

## **LEGAL AND PROTECTION POLICY**

### **RESEARCH SERIES**



# **Climate Change Displacement and International Law: Complementary Protection Standards**

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*We want to begin that [migration] now, and do it over the next twenty, thirty or forty years, rather than merely, in fifty to sixty years time, simply come looking for somewhere to settle our one hundred thousand people because they can no longer live in Kiribati, because they will either be dead or drown. We begin the process now, it's a win-win for all and very painless, but I think if we come as refugees, in fifty to sixty years time, I think they would become a football to be kicked around.*<sup>1</sup>

## 1. Introduction

Movement in response to environmental and climate change is a normal human adaptation strategy. It can provide a means of escaping danger and increasing resilience, especially when it is planned.<sup>2</sup> The difficulty today is that people cannot simply migrate as and when they choose: national immigration laws restrict the entry of non-citizens into other countries. International law only recognizes a very small class of forced migrants as people whom other countries have an obligation to protect: 'refugees', 'stateless persons', and those eligible for complementary protection, discussed below. This means that unless people fall within one of those groups, or can lawfully migrate for reasons such as employment, family and education, they run the risk of interdiction, detention and expulsion if they attempt to cross an international border and have no legal entitlement to stay in that other country.

Cross-border displacement as a result of natural disasters and the effects of climate change has thus been identified as a normative gap in the international protection regime.<sup>3</sup> This paper focuses on the relevance of complementary protection standards applicable at the universal, regional and national levels as a means to address such displacement.

This section provides an overview of current discussions on climate-related forced displacement and legal responses to it.

## 2. General background and contextualization

### 2.1 History of the concept

Analysis of climate change-induced displacement can be traced back to earlier deliberations on environmental displacement, which were particularly prominent during the 1990s.<sup>4</sup>

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<sup>1</sup> President Anote Tong in D. Wilson, 'Climate Change: Nobody is Immune' (*Islands Business*, 2008) available online at:

[http://www.islandsbusiness.com/islands\\_business/index\\_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=18087/overrideSkinName=issueArticle-full.tpl](http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=18087/overrideSkinName=issueArticle-full.tpl); cited in V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law' (2009) 11 *European Journal of Migration and Law* 313, 325.

<sup>2</sup> International Organization for Migration (IOM), *Assessing the Evidence: Environment, Climate Change and Migration in Bangladesh* (Dhaka: IOM, 2010) 26.

<sup>3</sup> This was expressly recognized at the 2010 High Commissioner's Dialogue on Protection Challenges (8–9 December 2010) Breakout Session 1: Gaps in the International Protection Framework and in Its Implementation, 'Protection Gaps and Responses', Report by the Co-Chairs, 3.

<sup>4</sup> See e.g. J.L. Jacobsen, 'Environmental Refugees: A Yardstick of Habitability' (November 1988) *Worldwatch Paper* 86; A. Suhrke and A. Visentin, 'The Environmental Refugee: A New Approach' (1991) *Ecodecision* 73; N. Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 *BioScience* 752; G. S. McCue, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration' (1993) 6 *Georgetown International Environmental Law Review* 151; A. Suhrke, 'Environmental Degradation and Population Flows' (1994) 47 *Journal of International Affairs* 473; G. Hugo, 'Environmental Concerns and International Migration' (1996) 30 *International Migration Review* 105; G. Kibreab, 'Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate' (1997) 21 *Disasters* 20; B. Hartmann,

Though the idea of an ‘ecological refugee’ was first mentioned in 1948,<sup>5</sup> its more recent and first ‘official’ derivation was a UNEP report in 1985 by El-Hinnawi. He used the term ‘environmental refugee’ to highlight the potentially devastating impacts of unchecked development, pollution and so on.<sup>6</sup> He did this in much the same way that environmental lobby groups today use the language of ‘climate refugees’ to draw attention to the most deleterious aspects of carbon emissions.<sup>7</sup>

During the 1980s and 1990s, climate change was predominantly conceived as a scientific and environmental issue. However, in 1990, the potential impacts of climate change on human migration were identified by the Intergovernmental Panel on Climate Change (IPCC). It noted that millions of people would likely be uprooted by shoreline erosion, coastal flooding and agricultural disruption,<sup>8</sup> and that climate change might necessitate consideration of ‘migration and resettlement outside of national boundaries’.<sup>9</sup>

In the 2000s, the social and humanitarian consequences of climate change began to be more readily identified.<sup>10</sup> The International Federation for the Red Cross created a climate change centre in 2002 to ‘better understand and address the risks of climate change, in particular in the context of disaster risk reduction, disaster management and health and care programs, with a focus on the most vulnerable people’.<sup>11</sup> In 2005, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution on ‘The legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous peoples’. It called on the Commission of Human Rights to appoint a Special Rapporteur to prepare ‘a comprehensive study on the legal implications of the disappearance

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‘Population, Environment and Security: A New Trinity’ (1998) 10 *Environment and Urbanization* 113; J. B. Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’ (1998) 6 *NYU Environmental Law Journal* 480; S. Lonergan, ‘The Role of Environmental Degradation in Population Displacement’ (1998) 4 *Environmental Change and Security Project Report* 5.

<sup>5</sup> W. Vogt, *Road to Survival* (New York: William Sloane Associates, 1948) in F. Gemenne, ‘Environmental Changes and Migration Flows: Normative Frameworks and Policy Responses’ (PhD thesis, Institut d’Etudes Politiques de Paris and University of Liège 2009) 114.

<sup>6</sup> See also the work of L. Brown of the Worldwatch Institute in the 1970s, and the 1984 briefing document of the International Institute for Environment and Development in Gemenne, note 5 above, 114. See also discussion in N. Myers and J. Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington, DC: The Climate Institute, 1995); E. El-Hinnawi, *Environmental Refugees* (United Nations Environment Programme, 1985); Suhrke and Visentin, note 4 above; J. Morrissey, ‘Environmental Change and Forced Migration: A State of the Art Review’ *Refugee Studies Centre Background Paper*, January 2009.

<sup>7</sup> See e.g. Friends of the Earth Australia, *A Citizen’s Guide to Climate Refugees* (rev. edn., Friends of the Earth Australia, 2007).

<sup>8</sup> Intergovernmental Panel on Climate Change (IPCC), *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (Cambridge: CUP, 1990). This was underscored in its most recent report: see e.g. G. C. Hegerl *et al.*, ‘Understanding and Attributing Climate Change’ in S. Solomon *et al.*, (eds), *Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: CUP, 2007); IPCC, *Climate Change 2007: Synthesis Report: Summary for Policymakers* (Cambridge: CUP, 2007).

<sup>9</sup> R. T. Watson, M. C. Zinyowera, R. H. Moss and D. J. Dokken (eds), *IPCC Special Report: The Regional Impacts of Climate Change: An Assessment of Vulnerability: Summary for Policymakers* (Geneva: IPCC, 1997) Part 6.8.

<sup>10</sup> N. Hall, ‘Climate Change and Institutional Change in UNHCR’ (UNU-EHS Summer Academy Conference on Protecting Environmental Migration: Creating New Policy and Institutional Frameworks, Hohenkammer, July 2010) citing telephone interview with International Federation of the Red Cross (IFRC) staff member (16 April 2010).

<sup>11</sup> *Ibid.* referring to the IFRC/Red Crescent Climate Centre available online at: <http://www.climatecentre.org/site/about-us> (last accessed 10 May 2011).

of States and other territories for environmental reasons, including the implications for the human rights of their residents’,<sup>12</sup> but this never occurred.

Since then, the issue has gained further momentum, with an explosion of literature and increasing institutional and NGO engagement in the issue since the mid-2000s.<sup>13</sup> In 2009, the Office of the UN High Commissioner for Human Rights in 2009 examined the links between human rights and climate change, including a whole section on displacement.<sup>14</sup> In the same year, the UN General Assembly adopted a resolution on ‘Climate Change and Its Possible Security Implications’, requesting the Security Council to provide a comprehensive report. The resultant report contains a short section on population displacement and migration.<sup>15</sup>

The Council of Europe Parliamentary Assembly’s Committee on Migration, Refugees and Population compiled a report on environmentally-induced migration and displacement in 2008.<sup>16</sup> In mid-2009, Kofi Annan, in his role as President of the Global Humanitarian Forum, issued a report which described ‘millions of people’ being ‘uprooted or permanently on the move as a result’ of climate change, with ‘[m]any more millions’ to follow.<sup>17</sup> The issue has also been taken up in the UNFCCC negotiations.<sup>18</sup>

UNHCR’s engagement with the issue was precipitated by the High Commissioner, Antonio Guterres, who first raised his concerns about climate change-related movement at UNHCR’s Executive Committee meeting in 2007.<sup>19</sup> He told States that: ‘We see more and more people

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<sup>12</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘The Legal Implications of the Disappearance of States and Other Territories for Environmental Reasons, Including the Implications for the Human Rights of their Residents, with Particular Reference to the Rights of Indigenous Peoples’, Res. 2005/20 (10 August 2005). No such reports appear to have been compiled. In 2008, Emmanuel Decaux, Human Rights Council Advisory Committee Expert, listed on-going studies submitted or mandated for submission by Special Rapporteurs. These did not include a study more recent than the 2005 one.

<sup>13</sup> The IOM and the Norwegian Red Cross have been particularly active, for example. See also recent reports by the United Nations Development Programme (UNDP), Office for the Coordination of Humanitarian Affairs (OCHA), Oxfam, Christian Aid, World Vision and so on, where climate change has become a focus.

<sup>14</sup> ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’, UN Doc. A/HRC/10/61, 15 January 2009, paras 55–60. See also the submissions made by States, UN organisations, regional intergovernmental organizations, national human rights institutions and non-government organisations: OHCHR, ‘OHCHR Study on the Relationship between Climate Change and Human Rights: Submissions and Reference Documents Received’ (2008) available online at: <http://www2.ohchr.org/english/issues/climatechange/submissions.htm> (last accessed 12 May 2011).

