and activists have suggested renegotiating the 1951 Refugee Convention to include the environmentally displaced. For example, with the support of the governments of the Maldives, Tuvalu and other small island States, the Living Space for Environmental Refugees (LiSER) has expressed interest in expanding the 1951 Convention definition of a refugee to include those with well-founded

fear of life endangerment, harm or loss of life due to severe environmental impact, or due to materials left, existent or being released in the displacement grounds by the state, commercial entities or both.<sup>151</sup>

However, UNHCR has opposed this option largely because of the resistance of most States to the expansion of asylum rights and the serious risk any renegotiation of the 1951 Convention might pose to the international refugee protection system. In light of this opposition, some have suggested drafting a new, binding agreement on the rights of environmentally displaced persons, including those who cross borders.<sup>152</sup> The United Nations University has been active in drawing together UN agencies to discuss this option and UNHCR has recognized that “new legal frameworks may need to be negotiated.”<sup>153</sup> However, the reluctance of many States to extend any new rights to foreign migrants and the failure of the world’s governments to even mention migration or human rights in the 2009 Copenhagen Accord, despite the lobbying efforts of leading advocacy organizations, suggests that this will be an uphill and long-term struggle.

*Soft law approach.* A more time-sensitive and forthcoming approach would be to build on the model provided by the development of the Guiding Principles. Carefully drafting, circulating and building international support for a set of guidelines might be the most promising route to strengthening international consensus on the rights of environmentally displaced persons who cross borders. It will require bringing together a group of leading experts to draft the guidelines based on international human rights and humanitarian law, and refugee law by analogy.<sup>154</sup> The 2008 International Law Commission *Preliminary*

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<sup>151</sup> Boana *et al.*, *supra* note 41, at 25.

<sup>152</sup> Lopez, *supra* note 47, at 365, 402-408.

<sup>153</sup> UNHCR, *supra* note 37, at 3.

<sup>154</sup> Boana *et al.*, *supra* note 41, at 26; R. Zetter, ‘Legal and Normative Frameworks’, 31 *Forced Migration Review* 62 (2008).

*Report on the Protection of Persons in the Event of Disasters* will be a valuable resource in the development of guidelines.<sup>155</sup>

Of course, it is important to recognize the limitations of this approach. In contrast to the team that produced the Guiding Principles, the drafters of the proposed new guidelines will face a particularly daunting challenge. Whereas IDPs have a clear claim as citizens to protection from their State, ensuring the security and wellbeing of those who cross borders will require not only clarifying the implications of existing laws and norms (as the Guiding Principles did), but also potentially creating *new* rights, which would necessitate the direct involvement of States. As UNHCR suggests, the “crux of the issue will be whether persons have a need for international protection; and if so, on what grounds this need may be turned into an entitlement.”<sup>156</sup> To the RSG, the

[...] point of departure should not be the subjective motives of individuals or communities for their decision to move, but [...] whether in light of the prevailing circumstances and the particular vulnerabilities of the persons concerned it would be inappropriate to require them to go back to their original homes.<sup>157</sup>

*Protection from forced return.* This raises the critical question of whether the ban on *refoulement* should extend to environmentally displaced persons who have crossed international borders. The international refugee regime requires that repatriation take place voluntarily, in conditions of safety and dignity. These criteria may also have to govern the return of disaster victims who have sought shelter abroad.

The RSG has proposed that the appropriateness of return may be determined on the basis of three elements: permissibility, factual possibility, and the reasonableness of return. The “permissibility” criterion would prohibit collective expulsions and returning people to situations where “life or limb is at risk.”<sup>158</sup> Returns would also be rendered factually impossible if there were the total submersion of island States, or technical or administrative problems, such as the destruction of roads, loss of documents, or lack of drinking water. Nor would repatriation be reasonable if, for example, protection and assistance were nonexistent or inadequate according to international standards, or where there was no access to a durable solution to displacement within the borders of the uprooted person’s country. When return is not permissible, possible and reasonable, then disaster victims who have sought shelter abroad

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<sup>155</sup> E. Valencia-Ospina, *International Law Commission Preliminary Report on the Protection of Persons in the Event of Disasters*, 5 May 2008, A/CN.4/598.