<sup>15</sup> ‘Climate Change and Its Possible Security Implications: Report of the Secretary-General’, UN Doc. A/64/350, 11 September 2009, paras 54–63 and Box III. While it notes that most displacement will occur *within* countries rather than across international borders, and that rural–urban movement will place enormous pressures on urban centres, the analysis is weak and at times inaccurate (especially relating to the law).

<sup>16</sup> Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, ‘Environmentally Induced Migration and Displacement: A 21st Century Challenge’, COE Doc 11785 (23 December 2008) paras 6.3 and 121 respectively.

<sup>17</sup> *The Anatomy of a Silent Crisis: Human Impact Report: Climate Change* (Geneva: Global Humanitarian Forum, 2009) ii available online at: [www.eird.org/publicaciones/humanimpactreport.pdf](http://www.eird.org/publicaciones/humanimpactreport.pdf) (last accessed 17 May 2011).

<sup>18</sup> See ‘Text to Facilitate Negotiations among Parties’, UN Doc. FCCC/AWGLCA/2010/6, 17 May 2010, para. 4(f) (page 17) available online at: [http://maindb.unfccc.int/library/view\\_pdf.pl?url=http://unfccc.int/resource/docs/2010/awglca10/eng/06.pdf](http://maindb.unfccc.int/library/view_pdf.pl?url=http://unfccc.int/resource/docs/2010/awglca10/eng/06.pdf) (last accessed 17 May 2011).

<sup>19</sup> However, a Working Group on Solutions and Protection within the Executive Committee of UNHCR reported in 1991 that there was ‘a need to provide international protection to persons outside the current international legal definition of refugee [where they were] forced to leave or prevented from returning to their homes because of human-made disasters, natural or ecological disasters’: M. Schwartz, ‘International Legal Protection for Victims of Environmental Abuse’ (1993) 18 *Yale Journal of International Law* 355, 379.

forced to move because of extreme deprivation, environmental degradation and climate change’, noting that

natural disasters occur more frequently and are of greater magnitude and devastating impact. Almost every model of the long-term effects of climate change predicts a continued expansion of desertification, to the point of destroying livelihood prospects in many parts of the globe. And for each centimeter the sea level rises, there will be one million more displaced. The international community seems no more adept at dealing with these causes than it is at preventing conflict and persecution.

He noted that he regarded UNHCR as having a ‘duty to alert states to these problems and help find answers to the new challenges they represent’,<sup>20</sup> while acknowledging that UNHCR’s legal mandate precluded its formal involvement.<sup>21</sup>

As a result of the High Commissioner’s lead, UNHCR produced its first policy paper in late 2008, and other publications since.<sup>22</sup> It has also become more actively engaged through networks such as the Inter-Agency Standing Committee;<sup>23</sup> in commissioning research on climate change-related movement;<sup>24</sup> and raising it as a normative protection gap at the 2010 High Commissioner’s Dialogue on Protection Challenges.<sup>25</sup>

There remains no authoritative international institution responsible for governing climate-related migration. Indeed, the issue cuts across several areas of international governance—migration and asylum, the environment, development, human rights, and humanitarian aid and assistance—each of which is represented by a number of different UN and other bodies. UNHCR is uniquely placed to address the protection dimension of movement, and to assist the international debate through its expertise on forced migration and the nature of population movements.

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<sup>20</sup> Opening Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, at the Fifty-eighth Session of the Executive Committee of the High Commissioner’s Programme (Geneva 1 October 2007).

<sup>21</sup> Indeed, this was, and remains, a key obstacle to UNHCR’s formal involvement. Hall’s interviews reflect a disquiet among some within UNHCR about taking a stance on the issue: Hall, note 10 above.

<sup>22</sup> UNHCR, ‘Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective’. rev. edn, 14 August 2009. See generally UNHCR’s climate change website at <http://www.unhcr.org/pages/49e4a5096.html>.

<sup>23</sup> Note also the Climate Change, Environment and Migration Alliance (CCEMA), formed in April 2008, which is comprised of the IOM, Munich Re Foundation, Stockholm Environment Institute, United Nations Environment Programme (UNEP), OCHA, United Nations University Institute for Environment and Human Security, University of Sussex Development Research Centre on Migration, Globalisation and Poverty, and World Wildlife Fund. It was formed as ‘an informal framework for a global multi-stakeholder partnership on climate change, environment and migration’: ‘About ccema’ (2010) available online at: <http://www.ccema-portal.org/article/read/about> (last accessed 9 May 2011).

<sup>24</sup> R. Zetter, ‘Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks’, December 2010, Refugee Studies Centre Research Report Executive Summary available online at: <http://www.rsc.ox.ac.uk>.

<sup>25</sup> See High Commissioner’s Dialogue on Protection Challenges Report, note 3 above. However, a Working Group on Solutions and Protection within the Executive Committee of the UNHCR reported in 1991 that there was ‘a need to provide international protection to persons outside the current international legal definition of refugee [where they were] forced to leave or prevented from returning to their homes because of human-made disasters, natural or ecological disasters’: M. Schwartz, note 19 above, 379.



## 2.2 Conceptualization of climate change-related movement

The ‘newness’ of displacement triggered (at least in part) by climate change is its underlying anthropogenic basis,<sup>26</sup> the large number of people thought to be susceptible to it,<sup>27</sup> and the relative speed with which climate change will occur, which means that people’s traditional coping strategies are likely to be overwhelmed at some point. As the Intergovernmental Panel on Climate Change (IPCC) has observed, ‘[w]hile physical exposure can significantly influence vulnerability for both human populations and natural systems, a lack of adaptive capacity is often the most important factor that creates a hotspot of human vulnerability’.<sup>28</sup> A country’s level of development is central to its adaptive capacity, since resources and technology increase capacity, while poverty limits it.<sup>29</sup>

According to UNHCR, it is becoming increasingly difficult to categorize displaced people because of the combined impacts of conflict, the environment and economic pressures.<sup>30</sup> While the term ‘refugee’ describes only a narrow sub-class of the world’s forced migrants, it is often misapplied to those who move (or who are anticipated to move) for environmental or climate reasons. As explored below, this is not only erroneous as a matter of law, but is conceptually inaccurate as well.

First, the growing body of empirical research shows that in most cases, movement is likely to be predominantly internal and/or gradual. Of course there *will* be some cross-border movement, but not in the magnitude often predicted,<sup>31</sup> nor necessarily in the nature of refugee ‘flight’.<sup>32</sup> This is important when it comes to devising the appropriate legal and policy responses, which must be attuned to the reality of movement. For example, alarmist predictions that some 30 million people<sup>33</sup> will be displaced from Bangladesh by 2050 as a

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<sup>26</sup> That is not to say that ‘natural’ disasters are without anthropogenic bases: see e.g. B. Wisner, P. Blaikie, T. Cannon and I. Davis, *At Risk: Natural Hazards, People’s Vulnerability and Disasters* (2nd edn., London: Routledge, 2004), who argue that few disasters are ever ‘natural’; they are a combination of environmental *plus* socio-economic and political factors.

<sup>27</sup> President of the Global Humanitarian Forum, Kofi Annan, described ‘millions of people’ being ‘uprooted or permanently on the move as a result’ of climate change, with ‘[m]any more millions’ to follow: *The Anatomy of a Silent Crisis*, note 17 above, ii. Debates about numbers remain highly contentious: see e.g. D. Kniveton *et al.*, ‘Climate Change and Migration: Improving Methodologies to Estimate Flows’ (2008) *IOM Migration Research Series* No. 33; S. Castles, ‘Environmental Change and Forced Migration: Making Sense of the Debate’ (2002) *New Issues in Refugee Research*, Working Paper No. 70. As Kibreab notes, numbers are based on ‘educated guesses and cannot therefore be the basis of evidence-based policy which can help with pre-emption, mitigation or adaptation’, G. Kibreab, ‘Climate Change and Human Migration: A Tenuous Relationship?’ (2009) 20 *Fordham Environmental Law Review* 357, 400.

<sup>28</sup> IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: CUP, 2007) 317.

<sup>29</sup> Referred to in IOM, note 2 above, 8.

<sup>30</sup> See remarks made by High Commissioner António Guterres in an interview with *The Guardian* in J. Borger, ‘Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN’ *The Guardian* (17 June 2008) available online at: <http://www.guardian.co.uk/environment/2008/jun/17/climatechange.food> (last accessed 17 May 2011).

<sup>31</sup> For alarmist figures, see e.g. Christian Aid, *Human Tide: The Real Migration Crisis* (2007). See also Friends of the Earth Australia, note 7 above; Robin McKie, ‘Climate Change Will Cost a Billion People Their Homes, Says Report’ *The Observer*, 28 November 2010; IFRC and Red Crescent Societies, *World Disasters Report: Focus on Recovery*, IFRC and Red Crescent Societies 2001; Myers, note 4 above; N. Myers, ‘Environmental Refugees: An Emergent Security Issue’, 13th Economic Forum, Prague, 23–27 May 2005.

<sup>32</sup> See e.g. F. Laczko and C. Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence*, Geneva: IOM, 2009; EACH-FOR, ‘Synthesis Report’, 14 May 2009.

<sup>33</sup> Author interview with Mihir Kanti Majumder, Secretary, Ministry of Environment and Forests, Bangladesh (Dhaka, 15 June 2010); K. M. Campbell *et al.*, *The Age of Consequences: The Foreign Policy and National*

result of climate change need to be treated with caution. Most displacement in Bangladesh that can be linked to climate change is likely to be internal rather than cross-border in character, based on current patterns of movement (which are the most likely indicators of future movement).<sup>34</sup> There is consequently scant evidence to justify claims that mass outflows of Bangladeshi ‘climate refugees’<sup>35</sup> will threaten international or regional security.<sup>36</sup> Alarmist predictions about the numbers of people on the move may negatively impact on the careful creation of principled and appropriate legal and policy responses.