<sup>156</sup> UNHCR, *supra* note 37, at 5.

<sup>157</sup> Kälin, *supra* note 34.

<sup>158</sup> *Ibid.*

should be granted temporary protection, while those from inundated island States should benefit from permanent resettlement.<sup>159</sup> The challenge is to concretize both the entitlements and obligations of this population, with a view to transforming temporary protection from an ad hoc response into a reliable, rights-based protection tool.

Current complementary protection regimes in Europe and temporary protection systems in the US do not provide strong models because they are overly discretionary, and may be limited to those who left their countries before disaster struck.<sup>160</sup> Removing these limitations would go a long way towards creating viable temporary protection models that could inform the development of a protection system for those who have crossed international borders and cannot return to their homes. At the same time, the experiences of countries such as Sweden and Finland in extending asylum rights to the environmentally displaced should be analyzed for transferable lessons. In order to build local support for temporary protection, particularly in poorer countries and communities, it will be essential to ensure that host communities are compensated, and their needs taken into account.

#### *D. Responding to Statelessness*

Beyond determining whether the citizens of inundated island States will be recognized as legally stateless, effective responses to this population will require the negotiation of more international resettlement options. States and inter-governmental organizations such as UNHCR and IOM would be well-advised to evaluate the lessons learned from past large-scale resettlement operations, in order to facilitate the smooth transfer of citizens from submerged islands.<sup>161</sup>

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<sup>159</sup> Documents such as the IASC Operational Guidelines and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons stress the importance of making return to original homes accessible as a durable solution wherever possible. Although this discussion focuses on protection for those for whom return is not immediately viable, the proposed Guidelines will need to explore to what extent States and other actors are obliged to make return to environmentally devastated communities possible. They will also need to explore how housing, land and property rights are affected in cases of environmental displacement, especially when return is impossible. While it is difficult to determine responsibility for the disasters caused by climate change, the displaced may have a legitimate right to a remedy for the loss of their homes and other grievances. See S. Leckie, 'Human Rights Implications', 31 *Forced Migration Review* 18 (2008).

<sup>160</sup> Lopez, *supra* note 47, at 392-399; S. Martin, A. Schoenholtz and D. Waller Meyers, 'Temporary Protection: Towards a New Regional and Domestic Framework', 12 *Geo. Immigr. L. J.* 543 (1998), at 550; J. McAdam, 'Complementary Protection and Beyond: How States Deal with Human Rights Protection', UNHCR Working Paper 118 (2005).

<sup>161</sup> Martin, *supra* note 6.

While internal relocation may be a viable option in the short term in some cases, international resettlement should be given priority when there is fear that internal relocation may provoke violence.<sup>162</sup> Ultimately, the international community needs to clarify its obligations towards the potentially stateless and explore different options open-mindedly and creatively. Island communities do not necessarily need to disperse into host communities, but could move to similar but more secure territories, or could negotiate a degree of autonomy within other countries, or buy other islands outright, and re-establish there.<sup>163</sup> The latter option is currently being explored by the Maldives government. Already there is a need for forums in which islanders can discuss the various alternatives and participate in decision-making about their futures.<sup>164</sup>

#### *E. Incorporation of Human Rights Protection into National Policy Frameworks on Disasters*

National policies on disaster response can be effective ways of ensuring that survivors are protected and do not feel compelled to flee across borders. The policies should begin with preventive measures, such as early warning systems, disaster risk reduction strategies, the dissemination of information about impending disasters, evacuation plans, in particular for persons without private vehicles, and the building of effective infrastructure that can withstand impact. Where these policies already exist in the context of the 2005 Hyogo Framework for Action, they should be reviewed to ensure that protection concerns have been effectively incorporated.<sup>165</sup>

To protect populations during disasters, non-discrimination in the provision of food, supplies, water and sanitation should be assured, as well as protection from assault, gender violence and other human rights abuse. In post-disaster situations, policies must make sure that persons are not forcibly returned or relocated to unsustainable or unsafe areas, that they have access to jobs, training and livelihoods, that they are able to regain their housing, land and property or receive compensation, and that they enjoy political participation, in particular voting rights.