Secondly, it is inherently fraught to speak of ‘climate change’ as the ‘cause’ of human movement, even though its impacts may exacerbate existing socio-economic or environmental vulnerabilities. Rather, climate change will have an ‘incremental impact’, ‘add[ing] to existing problems’ and ‘compound[ing] existing threats’.<sup>37</sup> As one government official in the so-called ‘sinking island’ of Kiribati observed, climate change overlays pre-existing pressures—overcrowding, unemployment, environmental and development concerns—which means that it may provide a ‘tipping point’ that would not have been reached in its absence.<sup>38</sup>

From a law and policy perspective, this raises questions about whether it is appropriate to differentiate between displaced people who deserve ‘protection’ on account of climate change, and those who are victims of ‘mere’ economic or environmental hardship. For example, in urban slums in Bangladesh, it is difficult to distinguish those who move from general poverty from those who are affected by climate change.<sup>39</sup> Some researchers suggest that it is arbitrary to identify ‘climate change’ as a driver of forced migration, while omitting

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*Security Implications of Global Climate Change* (Washington, DC: Center for Strategic and International Studies, November 2007) 5. Biermann and Boas calculate that there will be 26 million ‘climate refugees’ by that time solely on account of rising seas: F. Biermann and I. Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10 *Global Environmental Politics* 60, 70.

<sup>34</sup> See e.g. G. Hugo, ‘Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific’ in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 9.

<sup>35</sup> See e.g. ‘PM Warns of Climate Refugee Crisis’ *The Daily Star*, 22 September 2010; ‘Hasina Highlights Unfortunate Plight of Climate Migrants’ *The New Nation*, 25 September 2010. Bangladeshi non-governmental organization (NGO) network, Equity BD, which has from time to time used the ‘climate refugee’ terminology, e.g. Equity BD, ‘Climate Change Induced Forced Migrants: In Need of Dignified Recognition under a New Protocol’, December 2009, says it now rejects this: author interview with Md Shamsuddoha and Rezaul Karim Chowdhury from Equity BD, 19 June 2010.

<sup>36</sup> German Advisory Council on Global Change, *World in Transition: Climate Change as a Security Risk: Summary for Policy Makers* (Berlin: WBGU Secretariat 2007) 6; P. Schwartz and D. Randall, ‘An Abrupt Climate Change Scenario and Its Implications for United States National Security’ (October 2003) 3, 17; CNA Corporation, ‘National Security and the Threat of Climate Change’ (2007) 44; Former Prime Minister K. Rudd, ‘The First National Security Statement to the Australian Parliament’ (4 December 2008) available online at: <http://pmrudd.archive.dpmc.gov.au/node/5424> (last accessed 5 October 2010).

<sup>37</sup> Author interview with Saber Chowdhury MP, Member of the All Parliamentary Committee on Climate Change, Bangladesh (Dhaka, 21 June 2010).

<sup>38</sup> Author interview with Kiribati Solicitor-General David Lambourne (Kiribati, 8 May 2009). However, in Tuvalu, there is a concern that if climate drivers are overshadowed by other factors such as general poverty, which have traditionally not given rise to a protection response by third States, efforts to achieve funding for adaptation and migration options for the future will be stymied. This was the impression given in the author’s interview with Enele Sopoaga, Secretary for Foreign Affairs, Tuvalu (Funafuti, 25 May 2009).

<sup>39</sup> Author interview with SM Munjurul Hannan Khan, Deputy Secretary, Ministry of Environment and Forests and National Focal Point for the UNFCCC and IPCC, Bangladesh (Dhaka, 15 June 2010). Discussions with slum dwellers showed that some had moved on account of environmental degradation, but this was a very small sample and no firm conclusions can be drawn from it: author interviews in Shonamia *bosti* (slum) (Dhaka, 18 June 2010).

other causes such as poverty, general conflict, or lack of opportunity (especially since they may impact on the lives of even more people).<sup>40</sup>

Thirdly, the nature of people movement will vary greatly depending upon unknown variables, including when, precisely, climate change impacts make it impossible for people to remain in their homes; the extent to which movement is already an adaptation strategy employed by the community (e.g. cyclical movement in flood-prone areas) and can continue to be used as an adaptive strategy; the level of assistance available within the country; pre-existing migration options for that community; and whether movement is initial flight in response to a sudden disaster, or pre-emptive and/or secondary movement where climate impacts are more slow-onset in nature.<sup>41</sup> As Kibreab notes, the effects of climate change on human movement are ‘spatially and socially differentiated’,<sup>42</sup> which is a reason why seeking detailed universal responses, as opposed to broad, guiding principles, may be inappropriate.

### 2.3 Typology

The UN Secretary-General’s Representative on the Human Rights of Internally Displaced Persons, Walter Kälin, developed a framework setting out the diversity of scenarios that can be encompassed within the very wide concept of environmental displacement. This was subsequently adopted by the UN’s Inter-Agency Standing Committee Working Group on Migration/Displacement and Climate Change.<sup>43</sup> Not all scholars accept this way of categorizing climate change-related movement and a variety of other frameworks have been proposed.<sup>44</sup> Importantly, climate scientists note that storms, cyclones, and so on are extreme *weather* – not climate – events. Though climate change is likely to increase the severity and/or frequency of such events over time, this is a gradual process (much like sea-level rise). Accordingly, the distinction in forced migration scholarship between so-called ‘climate events’ and ‘climate processes’ is scientifically flawed.<sup>45</sup> The real distinction is between extreme weather events, and longer-term climate processes. This underscores the problem of placing ‘climate change’ in the centre of legal and policy solutions: what matters is in fact the nature of harm, rather than its source.

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<sup>40</sup> See A. Betts and E. Kaytaz, ‘National and International Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime’ (2009) *UNHCR New Issues in Refugee Research*, Working Paper No. 175; Alexander Betts, ‘Towards a “Soft Law” Framework for the Protection of Vulnerable Irregular Migrants’ (2010) 22 *IJRL* 209; Kibreab, note 27 above. Kälin also suggests that ‘it is conceptually sounder to look at sudden-onset disasters as a cause of displacement, and not to limit the focus to those triggered by global warming’: W. Kälin, ‘Conceptualising Climate-Induced Displacement’ in McAdam, note 34 above, 85.

<sup>41</sup> For further elaboration of the authors’ views on these issues, see J. McAdam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not *the Answer*’ (2011) 23 *IJRL* 1; J. McAdam and B. Saul, ‘Displacement with Dignity: Climate Change, Migration and Security in Bangladesh’ (2010) 53 *German Yearbook of International Law* 1.

<sup>42</sup> Kibreab, note 27 above, 377.

<sup>43</sup> Inter-Agency Standing Committee (IASC) Working Group on Migration/Displacement and Climate Change, ‘Displacement and Climate Change: Towards Defining Categories of Affected Persons’, 20 September 2008, Working Paper First Draft. See also the six-pronged typology in IOM Policy Brief, ‘Migration, Climate Change and the Environment’, May 2009.

<sup>44</sup> See Gemenne, note 5 above, 116–17; 124–25; 140–45; 161–64. For example, Gemenne queries the utility of categorizing environmental changes in this way. He argues that movement patterns ‘depend more on policy responses than on the type of change involved’ (163), and that it is impossible to encapsulate the wide variety of changes in clear-cut categories. Instead, he proposes viewing changes as part of different continua, including the geographical extent of the change (local to global); the degree of human responsibility for the change; and the pace of the change. It is important to note, though, that his approach refers to *environmental* change, which is broader than the *climate* change typology outlined above.

<sup>45</sup> O. Brown, ‘Migration and Climate Change’ (2008) *IOM Migration Research Series* No. 31, 17ff.

1. *The increase of hydro-meteorological disasters*, such as flooding, hurricanes, typhoons, cyclones and mudslides, leading predominantly to internal displacement.
2. Government-initiated *planned evacuation* of areas at high risk of disasters. This is likely to lead to permanent internal displacement.
3. *Environmental degradation and slow-onset disasters*, such as reduced water availability, desertification, recurrent flooding and increased salinity in coastal zones. Kälin explains: ‘Such deterioration may not necessarily cause displacement, but it may prompt people to consider ‘voluntary’ migration as a way to adapt to the changing environment and be a reason why people move to regions with better living conditions and income opportunities. However, if areas become uninhabitable over time because of further deterioration, finally leading to complete desertification, permanent flooding of coastal zones or similar situations, population movements will amount to forced displacement and become permanent.’<sup>46</sup>
4. *Small island countries at risk of disappearing* because of rising seas. At the point at which a territory is no longer habitable (e.g. because of the inability to grow crops or obtain fresh water), permanent relocation to other countries would be necessary even if the country is not yet under water. Kälin notes that current international law provides no protected status for such people, and even if they were to be treated as ‘stateless’, ‘current legal regimes are hardly sufficient to address their very specific needs’. For example, although small island countries (such as Kiribati and Tuvalu) emit less than one per cent of global greenhouse gases, their small physical size, exposure to natural disasters and climate extremes, very open economies, and low adaptive capacity make them particularly susceptible, and less resilient, to climate change.<sup>47</sup>
5. *Risk of conflict* over essential resources. Even though the humanitarian community is used to dealing with internal conflict, and people displaced by conflict may be eligible for protection as refugees or assistance as IDPs, resource-based conflicts ‘may be particularly challenging’ at the operational level. In particular, where the resource scarcity cannot be resolved, ‘it will be extremely difficult to reach peace agreements providing for an equitable solution. The likely outcome is both conflict and the displacement of a protracted nature.’ Conflict is likely to be social conflict, rather than armed conflict.

Each type of scenario described above involves different kinds of pressures and impacts, which will affect the time, speed, and size of movement. Thus, at various points in time, the role of climate change in individual or household decisions to move may be stronger or weaker, and interact with other reasons for moving. Since such a wide range of scenarios can be caught under the ‘climate displacement’ umbrella, no single legal or policy response is appropriate or able to address them all. However, existing legal frameworks seem better equipped to respond to disaster-related movement (contemplated by weather ‘events’), and less able to accommodate pre-emptive movement on account of slower-onset processes.

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<sup>46</sup> Kälin, note 40 above, 85. See also McAdam and Saul, note 41 above, on secondary movement.

<sup>47</sup> N. Mimura *et al.*, ‘Small Islands’ in IPCC, note 28 above, 692–93. The report additionally lists the impacts of globalization, pressures on infrastructure, a scarcity of fresh water and, in the Pacific, internal and external political and economic processes, including the imposition of western adaptation models which are not readily transposable to the island context. These features have resulted in some small island countries being recognized by the UN as Least Developed Countries or Small-Island Developing States (SIDS).

## 2.4 Relevance of the 1951 Refugee Convention

The term ‘refugee’ is a legal term of art. The legal definition of a ‘refugee’, and the rights and entitlements which a refugee is owed, are set out in the 1951 Refugee Convention relating to the Status of Refugees, read in conjunction with its 1967 Protocol. A ‘refugee’ is defined as someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>48</sup>

First, the refugee definition only applies to people who have already crossed an international border. As noted above, much of the anticipated movement in response to climate change will be internal, and thus will not meet this preliminary requirement.

Secondly, there are difficulties in characterizing ‘climate change’ as ‘persecution’. ‘Persecution’ entails violations of human rights that are sufficiently serious, either because of their inherent nature, or because of their repetition (for example, an accumulation of breaches which, individually, would not be so serious but which together constitute a severe violation).<sup>49</sup> It remains very much a question of degree and proportion. Whether something amounts to ‘persecution’ is assessed according to the nature of the right at risk, the nature and severity of the restriction, and the likelihood of the restriction eventuating in the individual case.<sup>50</sup>

Although adverse climate impacts such as rising sea-levels, salination, and increases in the frequency and severity of extreme weather events (e.g. storms, cyclones, floods) are harmful, they do not meet the threshold of ‘persecution’ as this is currently understood in law. Part of the problem in the climate change context is identifying a ‘persecutor’. For example, the governments of Kiribati and Tuvalu are not responsible for climate change as a whole, nor are they developing policies which increase its negative impacts on particular sectors of the population. One might argue that the ‘persecutor’ in such a case is the ‘international community’, and industrialized countries in particular, whose failure to cut greenhouse gas emissions has led to the predicament now being faced.<sup>51</sup> These are the very countries to which movement might be sought if the land becomes unsustainable. This is a complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government,

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<sup>48</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art. 1A(2), read in conjunction with Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>49</sup> See also Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 (‘Qualification Directive’) art. 9. It may include a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: Migration Act 1958 (Cth), s 91R(2) (Australia).

<sup>50</sup> See G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, Oxford: OUP, 2007) 92.

<sup>51</sup> See IPCC, *Climate Change: The IPCC Scientific Assessment*, note 8 above, 8 (fn omitted); IPCC, *Climate Change 2007: Synthesis Report*, note 8 above, 5; 6; 12; 13.

but rather is seeking refuge from—yet within—countries that have contributed to climate change. This presents yet another problem in terms of the legal definition of ‘refugee’: in the case of Tuvalu and Kiribati, the government remains *willing* to protect its citizens, although the extent of its ability to do so over time is unclear.

Finally, even if the impacts of climate change could be characterized as ‘persecution’, the Refugee Convention requires such persecution to be *on account of* an individual’s race, religion, nationality, political opinion, or membership of a particular social group. Persecution alone is not enough. The difficulty here is that the impacts of climate change are largely indiscriminate, rather than tied to particular characteristics such as a person’s background or beliefs. Although climate change more adversely affects some countries, by virtue of their geography and resources, the reason it does is not premised on the nationality or race of their inhabitants. An argument that people affected by its impacts could constitute a ‘particular social group’ would be difficult to establish, because the law requires that the group must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.<sup>52</sup>

Superior courts around the world have explained that the Refugee Convention does not cover ‘individuals in search of better living conditions, and those of victims of natural disasters, *even when the home state is unable to provide assistance*, although both of these cases might seem deserving of international sanctuary.’<sup>53</sup> The High Court of Australia has stated that the requirement of ‘persecution’ limits the Convention’s ‘humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention.’<sup>54</sup> People fleeing ‘natural disasters and bad economic conditions’ fall outside the Convention.<sup>55</sup> The House of Lords has also observed that the Convention does not provide protection in all cases.

The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy.<sup>56</sup>

So far, there have been a small number of cases in Australia and New Zealand where people from Tuvalu and Kiribati have sought to argue they should receive refugee protection from climate change impacts, and applicants from Tonga and Bangladesh have sought protection on the basis of natural disasters.<sup>57</sup> They have all failed.

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<sup>52</sup> Goodwin-Gill and McAdam, note 50 above, 79–80; *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J).

<sup>53</sup> *Canada (Attorney General) v. Ward* [1993] 2 SCR 689, 732 (emphasis added).

<sup>54</sup> *Applicant A v. Minister for Immigration & Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225, 248 (Dawson J).

<sup>55</sup> *Minister for Immigration v. Haji Ibrahim* [2000] HCA 55; 204 CLR 1, para. 140.

<sup>56</sup> *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489, 499–500 (Lord Hope).

<sup>57</sup> NZ cases: *Refugee Appeal No. 72719/2001*, RSAA (17 September 2001) (Tuvalu); *Refugee Appeal No. 72313/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No. 72314/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No. 72315/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No. 72316/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal Nos 72179–72181/2000*, RSAA (31 August 2000) (Tuvalu); *Refugee Appeal Nos 72189–72195/2000*, RSAA (17 August 2000) (Tuvalu); *Refugee Appeal No. 72185/2000*, RSAA (10 August 2000) (Tuvalu); *Refugee Appeal No. 72186/2000*, RSAA (10 August 2000) (Tuvalu). Australian cases: *1004726* [2010] RRTA 845 (30 September 2010) (Tonga); *0907346* [2009] RRTA

Two case examples illustrate the reasoning. In New Zealand, the Refugee Status Appeals authority explained:

This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide.<sup>58</sup>

In Australia, the Refugee Review Tribunal stated:

In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required. ... There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion.<sup>59</sup>

Nonetheless, there remain limited exceptions where exposure to climate impacts or environmental degradation might amount to persecution for a Convention reason. One example would be where government policies target particular groups reliant on agriculture for survival, where climate change is already hampering their subsistence. Another example would be if a government induced famine by destroying crops or poisoning water, or contributed to environmental destruction by polluting the land and/or water.<sup>60</sup> However, in most cases people displaced by climate change are unlikely to gain protection as refugees.

## 2.5 Relevance of regional refugee instruments: OAU Convention and Cartagena Declaration

The regional OAU Convention in Africa and the Cartagena Declaration in Latin America contain broader refugee definitions than the 1951 Convention.<sup>61</sup> The OAU Convention includes as refugees *inter alia* people who are displaced on account of ‘events seriously disturbing the public order’, and it has been queried whether this could encompass

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1168 (10 December 2009); *N00/34089* [2000] RRTA 1052 (17 November 2000); *N95/09386* [1996] RRTA 3191 (7 November 1996); *N96/10806* [1996] RRTA 3195 (7 November 1996); *N99/30231* [2000] RRTA 17 (10 January 2000); *V94/02840* [1995] RRTA 2383 (23 October 1995).

<sup>57</sup> *Mohammed Motahir Ali v. Minister of Immigration, Local Government and Ethnic Affairs* [1994] FCA 887 (Bangladesh and natural disasters in the refugee context); *N93/00894* [1996] RRTA 3244 (14 November 1996) (Bangladesh, generalized socio-economic circumstances and natural disasters). See also consideration of natural disasters and poor economic conditions in *1004726* [2010] RRTA 845 (30 September 2010) (Tonga).

<sup>58</sup> *Refugee Appeal No. 72189/2000*, RSAA (17 August 2000) para. 13.

<sup>59</sup> *0907346* [2009] RRTA 1168 (10 December 2009) para. 51.

<sup>60</sup> *SERAC and CESR v. Nigeria, Decision regarding Communication No 155/96*, ACHPR/COMM/A044/1, ‘15th Annual Activity Report of African Commission on Human and Peoples’ Rights’ (7 May 2002) annex V, para. 44. Cooper argues that desertification in the African Sahel and the nuclear explosion at Chernobyl constitute persecution: see Cooper, note 4 above, 480.

<sup>61</sup> Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (‘OAU Convention’); Cartagena Declaration on Refugees (22 November 1984) in ‘Annual Report of the Inter-American Commission on Human Rights’ (1984–85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (‘Cartagena Declaration’).

environmental catastrophes such as famine and drought.<sup>62</sup> Edwards argues that such an interpretation is theoretically possible, but notes that even though people fleeing such catastrophes are ‘frequently given refuge on the territory of neighbouring States (e.g. Congolese fleeing the eruption of Mount Nyiragongo in January 2002 sought refuge in Rwanda), receiving States rarely declare that they are acting pursuant to their OAU Convention obligations.’<sup>63</sup> This is significant because the explanation a State gives for acting in a particular way is relevant to ascertaining whether it supports or rejects a liberal interpretation of the treaty. Kälin similarly sees the potential for sudden-onset disasters to be characterized in this way, but sees it as ‘rather unlikely that the states concerned would be ready to accept such an expansion of the concept beyond its conventional meaning of public disturbances resulting in violence.’<sup>64</sup> Thus, Edwards suggests that, at most, the general practice of hosting people displaced by environmental events ‘may be seen as contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty.’<sup>65</sup>

However, if refuge were sought on account of riots in the aftermath of a disaster, triggered by the government’s failure to provide assistance, Kälin suggests that the treaty would apply. By analogy, he argues that the same analysis applies to article III(3) of the Cartagena Declaration with respect to ‘refugees’ who ‘have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’<sup>66</sup> Kälin’s example highlights the difficulties of attributing movement to ‘climate change’ – at what point does it become too indirect to be considered a driver of movement, and should this matter in terms of the protection and assistance granted?