Policies must be comprehensive and cover both disaster and conflict IDPs so as to avoid potential resentments and tensions that could undermine

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<sup>162</sup> *Ibid.*

<sup>163</sup> I. Kelman, 'Island Evacuation', 31 *Forced Migration Review* 20 (2008).

<sup>164</sup> Loughry and McAdam, *supra* note 78, at 51.

<sup>165</sup> *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, International Strategy for Disaster Reduction (ISDR), A/Conf.206/6, 2005.

recovery.<sup>166</sup> They must also extend to families and communities hosting displaced persons. Emergency food rations or cash payments, for example, should be made available not only to IDPs but to families and communities hosting IDPs. In Indonesia, a program that aided families hosting the displaced helped end the disparity between IDPs who received aid in government-run relocation centers, and families' hosting IDPs who did not. The aid also encouraged greater community support for the displaced by injecting cash into the local economy.<sup>167</sup>

To promote greater government accountability, government focal points and offices must be designated to monitor implementation of the policies, ensure their dissemination, provide technical assistance on how to apply for aid from the government, and assure that adequate resources are allotted so that the policy may be carried out.

The IASC's new Framework on Durable Solutions for Internally Displaced Persons should guide policies in the recovery stage. It makes clear that displacement does not end when flood waters recede but rather is a gradual and long-term process, in which certain conditions have to be met, such as ongoing safety and security in areas of return or resettlement; access to basic services and sustainable livelihoods; protection against discrimination; access to documentation; restitution or compensation for lost or damaged housing, land and property; participation in public affairs; and access to justice for displacement-related violations. It also calls for "building back better" after natural disasters in which the status quo did not offer sufficient protection.<sup>168</sup>

#### *F. Special Attention to Vulnerable Groups*

All vulnerable and marginalized groups should be a priority concern in disaster response, and governments should design programs to ensure their protection. The Indonesian government's and UNICEF's efforts after the tsunami to prevent the trafficking of children is instructive. To prevent separated children from being spirited away to other parts of the country or to foreign countries for adoption, the children were moved in with extended families and communities. Of 2,393 separated from their parents or orphaned in Aceh,

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<sup>166</sup> Statement by UN Special Envoy for Tsunami Recovery William J. Clinton, Asia Foundation/Asia Society conference on tsunami recovery, Washington DC, 12 May 2005.

<sup>167</sup> C. Hudspeth, 'Accessing IDPs in Post-tsunami Aceh', Special Issue *Forced Migration Review* 20 (2005).

<sup>168</sup> *Framework on Durable Solutions for Internally Displaced Persons*, adopted by UN Inter-Agency Standing Committee (on file with authors), 2010.

85 percent were placed with relations or family friends and only 400 placed in homes.<sup>169</sup>

Making children aware of how to protect themselves and others during disasters is also essential.<sup>170</sup> In Guatemala, the government has introduced information about disasters and human rights into school curricula,<sup>171</sup> and in Cuba, hurricane awareness programs are mandatory in schools.<sup>172</sup> Teaching coping strategies to women, such as how to swim, could enable them to survive disasters better. Practical steps are also needed to reduce sexual abuse against women and girls, such as the construction of separate toilet and bathing facilities for men and women survivors, and the location of such facilities in safe areas of camps rather than a kilometer away or near military barracks.<sup>173</sup> Arrests and prosecution of the perpetrators of sexual violence is also critical especially when they are the military forces assigned to protect the survivors.<sup>174</sup> Protection for women also means safe access to personal supplies, service packages for reproductive health, and measures to prevent transmission of sexually transmitted diseases. In recovery and reconstruction, women's inclusion in the design, development and implementation of programs is known to enhance their capacity to earn income, save assets, learn new skills and benefit their households and communities.<sup>175</sup> As an Indian academic aptly observed, "the inability or unwillingness to shed the gender-neutral lens is detrimental to the entire community's survival."<sup>176</sup>

The vulnerability of men must also elicit attention. In Nepal, after large-scale floods, most psycho-social counseling was provided to women and children but not to men who also needed it.<sup>177</sup> And after the tsunami, men whose wives perished found themselves ill equipped to fend for themselves – prepare food, wash clothes or take care of surviving children. This in turn was a

<sup>169</sup> S. Baldauf, 'Aceh's next Generation', *Christian Science Monitor*, 19 December 2005.

<sup>170</sup> See E. Back, C. Cameron and T. Tanner, *Children and Disaster Risk Reduction: Taking Stock and Moving Forward*, Institute of Development Studies (November 2009).

<sup>171</sup> Brookings-Bern Project et al., Regional Workshop, Guatemala City, *supra* note 80, at 11.

<sup>172</sup> E. Ferris, 'Natural Disasters: Thinking Beyond Immediate Response', Brookings Institution, 2 October 2009.

<sup>173</sup> M. Kapila et al., 'Health Aspects of the Tsunami Disasters in Asia', 20(6) *Prehospital and Disaster Medicine* 368 (2005), cited in Mathai-Luke, 'HIV and the Displaced', *supra* note 114, at 55.

<sup>174</sup> Kapila et al., *ibid.*, at 55.

<sup>175</sup> Women's Environment and Development Organization, *supra* note 117, at 56.

<sup>176</sup> Brookings-Bern Project, 'Protecting and Promoting Rights in Natural Disasters in South Asia', *supra* note 80, at 13.

<sup>177</sup> *Ibid.*, at 16-17.

contributing factor to a rise in child marriages, since many men married young girls to help them cope with their new duties.

Although cultural sensitivities sometimes impede help for vulnerable groups, international organizations must regularly remind governments that their mission is to support the most excluded and marginalized in emergencies. Indeed, the IASC Operational Guidelines call for “priority access” to humanitarian aid for vulnerable groups and specific measures for those with special needs.<sup>178</sup> In India, the many abuses reported during the tsunami against vulnerable groups led the National Disaster Management Authority to take steps to improve protection for them.<sup>179</sup>

### *G. Increased Consultation with Affected Populations*

The most effective means of informing persons about what to expect from their governments and the international community in natural disasters is through consultative mechanisms. While it is not always possible to establish such mechanisms in the immediate aftermath of a disaster, they should be built into relief and recovery programs so that the displaced can make known their concerns and also learn how their protection and basic material needs will be addressed.

A study by the Brookings-Bern Project on Internal Displacement found that the opinions and preferences of IDPs are critical to the success of policies and programs, whether the provision of humanitarian aid, camp management, or job creation and livelihoods. Utilizing the capacities of survivors is also important since government resources are rarely adequate. It also helps survivors to overcome trauma and promotes government accountability toward the displaced.<sup>180</sup>

Consultative processes work best when both women and men are represented and when people of different age groups, socio-economic backgrounds, religions and ethnicities are involved. They also should extend to local communities so as to overcome tensions over resources and jobs and ensure the successful integration of the displaced into new areas. The Office of the Ombudsman for Human Rights in Guatemala has developed a consultative

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<sup>178</sup> IASC Operational Guidelines, *supra* note 12, at A.1.1, A.4.2, B.1.3, B.2.5 and D.4.1.

<sup>179</sup> Brookings-Bern Project, ‘Protecting and Promoting Rights in Natural Disasters in South Asia’, *supra* note 80, at 3.

<sup>180</sup> See Brookings-Bern Project, ‘Summary of Meeting on Consulting IDPs: Moving Beyond Rhetoric’, at 15-16. November 2007; Brookings-Bern Project, ‘Moving Beyond Rhetoric: Consultation and Participation’, *supra* note 116, at i-ii, 21, 26, 32, 36-37, 42-45, 61-2, 65; and Brookings-Bern Project et al., Regional Workshop, Guatemala City, *supra* note 80.

process with local communities to address the psychosocial consequences of disasters and promote ways to reduce the risk of disasters.<sup>181</sup>

Consultative mechanisms often encourage UN and NGO staff to act as advocates for the displaced. It was after listening to the voices of IDPs in tsunami affected areas that the RSG developed Operational Guidelines to integrate their protection and human rights concerns into the international response to disasters.<sup>182</sup>