By contrast to the 1951 Refugee Convention, which assesses the risk of potential future harm, both regional instruments seem to require evidence of an *actual* threat: protection is premised on having already been compelled to leave because of it.<sup>67</sup> Thus, their utility as tools for providing pre-emptive protection is limited.

### **3. Relevant universal and regional complementary protection standards**

This section examines whether existing universal and/or regional standards on complementary protection – protection needs arising outside the 1951 Convention framework – might offer protection options for those forcibly displaced across international borders as a result of climate change-related events. It also assesses whether relevant State practice may

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<sup>62</sup> A. Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204, 225–27; Kälin, note 40 above, 88–89; cf J. C. Hathaway, *The Law of Refugee Status* (London: Butterworths, 1991) 16–21, who argues that the definition ‘does not ... suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community’, 17. See also Schwartz, note 19 above, 380.

<sup>63</sup> Edwards, note 62 above, 227.

<sup>64</sup> Kälin, note 40 above, 88.

<sup>65</sup> Edwards, note 62 above, 227. UNHCR similarly made clear that its assistance activities for people displaced by the Boxing Day tsunami did not fall within its formal protection mandate, but rather constituted ‘time-limited humanitarian assistance’ requested especially by the UN Secretary-General: UNHCR, ‘Note on International Protection’, UN Doc. A/AC.96/1008, 4 July 2005, para. 36 in Edwards, note 62 above, 227.

<sup>66</sup> Kälin, note 40 above, 88–89.

<sup>67</sup> OAU Convention art. 1(2): ‘was compelled to leave’; Cartagena Declaration art. III(3): ‘who have fled their country because ...’.



support such progressive interpretation. Finally, it considers frameworks developed around natural disasters, in particular the work of the International Law Commission on the protection of persons in the event of disasters.

### 3.1 Overview

It is a trite observation that climate change will impact upon people’s enjoyment of human rights. Climate processes, such as shoreline erosion, coastal flooding and rising sea levels, as well as more frequent and intense severe weather events, such as storms and cyclones, will affect agriculture, infrastructure, services, and the continued habitability of certain parts of the world. This, in turn, may threaten rights such as the right to life, health, property, culture, means of subsistence, and, in extreme cases, self-determination. The worst effects of climate change are likely to be felt in communities where human rights are already precarious, given that the most drastic impacts of climate change will be felt in the poorest parts of the world where human rights protection is often weak.<sup>68</sup>

The following table provides a summary by the Office of the High Commissioner for Human Rights of how climate impacts may affect human rights.<sup>69</sup> Only a handful of these rights are presently recognized as giving rise to a protection obligation (based on the principle of *non-refoulement*).

Effects	Examples of rights affected
Extreme weather events	Right to life <sup>70</sup>
Increased food insecurity and risk of hunger	Right to adequate food, right to be free from hunger <sup>71</sup>
Increased water stress	Right to safe drinking water <sup>72</sup>
Stress on health status	Right to the highest attainable standard of health <sup>73</sup>
Sea-level rise and flooding	Right to adequate housing <sup>74</sup>

Human rights law has expanded countries’ protection obligations beyond the ‘refugee’ category, to include (at least) people at risk of arbitrary deprivation of life, torture, or cruel,

<sup>68</sup> S. Humphreys, ‘Introduction: Human Rights and Climate Change’ in S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge: CUP, 2010) 1.

<sup>69</sup> UN Doc. A/HRC/10/61, note 14 above, Annex.

<sup>70</sup> International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’) art. 6; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (‘CRC’) art. 6; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res. 217A (III) (‘UDHR’) art. 3.

<sup>71</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (‘ICESCR’) art. 11; CRC art. 24(c); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, opened for signature 30 March 2007) UNGA Res. 61/106 (‘CRPD’) arts 25(f), 28(1); UDHR art. 25.

<sup>72</sup> ICESCR arts 11,12; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res. 34/180, 34 UN GAOR Supp (No. 46) 193, UN Doc. A/34/46 (‘CEDAW’) art. 14(2)(h); CRPD art. 28(2)(a); CRC art. 24(2)(c).

<sup>73</sup> ICESCR arts 7(b), 10, 12; CEDAW arts 12, 14(2)(b); UDHR art. 25; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (‘CERD’) art. 5(e)(iv); CRC art. 24; CRPD arts 16(4), 22(2), 25; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNGA Res. 45/158 of 18 December 1990 (‘Migrant Workers Convention’) arts 43(1), 45(1)(c), 70.

<sup>74</sup> ICESCR art. 11; CERD art. 5(e)(iii); CEDAW art. 14(2)(h); CRC art. 27(3); Migrant Workers Convention art. 43(1)(d); CRPD arts 9(1)(a), 28(1), 28(2)(d); UDHR art. 25(1).

inhuman or degrading treatment or punishment. This is known in international law as ‘complementary protection’, because it describes human rights-based protection that is complementary to that provided by the 1951 Refugee Convention. The European Union,<sup>75</sup> Canada,<sup>76</sup> the United States,<sup>77</sup> New Zealand,<sup>78</sup> Hong Kong,<sup>79</sup> Mexico<sup>80</sup> and (shortly) Australia<sup>81</sup> all have systems of complementary protection in place, which seek to implement these international law obligations.

Although, in theory, any human rights violation may give rise to a *non-refoulement* obligation,<sup>82</sup> in most cases ‘it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach’ of a human right.<sup>83</sup> This is because unlike the absolute prohibition on returning someone to inhuman or degrading treatment, for example, most other human rights provisions permit a balancing test between the interests of the individual and the State, thus placing protection from *refoulement* out of reach in all but the most exceptional cases. Furthermore, a State’s general lack of resources cannot be used to justify a breach of article 3.<sup>84</sup>

For this reason, it is common for a violation of a socio-economic right—for example, violation of the right to an adequate standard of living—to be re-characterized as a form of inhuman treatment, which is a right giving rise to international protection.<sup>85</sup> However, courts have carefully circumscribed the meaning of ‘inhuman or degrading treatment’ so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical care except in the most exceptional circumstances.<sup>86</sup>

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<sup>75</sup> Qualification Directive arts 2(e), 15.

<sup>76</sup> Immigration and Refugee Protection Act, SC 2001, c 27, s 97.

<sup>77</sup> Immigration and Nationality Act of 1952, 8 CFR §§ 208.16, 208.17 (1952) (CAT-based protection only).

<sup>78</sup> Immigration Act 2009 (NZ) ss 130, 131.

<sup>79</sup> CAT-based protection only. Refugee status determination is conducted by UNHCR. See further K. Loper, ‘Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong’ (2010) 22 *IJRL* 404.

<sup>80</sup> Law on Refugees and Complementary Protection (December 2010): Decreto por el que se expide la Ley sobre Refugiados y Protección Complementaria y se reforman, adicionan y derogan diversas disposiciones de la Ley General de Población available online at: [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5175823&fecha=27/01/2011](http://www.dof.gob.mx/nota_detalle.php?codigo=5175823&fecha=27/01/2011) (last accessed 28 January 2011). Mexico is the first country in Latin America to grant complementary protection: available online at: <http://www.unhcr.org/4d025a8a6.html> (last accessed 21 January 2011).

<sup>81</sup> Migration Amendment (Complementary Protection) Bill 2009 (Cth).

<sup>82</sup> *R v. Special Adjudicator, ex parte Ullah* [2004] UKHL 26, paras 24–25 (Lord Bingham), 49–50 (Lord Steyn), 67 (Lord Carswell).

<sup>83</sup> *Kacaj v. Secretary of State for the Home Department* [2002] EWCA Civ 314, para. 26.

<sup>84</sup> For example in *Kalashnikov v. Russia* (2002) 36 EHRR 587, the European Court of Human Rights rejected Russia’s argument that squalid prison conditions did not violate art. 3 because they were a result of Russia’s economic difficulties, and were experienced generally by detainees in Russia. See also K. Röhl, ‘Fleeing Violence and Poverty: *Non-refoulement* Obligations under the European Convention of Human Rights’, January 2005, *UNHCR New Issues in Refugee Research*, Working Paper No. 111. But see UK Discretionary Leave, discussed in section 3.3.3 below.

<sup>85</sup> The South African constitutional court has rejected the use of civil and political rights as a fallback for social and economic rights in the domestic context: *Soobramoney v. Minister of Health KwaZulu Natal* 1998 (1) SA 765. There, it relied on the constitutional right to health in preference to the constitutional right to life. Given their equal constitutional status, this caused the plaintiffs no loss. Indian courts have conflated the right to life (a ‘first generation’ right) with social and economic (‘second generation’) rights. The Indian position, in part, has come about because the constitutional protection given to the first generation is higher than that given to the second generation of rights. Socio-economic rights under the Indian constitution are protected as directive principles and state policy, not as enforceable rights as such. However, Indian courts have greatly expanded the constitutional right to life (art. 21) to make socio-economic rights justiciable.

<sup>86</sup> *D. v. United Kingdom* (1997) 24 EHRR 423; *N. v. Secretary of State for the Home Department* [2005] UKHL 31; *HLR v. France* (1997) 20 EHRR 29, para. 42. See also the views of Committee against Torture, as in *AD v.*

Although existing jurisprudence does not *preclude* climate impacts from being recognized as a source of inhuman treatment (for example), it would need to be substantially developed before such harms would fall clearly within the scope of this concept.<sup>87</sup> It is also important to note that in a removal case, an internal flight alternative may be considered a reasonable option.<sup>88</sup>

The following analysis examines: (a) whether, when and to what extent certain socio-economic forms of harm may be regarded as triggering the principle of *non-refoulement*; (b) whether they can do so independently, or need to be re-characterized as violations of civil and political rights already recognized as mandating this (such as a violation of the right to life); and (c) whether they may form part of the progressive development of the principle of *non-refoulement*, as foreshadowed by international treaty monitoring bodies, the European Court of Human Rights and the House of Lords (now UK Supreme Court).