#### *H. Training in Human Rights Protection in Disasters*

The large number of actors that become involved in disasters – community leaders, government authorities, military forces, international organizations, the private sector and NGOs – all require training in the practical measures to protect affected populations and prevent discrimination in aid distribution. The importance of such training became evident in the Philippines, after Typhoon Durian. Although the authorities initially feared that training in the Guiding Principles would “incite” the victims to make “unmeetable demands,” the training led to improvements in standards of response.<sup>183</sup> Three hundred “Core Groups” of IDPs were set up with the following beneficial results: improved distribution of goods and services; better communication between IDPs, government officials and NGOs; and changed government policies more responsive to the needs and rights of the displaced. Government authorities later acknowledged that without the training, “they would have been faced with significant unrest amongst evacuees.”<sup>184</sup>

#### *I. Monitoring of Compliance with Human Rights Standards*

National human rights commissions, which are quasi governmental bodies, can play an important role in monitoring the extent to which the rights of disaster victims are protected. In Sri Lanka, the national commission introduced a complaints procedure and investigated 17,000 cases about tsunami response, and claims to have successfully resolved up to 60 percent. In India, the national human rights commission sent out special rapporteurs to look

<sup>181</sup> Brookings-Bern Project et al., Regional Workshop, Guatemala City, *supra* note 80, at 12.

<sup>182</sup> See R. Cohen, ‘Listening to the Voices of the Displaced: Lessons Learned’, Brookings-Bern Project on Internal Displacement, September 2008, at 2, 24-26, 36.

<sup>183</sup> S. McHattie, ‘Guiding Principle 27 and Philippine Typhoon Response’, GP10 *Forced Migration Review* 30 (2008), at 30.

<sup>184</sup> *Ibid.*, at 31.

into the human rights concerns of those affected by disasters in Orissa and Gujarat while the Thai commission submitted recommendations to its government for compensation and reparation for families and communities.<sup>185</sup> These South Asian national commissions belong to the Asia Pacific Forum of National Human Rights Institutions (APF) which has urged its member commissions to help their governments draft laws and policies that take into account the human rights of disaster victims.

The national commissions, however, need increased resources, staff and training as do commissions in Africa, which have not yet fully engaged in monitoring and advocating for disaster victims. In the Americas, the office of the Ombudsman for Human Rights in Guatemala has pledged to promote a human rights based approach before, during and after a disaster and has published a Guide to Human Rights in Emergency and Disaster Situations.<sup>186</sup>

NGOs can also play an important role in monitoring, advising survivors on how to report complaints, and help survivors to organize into advocacy groups. When labor coalitions and gender groups such as fisherwomen organized in India, they were much better prepared to press for their rights.<sup>187</sup> At the international level, the IDMC with additional resources and a more developed methodology would be well placed to monitor and report on the protection dimension of disaster-related displacement.

### *J. Greater Regional Involvement*

The role of regional organizations needs to be expanded beyond aid coordination to include human rights and protection issues and foster greater cooperation between human rights and humanitarian actors. In Central America, a 2009 workshop of regional bodies, national authorities, international organizations and NGOs called upon the Coordination Center for the Prevention of Natural Disasters in Central America (CEPRENAC) to incorporate human rights in all aspects of its work and establish links with human rights groups, disseminate information throughout the region, and monitor the way in which rights are respected in planning for disasters and in the response and recovery phases.<sup>188</sup> These regional approaches need to be replicated in other

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<sup>185</sup> See Brookings-Bern Project, 'Moving beyond Rhetoric: Consultation and Participation', *supra* note 116, at 45-6; and Cohen, *supra* note 87.

<sup>186</sup> Brookings-Bern Project et al., Regional Workshop, Guatemala City, *supra* note 80, at 11.

<sup>187</sup> Brookings-Bern Project, 'Protecting and Promoting Rights in Natural Disasters in South Asia', *supra* note 80, at 11.

<sup>188</sup> Brookings-Bern Project et al., Regional Workshop, Guatemala City, *supra* note 80, at 16.

parts of the world. One promising development has been in Africa, where the Kampala Convention calls for the sharing of information on the protection of displaced persons with the African Commission on Human Rights and Peoples' Rights.<sup>189</sup>

### *K. More Effective International Institutional Arrangements*

Protection of the human rights of disaster victims needs to become part and parcel of the programs and policies of international organizations. To this end, the UN will have to ensure that its Operational Guidelines and a new field manual being developed on how to promote human rights in disasters<sup>190</sup> are widely disseminated so that the human rights of IDPs become an integral part of the programs of UN agencies and NGOs.

More importantly, the UN will have to decide on a lead agency for protection in disasters to bring predictability to the response. As the UN's potential protection lead in disasters, UNHCR will have to strengthen its in house capacity for playing a more active role as called for by High Commissioner Antonio Guterres.<sup>191</sup> It will have to train staff in the human rights dimension of disasters, expand its protection presence in the field, and persuade donor governments to provide increased funding. When disasters strike areas of conflict where UNHCR is already on the ground and engaged with IDPs, its involvement should become automatic just as it is when disasters strike refugee camps.<sup>192</sup>

Because protection concerns cut across most if not all activities related to displacement in natural disasters, the organizations UNHCR will coordinate will also have to develop greater protection skills. OHCHR for one should explore how it could become more relevant to disaster protection through the deployment of human rights monitors, the undertaking of advocacy and the expansion of training programs for local authorities on how to integrate human rights in disaster management. UNICEF should seek some expansion of its protection role beyond children (since the security of family members also has direct bearing on children), and the UN Emergency Relief Coordinator

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<sup>189</sup> The Kampala Convention, *supra* note 144, art. 8(3e).

<sup>190</sup> The 'pilot version' was first published by Brookings Bern Project, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Right Protection in Situations of Natural Disaster*, March 2008.

<sup>191</sup> Opening Statement by Mr. Antonio Guterres, *supra* note 31.

<sup>192</sup> UNHCR, *supra* note 37, at 14.

should make sure that RC/HCs in the field give priority to protection as an automatic part of emergency response.

Relationships between UNHCR and non-UN organizations will also have to be strengthened, in particular with IOM. The two organizations must work out ways to complement and reinforce each other's work and ensure that disaster victims – whether within countries or crossing borders – do not fall within the cracks of protection responses. Partnerships with international and local NGOs and with local communities will also be essential. Their “grass-roots initiatives” are often in the forefront of disaster response, helping to fill the gaps in government performance.<sup>193</sup> Moreover, when international agencies depart, it is the local groups left to carry forward.

Because displaced persons will need assistance beyond the emergency phase, UNHCR will have to develop effective partnerships with UNDP, the World Bank and other development agencies to ensure a smooth transition to early recovery and reintegration for displaced people. This transition has often been marred by lack of close working relationships between relief and development organizations and by a lack of understanding of protection and human rights concerns.

In the case of those who cross borders, far more innovation will be required. UNHCR has not wanted to expand its mandate to cover those who cross borders for environmental reasons, yet on a *de facto* basis has sometimes helped such persons, in particular when they seek protection in refugee camps.<sup>194</sup> However, flexibility and ‘muddling through’ will not be sufficient when large numbers require immediate and longer-term protection. Here, UNHCR will need to engage in a dialogue with agencies and governments to develop a strategy to ensure that the response to this population becomes predictable and evenhanded. As its former Deputy High Commissioner asserted, in situations of “forced displacement precipitated directly or indirectly by climate change,” UNHCR has “to be ready to assume our share of this responsibility.”<sup>195</sup>

To this end, UNHCR and IOM should play leading roles in supporting the development of international guidelines on the protection of environmentally displaced persons who cross borders, and should use these guidelines as a springboard for the effective and reliable allocation of responsibility for protecting and assisting those uprooted by disasters. Given its expertise, UNHCR

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<sup>193</sup> See Snyder, *supra* note 81, at 99. See Ferris, ‘Natural Disasters’, *supra* note 172; and Brookings-Bern Project et al., Regional Workshop, Guatemala City, *supra* note 80, at 12.

<sup>194</sup> E. Sanders, ‘Fleeing Drought in the Horn of Africa’, *Los Angeles Times*, 25 October 2009; and UNHCR, *supra* note 37, at 2.

<sup>195</sup> C.L. Johnstone, ‘The Future Is Now’, 31 *Forced Migration Review* 47 (2008).

is well-placed to take on responsibility for legal protection of those who cross borders.

New forms of inter-State cooperation will also be required to ensure that those who cannot return to their home countries benefit from effective temporary protection while those whose island States have disappeared will find permanent resettlement. The role of international organizations in encouraging States to address the issue can be significant in accelerating action.