The key rights to consider in the complementary protection context are: (a) the right to life (sometimes expressed in the removal context as the right not to be subjected to arbitrary deprivation of life); and (b) the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment. While these are not necessarily the only rights which encompass a *non-refoulement* obligation,<sup>89</sup> they are the two which are clearly recognized in international law as giving rise to such an obligation, and which have been incorporated into a number of domestic complementary protection regimes.

Although they are identified separately below under ‘universal’ and ‘regional’ standards, much of the analysis about the nature and scope of the rights applies equally to both contexts. The jurisprudence of the European Court of Human Rights is discussed in particular detail since it is the most developed in this area and provides the most extensive reasoning about the scope and content of human rights-based *non-refoulement*.

## 3.2 Right to life

### 3.2.1 Universal (ICCPR, article 6)

The right to life is protected in the UDHR (art 3), ICCPR (art 6), the CRC (art 6) and all regional human rights treaties.<sup>90</sup> It has been described by the UN Human Rights Committee

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*The Netherlands*, Communication No. 96/1997 (24 January 2000) UN Doc. CAT/C/23/D/96/1997, para. 7.2. See discussion in Goodwin-Gill and McAdam, note 50 above, 350–51. The developing jurisprudence on recharacterizing socio-economic violations as civil and political ones has been described as an ‘extension of an extension’: *AJ (Liberia) v. Secretary of State for the Home Department* [2006] EWCA Civ 1736, para. 12 referring to *N. v. Secretary of State for the Home Department* [2004] 1 WLR 1182 (EWCA) paras 37, 46 in M. Foster, ‘Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’ [2009] *New Zealand Law Review* 257, 266.

<sup>87</sup> *R. v. Special Adjudicator ex parte Ullah* [2004] UKHL 26; Human Rights Committee, ‘General Comment No. 15: The Position of Aliens under the Covenant’, 11 April 1986, para. 5. See also Human Rights Committee, ‘General Comment No. 18: Non-Discrimination’, 10 November 1989.

<sup>88</sup> See e.g. Immigration and Refugee Protection Act, SC 2001, c 27 (Canada) s 97(1)(b); Qualification Directive art. 8.

<sup>89</sup> See section 3.4 below.

<sup>90</sup> European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) (drafted 4 November 1950, entered into force 3 September 1953) ETS No. 5 (‘ECHR’) art. 2; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art. 4; African Charter on Human and Peoples’ Rights (adopted 17 June 1981, entered into

as the ‘supreme right’ which is ‘basic to all human rights’.<sup>91</sup> It is non-derogable and is recognized as entailing a *non-refoulement* obligation.<sup>92</sup>

The right to life is very closely connected to other human rights. The right to an adequate standard of living under human rights law, including adequate food, clothing, housing and the continuous improvement of living conditions,<sup>93</sup> and the right not to be deprived of means of subsistence,<sup>94</sup> have been argued to be as necessary components of the right to life, which are compromised where global warming leads to the destruction of people’s ability to hunt, fish, gather, or undertake subsistence farming.<sup>95</sup> The UN Commission on Human Rights has observed that the right ‘encompasses existence in human dignity with the minimum necessities of life’.<sup>96</sup>

Similarly, the Convention on the Rights of the Child links the right to life to States’ duty ‘to ensure to the maximum extent possible the survival and development of the child’.<sup>97</sup> The Committee on the Rights of the Child has explained the need to view and implement the right to life holistically, ‘through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment’.<sup>98</sup> This is also reflected in the IASC guidelines on human rights and natural disasters.<sup>99</sup>

Importantly, the right to life includes an obligation to take positive measures to protect it, which may be relevant in considering whether a country of origin is in fact taking steps to improve such things as health care and nutrition. A useful analogy for the climate change context may be provided by the UN Human Rights Committee’s remarks on the threat to life posed by nuclear weapons. Nuclear weapons may not only cause death directly, but also indirectly by contaminating the environment with radiation. Similarly, the impacts of climate change experienced (for example) through salt-water intrusion into fresh water supplies could, on this reasoning, be interpreted as a threat to the right to life. In each case however,

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force 21 October 1986) 21 *ILM* 58 (1982) art. 4; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art. 5.

<sup>91</sup> Human Rights Committee, ‘General Comment No. 6: The Right to Life (Art. 6)’, 30 April 1982, para. 1; Human Rights Committee, ‘General Comment No. 14: Nuclear Weapons and the Right to Life (Art. 6)’, 9 November 1984, para. 1.

<sup>92</sup> *Ahani v. Canada* Communication No. 1051/2002, 24 March 2004; Human Rights Committee, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. See also Committee on the Rights of the Child, ‘General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 27.

<sup>93</sup> ICESCR art. 11.

<sup>94</sup> ICCPR art. 1(2); ICESCR art. 1(2). See e.g. F. Menghistu, ‘The Satisfaction of Survival Requirements’ in B. G. Ramcharan (ed), *The Right to Life in International Law* (Leiden: Martinus Nijhoff Publishers, 1985) 63.

<sup>95</sup> See e.g. ‘Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005) available online at: [http://www.earthjustice.org/library/legal\\_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf](http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf) (last accessed 17 May 2011).

<sup>96</sup> Commission on Human Rights, ‘Human Rights and Extreme Poverty’, Human Rights Res. 2005/16, para. 1(b).

<sup>97</sup> CRC art. 6(2).

<sup>98</sup> Committee on the Rights of the Child, ‘General Comment No. 7 (2005): Implementing Child Rights in Early Childhood’ UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006.

<sup>99</sup> Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters* (Brookings-Bern Project on Internal Displacement 2006).

the severity and extent of the harm would determine whether the right to life had been violated.<sup>100</sup>

An analysis of the views expressed by the UN Human Rights Committee in relation to individual complaints suggests that the following criteria apply to article 6 cases:

- the risk to life must be actual or imminent;<sup>101</sup>
- the applicant must be personally affected by the harm;<sup>102</sup>
- environmental contamination with proven long-term health effects may be a sufficient threat, however there must be sufficient evidence that harmful quantities of contaminants have reached, or will reach, the human environment;
- a hypothetical risk is insufficient to constitute a violation of the right to life; and
- cases challenging public policy will, in the absence of an actual or imminent threat, be considered inadmissible.<sup>103</sup>

### 3.2.2 Regional (ECHR, article 2)

Although the European Court of Human Rights has confirmed that article 2 may be relied upon to prevent removal,<sup>104</sup> no removal case has succeeded solely on this ground.<sup>105</sup> Article 2 is generally raised in conjunction with article 3, and if a violation of the latter is found, then the analysis of article 2 typically falls away.<sup>106</sup>

In the present context, it is useful to examine the extent to which the destruction of the environment be understood as a threat to the right to life. As Judge Weeramantry noted in a Separate Opinion in the International Court of Justice, the protection of the environment is ‘a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself.’<sup>107</sup> The European Court has similarly acknowledged that the right to a healthy environment is linked to the right to life, and that environmental damage can affect the rights to life, property, home

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<sup>100</sup> Asia Pacific Forum of National Human Rights Institutions (APF), ‘Human Rights and the Environment: Reference Paper’ (2007) 57–58, 62–63, 66 in APF, ‘Human Rights and the Environment: Final Report and Recommendations’ (2007).

<sup>101</sup> See section 5.1 below on ‘timing’.

<sup>102</sup> See the difficulties this has caused in the context of armed conflict pursuant to art. 15(c) of the EU Qualification Directive: H. Lambert and T. Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22 *IJRL* 237; J.-F. Durieux, ‘*Salah Sheekh* is a Refugee: New Insights into Primary and Subsidiary Forms of Protection’ (October 2008) *Refugee Studies Centre Working Paper* No. 49; J. McAdam, ‘Individual Risk, Armed Conflict and the Standard of Proof in Complementary Protection Claims: The European Union and Canada Compared’ in J. C. Simeon (ed.), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (Cambridge: CUP, 2010).

<sup>103</sup> APF, *Human Rights and the Environment*, note 100 above, 19–20.

<sup>104</sup> For example in *Z. and T. v. United Kingdom*, App. No 27034/05 (ECtHR, 28 February 2006) 6: the art. 3 analysis from *Soering v. United Kingdom* (1989) 11 EHRR 439 ‘applies equally to the risk of violations of [article] 2’. See also *Ullah* para. 40 (Lord Steyn): ‘If article 3 may be engaged it is difficult to follow why, as a matter of logic, article 2 could be peremptorily excluded. There may well be cases where article 3 is not applicable but article 2 may be’.

<sup>105</sup> A breach of art. 2 has only been found in one removal case, and on that occasion it was in conjunction with art. 3: *Bader v. Sweden*, App. No. 13284/04 (ECtHR, 8 November 2005).

<sup>106</sup> For example *Tatete v. Switzerland*, App. No. 41874/98 (ECtHR, 6 July 2000) (settlement reached); *D. v. United Kingdom* (decided on art. 3); *Mamatkulov v. Turkey*, App. Nos 46827/99, 46951/99 (ECtHR, 6 February 2003). Thus, in *D. v. United Kingdom*, for example, the court did not regard the art. 2 claim as unfounded in principle, but thought it unnecessary to review the art. 2 claim separately from art. 3.

<sup>107</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* 1997 ICJ 92 (Separate Opinion of Judge Weeramantry) para. A(b).

and private life.<sup>108</sup> In particular, the obligation to protect the right to life may also include protection from environmental harm.<sup>109</sup> So far, this issue has not arisen in a removal case, however.