#### *L. Making Humanitarian Aid an Imperative when People's Lives Are at Stake*

Although States have the primary duty and responsibility for providing humanitarian assistance to their displaced populations, the Guiding Principles make clear that international humanitarian organizations have “the right to offer their services” and that such offers “shall not be regarded as an unfriendly act or an interference in a State’s internal affairs.”<sup>196</sup> Indeed, when the authorities are unable or unwilling to provide the required humanitarian assistance, consent is not to be “arbitrarily withheld.”<sup>197</sup> An obligation is thus imposed on States to refrain from refusing reasonable offers of international assistance. Refusal without good reason constitutes arbitrariness and a violation of the right to life.<sup>198</sup>

This principle also should apply when donor governments offer humanitarian aid. Indeed, donors are expected to “know no politics,” that is, they are expected to provide aid irrespective of their relationship with the government in question because of the overriding international obligation to help those at risk.<sup>199</sup> By the same token, *recipient governments should be expected to know no politics in receiving humanitarian aid*. When they need help, they must be ready to accept it from all parties especially when they do not have the capacity to protect and assist their own populations. If such understandings are not strongly promoted, then more and more countries will believe that it is acceptable to arbitrarily refuse aid on political grounds. Burma’s government in the end relented under regional and international pressure to allow in outside aid to cyclone victims. The US also allowed in some foreign aid to victims of

<sup>196</sup> Guiding Principles on Internal Displacement, No. 25.

<sup>197</sup> *Ibid.* The Kampala Convention (*supra* note 144) also requires States Parties to seek the assistance of outside aid when available resources are inadequate, see art. 5(6) as does the Great Lakes Protocol.

<sup>198</sup> Kälin, *Guiding Principles*, *supra* note 140, at 64-65.

<sup>199</sup> The slogan ‘hunger knows no politics’ arose during the Ethiopian famine in the mid 1980s driving the United States to provide humanitarian aid despite its adversarial relationship with the Mengistu government.

Katrina after being criticized for unnecessarily denying such assistance. But there should be an overall international understanding that acceptance of aid from certain countries, but not others, on political grounds that are unreasonable when populations are at risk, contravenes international obligations to the victims of disasters.

### *M. A more Flexible Application of R2P*

The UN's exclusion of all disaster survivors from the umbrella of the responsibility to protect should be revisited, especially in cases where governments deliberately cause suffering on a massive scale tantamount to crimes against humanity in the course of a natural disaster. Making Cyclone Nargis the litmus test of whether or not R2P applies clearly should be reconsidered. It is noteworthy that the Kampala Convention, which covers IDPs in disasters and conflicts, sees fit to reiterate the AU's "right to intervene" when war crimes, genocide and crimes against humanity are committed.<sup>200</sup> Flexibility in the application of R2P is essential so that disasters used as a cover or pretext for committing criminal acts can be addressed by carefully calibrated collective action, if need be.

## **Conclusion**

Climate change promises to create massive new waves of people uprooted from their homes, and is already challenging established international concepts, norms and institutional arrangements for dealing with forced displacement. Concertedly focusing on the human rights and protection needs of those displaced will be essential to a successful response, as will a willingness on the part of governments, international organizations, NGOs and host populations to adapt to changing realities. States of course have the primary responsibility for protecting those environmentally displaced, but international organizations will also have a substantial role to play. The IASC Operational Guidelines wisely call upon humanitarian actors to do their utmost to ensure that the rights of the people are protected even when it means going "beyond the strict wording of their mandates."<sup>201</sup> Important steps forward have already been made in terms of identifying some of the particular protection needs of disaster victims, and the institutions responsible

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<sup>200</sup> The Kampala Convention, *supra* note 144, art. 8(1).

<sup>201</sup> IASC Operational Guidelines, *supra* note 12, at 9.

for meeting these needs. Yet critical gaps remain, especially regarding those who are displaced by slow-onset disasters and those who cross international borders. New legal frameworks and institutional arrangements may be required. To date, it has proven difficult to attract sufficient attention to these issues on the international stage. However, as the frequency and severity of disasters increase, the importance of effective, rights-based responses will undoubtedly become all too clear.