In *Budayeva v. Russia*, the European Court of Human Rights held that the State's duty to protect life extends to protection from natural disasters where the risk is known.<sup>110</sup> However, it is questionable whether this would assist an applicant seeking protection against climate change impacts, given the requirement that the home State is deficient in its own response capacity – i.e. the environmental harm is caused or perpetuated by the State (or by its inaction). Furthermore, the court has emphasized that the burden placed on the State must be reasonable, which means that consideration must be given, 'in particular, to the operational choices which [it] must make in terms of priorities and resources'.<sup>111</sup> It would appear that the burden is less onerous in cases of natural, as opposed to human-made, activities, presumably on the basis that the former are less easy to predict and control. The factors to be taken into account include the 'origin of the threat and the extent to which one or the other risk is susceptible to mitigation'.<sup>112</sup> The burden would be more stringent if it were a 'recurring calamity affecting a distinct area developed for human habitation or use'.<sup>113</sup>

The focus of a complementary protection claim is the potential 'harm' to the applicant if he or she is removed. Thus, the relevant question is the extent to which the receiving country is able and willing to mitigate against that harm, whatever its cause. Since the European Court of Human Rights has been inclined to allow the State a higher degree of latitude where the cause of harm is 'natural', such as a landslide, it may actually be more beneficial to an applicant to acknowledge the multicausality of climate change-related impacts, rather than trying to pinpoint 'climate change' as *the* cause of harm. In other words, the combination of environmental, social, economic and political factors, which draw on human-made as well as natural vulnerabilities, may better substantiate an article 2 or 3 claim.

In other regions, the Inter-American Commission on Human Rights has likewise recognized that realization of the right to life is necessarily linked to and dependent on the physical environment.<sup>114</sup> It has found that forcibly displacing indigenous people from their land could breach the right to life if it causes indignity.<sup>115</sup> The African Commission on Human and Peoples' Rights found a breach of the right to health and the right to life as a result of repeated eviction and displacement from lands in Mauritania, which were confiscated by the government.<sup>116</sup>

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<sup>108</sup> See Loucaides and cases cited there, beginning with *Arrondelle v. United Kingdom* DR 26, 5 (noise pollution cases offensive smells).

<sup>109</sup> See *Öneryildiz v. Turkey*, App. No. 48939/99 (ECtHR Grand Chamber, 30 November 2004); (2005) 41 EHRR 20, paras 71–72.

<sup>110</sup> *Budayeva v. Russia*, App. Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008).

<sup>111</sup> *Budayeva v. Russia*, para. 135: 'this results from the wide margin of appreciation States enjoy'.

<sup>112</sup> *Budayeva v. Russia*, para. 137.

<sup>113</sup> *Ibid.*

<sup>114</sup> 'Report on the Situation of Human Rights in Ecuador' (1997) OEA/Ser.L/V/II.96, Doc 10, Rev. 1, ch 8; *Yanomami Case* (Case 7615 of 5 March 1985) in Inter-American Commission on Human Rights, 'Annual Report (1984–85) OEA/Ser.L/V/II.66, Doc 10, Rev. 1.

<sup>115</sup> *Yakye Axa v. Paraguay* (Inter-American Court of Human Rights, Judgment of 17 June 2005). In *The Massacres of Ituango v. Colombia* (Inter-American Court of Human Rights, Judgment of 1 July 2006), the court found that forced eviction, displacement and house destruction by paramilitaries violated the right to property.

<sup>116</sup> *Malawi African Association v. Mauritania* (2000) AHRLR 149 (African Commission on Human and Peoples' Rights 2000) pursuant to the African Charter on Human Rights arts 16 and 4 (respectively). See also

### 3.2.3 Domestic frameworks

It would appear that article 2 is an underutilized provision in the removal context and that it is ripe for progressive development. This may begin to occur in domestic contexts, since non-return to arbitrary deprivation of life is one of the complementary protection grounds in Canadian and New Zealand legislation (and draft Australian legislation). German law also includes in its complementary protection provisions protection against return to a concrete and considerable danger to life, person or liberty (although the requirement of a ‘concrete’ danger may be hard to meet in cases of pre-emptive movement in response to slow-onset climate impacts).<sup>117</sup>

On its face, Canadian law does not appear to offer much scope to protect people at risk of climate change-related impacts. Its complementary protection provisions on risk to life and risk of cruel and unusual treatment preclude protection being granted if the harm feared is generalized or based on a country’s inability to provide adequate health or medical care.<sup>118</sup> The Legal Services division of the Immigration and Refugee Board noted that a ‘claim based on natural catastrophes such as drought, famine, earthquakes, etc. will not satisfy the definition as the risk is generalized.’<sup>119</sup> However, a nine year old child successfully argued that his return to Haiti would put his life at risk. Since his biological family was unknown, he was at risk of becoming homeless and prey to prostitution were he returned.<sup>120</sup>

Similarly, in the United Kingdom, the Asylum and Immigration Tribunal (AIT) has acknowledged that ‘if survival comes at a cost of destitution, beggary, crime or prostitution, then that is a price too high.’<sup>121</sup> Although that remark was made in the context of internal relocation, it would arguably carry even greater weight in a straight removal context, since the courts have noted that the standard of treatment on internal relocation does not have to command as high respect for human rights as would be found in the removing State. This is also supported by AIT case law on the protective scope of article 3 in relation to poor socio-economic conditions.<sup>122</sup>

In the non-removal context, the following domestic constitutional law cases have developed the socio-economic elements of the right to life. They are included here to illustrate the

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*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples’ Rights (4 February 2010) 276/2003, para. 216.

<sup>117</sup> Residence Act 2007, s 60(7).

<sup>118</sup> Immigration and Refugee Protection Act, s 97(b). It would, however, be different if the country refused to provide such care to particular classes of people: Legal Services, Immigration and Refugee Board of Canada (IRB), ‘Consolidated Grounds in the *Immigration and Refugee Protection Act*: Persons in Need of Protection: *Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) 11.

<sup>119</sup> Legal Services (IRB), note 118 above, 9. See also *Sinnappu v. Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 791 (TD), para. 38 where an expert on the earlier regime Post-Claim Determination Class Risk Review (PDRCC) which had similar bases for protection, stated that the requirement that the risk be one that is not faced generally by other individuals would apply only in extreme situations such as a generalized disaster of some sort that would involve all the inhabitants of a given country.

<sup>120</sup> *Re MQF* [2004] RPDD No. 87. See also *FB (Lone Women – PSG – Internal Relocation – AA (Uganda) Considered) Sierra Leone* [2008] UKAIT 00090, para. 81, in which the Tribunal ultimately found that the applicant was not at risk of prostitution, ‘the most degrading form of destitution and one that is most alien to universal principles of human dignity.’ Although that was a case about internal relocation, one might seek to extend the argument to the non-removal context in relation to ECHR arts 2 or 3.

<sup>121</sup> *FB* para. 39. The facts did not preclude her relocation in this case.

<sup>122</sup> See section 3.2.3 below.

potential scope of that right. In India, the constitutional protection of the right to life has been held to include the right to a clean environment;<sup>123</sup> the right to food and freedom from malnutrition;<sup>124</sup> the protection of human dignity;<sup>125</sup> the right to education;<sup>126</sup> and the right to health.<sup>127</sup> The Supreme Court of Bangladesh has also drawn on a constitutional right to life to imply a ‘right to livelihood’, in a case concerning evictions without notice from homes that were later demolished.<sup>128</sup> The Supreme Court of Pakistan has found that the constitutional right to life implies the right to a healthy environment.<sup>129</sup> The High Court of Botswana has held that the termination of water, food and health services and forced evictions from traditional lands violated the constitutional right to life.<sup>130</sup>

### 3.3 Cruel, inhuman or degrading treatment

#### 3.3.1 Universal (ICCPR, article 7)

Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment. The standard approach of the UN Human Rights Committee is to regard these forms of ill-treatment as falling on a sliding scale, or hierarchy, with torture the most severe manifestation. The distinction between torture and inhuman treatment is thus one of degree. The UN Human Rights Committee considers it undesirable ‘to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied’.<sup>131</sup> For that reason, it commonly fails to determine precisely which aspect of article 7 ICCPR has been violated, and there is accordingly very little jurisprudence from that body about the nature of each type of harm.

Article 7 contains a *non-refoulement* obligation,<sup>132</sup> although a violation of this provision from a proposed deportation has only once been substantiated on the facts.<sup>133</sup> By contrast, article 3 of the ECHR – which protects against torture and inhuman or degrading treatment or punishment – is a frequently utilized provision which has significantly developed the human rights-based *non-refoulement* jurisprudence in the European Court of Human Rights. It is for this reason that decisions from that jurisdiction form the bulk of the following discussion.

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<sup>123</sup> *Kendra, Dehradun and others v. State of UP* (1985) 3 SCC 545; *Subhash Kumar v. State of Bihar* (1991) 1 SCC 598; *Attakoya Thangal v. Union of India*; *Koolwal v. State of Rajasthan* 1988 AIR (Raj) 2.

<sup>124</sup> *People’s Union for Civil Liberties v. Union of India and Others* WP (Civil) No. 196/2001.

<sup>125</sup> *Francis Carolie Mullin v. Union Territory of Delhi* 1981 (1) SCC 608.

<sup>126</sup> *Unni Krishnan JP v. State of Andhra Pradesh* (1993) 1 SCC 645.

<sup>127</sup> *Paschim Banga Khet Mazdoor Samity and Ors v. State of West Bengal and Another* (1996) AIR SC 2426.

<sup>128</sup> *ASK v. Government of Bangladesh* Writ No. 3034 of 1999. As in India, Bangladesh’s Constitution provides a directive principle, rather than a justiciable right, to shelter (art. 15).

<sup>129</sup> *Shala Zia v. WAPDA PDL* (1994) SC 693; ‘*Salt Miners Case*’, Lahora, Human Rights Case No. 120 of 1993 (1994) SCMR, 2601.

<sup>130</sup> *Sesana v. Botswana*, High Court of Botswana, Misca, No. 52 of 2002 (13 December 2006).

<sup>131</sup> Human Rights Committee, ‘General Comment No. 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)’ (10 March 1992) para. 4.

<sup>132</sup> Human Rights Committee, ‘General Comment No. 31’, note 92 above, para. 12; *Kindler v. Canada* Communication No. 470/1991, 30 July 1993, para. 6.2; *ARJ v. Australia* Communication No. 692/1996, 11 August 1997, para. 6.8; *Ahani v. Canada*, note 92 above. See also Committee on the Rights of the Child, ‘General Comment No. 6’, note 92 above, para. 27 (emphasis added).

<sup>133</sup> *Ng v. Canada* (469/91) in Sarah Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, Oxford: OUP, 2004) para. 9.80. This is in contrast to the multiple findings by the Committee against Torture with respect to art. 3 of CAT.



### 3.3.2 Regional (ECHR, article 3)

Since the case of *Soering v. United Kingdom*, article 3 of the ECHR has been recognized as precluding removal to a place where an applicant would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment.<sup>134</sup> Article 3 is absolute, and the European Court of Human Rights has consistently affirmed that it cannot be balanced against the public interest or any other matter, irrespective of the applicant's criminal or personal conduct.<sup>135</sup>

Inhuman treatment must attain 'a minimum level of severity' and involve 'actual bodily injury or intense physical or mental suffering'.<sup>136</sup> Importantly, for the present context, it does not need to be deliberate.<sup>137</sup> Degrading treatment 'humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.'<sup>138</sup> A lack of intent to humiliate will not conclusively rule out a violation of article 3.<sup>139</sup>

The European Court has made clear that the assessment of this minimum level of severity is relative: 'it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.<sup>140</sup> Ordinarily, 'the risk which the individual runs of being subjected following expulsion to the proscribed form of treatment emanates from *intentionally inflicted acts* on the part of the public authorities in the receiving country',<sup>141</sup> but also where the danger emanates from non-State actors against whom 'the state has *failed to provide reasonable protection*'.<sup>142</sup>

The European Court of Human Rights has left open the possibility that a general situation of violence could violate article 3. However, the level of violence would have to reach a sufficient level of intensity,<sup>143</sup> namely 'a real risk of ill-treatment *simply by virtue of an individual being exposed to such violence on return*.'<sup>144</sup> Acknowledging this, the UK Asylum

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<sup>134</sup> *Soering v. United Kingdom*, note 104 above.

<sup>135</sup> *Chahal v. United Kingdom* (1996) 23 EHRR 413; *Saadi v. United Kingdom* (2007) 44 EHRR 50. See the concerns of the dissenting judges in *N. v. United Kingdom* [2008] EHRR 453 in the majority's consideration of policy in determining whether art. 3 had been breached.

<sup>136</sup> *Pretty v. United Kingdom* (2002) 35 EHRR 1, para. 52, referring to *Ireland v. United Kingdom* (1979–80) 2 EHRR 25, para. 167.

<sup>137</sup> *Labita v. Italy* (2008) 46 EHRR 1228, para. 120.

<sup>138</sup> *Pretty v. United Kingdom* (2002) 35 EHRR 1, para. 52; see also *Ireland v. United Kingdom*, para. 167; *Moldovan and others v. Romania* App. Nos 41138/98 and 64320/01 (ECtHR, 12 July 2005) para. 101; *East African Asians* (1973) 3 EHRR 76, paras 189, 195.

<sup>139</sup> *Peers v. Greece* (2001) 33 EHRR 51, para. 74.

<sup>140</sup> *N. v. United Kingdom* para. 29.

<sup>141</sup> *Queen, on the Application of Ruslanas Bagdanavicius, Renata Bagdanaviciene v. Secretary of State for the Home Department* [2003] EWCA Civ 1605, para. 8 (Lord Brown) (emphasis added). The rest of the court concurred with Lord Brown's judgment: para. 1 (Lord Nicholls); para. 2 (Lord Hope); para. 3 (Lord Walker); para. 4 (Baroness Hale).

<sup>142</sup> *Bagdanavicius* para. 24 (Lord Brown) (emphasis added).

<sup>143</sup> See *HLR* para. 41; *NA v. United Kingdom*, App. No. 25904/07 (ECtHR, 17 July 2008) para. 114. In *Ahmed v. Austria* (1997) 24 EHRR 278, the court found art. 3 was violated partly on account of conditions in Somalia.

<sup>144</sup> *NA v. United Kingdom*, para. 115 (emphasis added). In *AM & AM (Armed Conflict: Risk Categories) Somalia CG* [2008] UKAIT 00091, para. 87, the UK Asylum and Immigration Tribunal (AIT) said there was nothing, in principle, that would prevent 'poor humanitarian conditions in Somalia, even if in an IDP camp', from violating art. 3. In that case, the evidence did not persuade the AIT that there was 'a real risk of denial of basic food and shelter and other bare necessities of life': para. 157.

and Immigration Tribunal said there was nothing, in principle, that would prevent ‘poor humanitarian conditions in Somalia, even if in an IDP camp’,<sup>145</sup> from violating article 3. It was not persuaded, however, that there was ‘a real risk of denial of basic food and shelter and other bare necessities of life’ in Somalia.<sup>146</sup> This indicates the very high threshold that would apply if it were extrapolated to the climate change context. Even though the impacts of climate change may ultimately render basic survival in a particular location impossible, article 3 (and, by extension, article 7 of the ICCPR) would only assist a person once conditions were already very extreme. This mechanism does not allow for pre-emptive movement where conditions are *anticipated* to become dire, and thus would not assist people trying to move before the situation becomes intolerable.

Thus, although in principle there is no reason why a person suffering from the impacts of climate change could not seek to argue that those impacts – collectively or separately – violate article 3, it is doubtful that an applicant could presently substantiate a claim according to the level of severity of harm mandated by the European Court of Human Rights. Notwithstanding that the impacts of climate change are already being felt in communities around the world, empirical evidence suggests that those impacts are not *yet* sufficiently severe as to amount to a violation of article 3,<sup>147</sup> or that an internal flight alternative is available.<sup>148</sup>

### 3.3.3 Article 3 and socio-economic claims<sup>149</sup>

Human rights treaties and monitoring bodies have traditionally failed to accord the same weight to economic, social and cultural rights as they have to civil and political rights.<sup>150</sup> This led to the development of an interpretative approach, known as the ‘integrated’ or ‘holistic’ approach, which sought to show that civil and political rights have inherent socio-economic elements.<sup>151</sup> A treaty dealing with civil and political rights could therefore have ‘its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights’, such as socio-economic ones.<sup>152</sup>

This is why breaches of socio-economic rights have often been ‘re-characterized’ as violations of article 3 ECHR – an absolute right with a clear *non-refoulement* component.<sup>153</sup>

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<sup>145</sup> *AM & AM*, note 144 above, para. 87.

<sup>146</sup> *AM & AM*, note 144 above, para. 157.

<sup>147</sup> See e.g. *RSAA* and *RRT* cases.

<sup>148</sup> See section 5.1 on ‘timing’.

<sup>149</sup> For an excellent overview, see Foster, note 86 above.

<sup>150</sup> See e.g. V. Mantouvalou, ‘Work and Private Life: *Sidabras and Dziautas v. Lithuania*’ (2005) 30 *European Law Review* 573; C. Gearty and V. Mantouvalou, *Debating Social Rights* (Oxford: Hart Publishing, 2010).

<sup>151</sup> Mantouvalou, note 150 above, 574. See especially *Airey v. Ireland* (1979–80) 2 EHRR 305, para. 26.

<sup>152</sup> C. M. Scott, ‘The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’ (1989) 27 *Osgoode Hall Law Journal* 769, 771 in Mantouvalou, note 150 above, 574. See also M. Scheinin, ‘Economic and Social Rights as Legal Rights’ in A. Rosas *et al.*, (eds), *Economic, Social and Cultural Rights* (2nd edn, The Hague: Kluwer 2002). It is in part based on the idea that the enjoyment of civil and political rights is impossible if socio-economic rights are ignored, a perspective that was in fact reflected in the *travaux préparatoires* of the ECHR: Mantouvalou, note 150 above, 574–75. Waldron, by contrast, sees socio-economic rights as *intrinsically* valuable and as having equal weight: J. Waldron, ‘Liberal Rights: Two Sides of the Coin’ in Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge: CUP, 1993) in Mantouvalou, note 150 above, 575.

<sup>153</sup> Den Heijer suggests that the focus on ECHR art. 3 as the core *non-refoulement* provision has become a ‘self-fulfilling prophecy’, in that it has hindered ‘the development of a more profound understanding of the scope of applicability of the ECHR’: M. den Heijer, ‘Whose Rights and Which Rights? The Continuing Story of *Non-*

The case of *D. v. United Kingdom*, where the absence of medical treatment in the country of origin precluded the applicant's return, is often cited as evidence that complementary protection claims based on climate change impacts (lack of fresh water, food, safe shelter, etc) could succeed.<sup>154</sup> However, *D. v. United Kingdom* is the *only* case in which non-removal has been substantiated on the basis of socio-economic deprivation.<sup>155</sup>

The standard in such cases is extremely high. In the seminal case of *D. v. United Kingdom*, the European Court stressed that it was the exceptional combination of factors that made the applicant's removal incompatible with article 3:<sup>156</sup> the abrupt withdrawal of medical facilities; poor medical conditions in the home country (St Kitts) which could 'further reduce his already limited life expectancy and subject him to acute mental and physical suffering'<sup>157</sup>; no assurance that he would get a hospital bed; no strong family ties or other moral or social support at home; the fact that his lack of shelter and proper diet in St Kitts could expose him to infections unable to be properly treated; and the country's *general* health and sanitation problems.<sup>158</sup>

In the later case of *N. v. United Kingdom*, the majority observed that:

The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient *in itself* to give rise to breach of article 3.<sup>159</sup>

By contrast, the dissenting judges in that case regarded the removal of a person on their death bed as being, in and of itself, inconsistent with article 3.<sup>160</sup> Accordingly, they regarded the *additional* grounds in *D.*'s case – lack of medical and palliative care – as 'equally relevant to the finding of a *separate* potential violation of Article 3 of the Convention'.<sup>161</sup>

It is clear that policy considerations form part of the court's rationale in taking a strict approach to socio-economic cases. It has consistently held that the ECHR is not a means of ironing out socio-economic differences between States, noting that 'the level of treatment available in the Contracting State and the country of origin may vary considerably.'<sup>162</sup> It has referred to the onerous burden that would otherwise be placed on Contracting States if they

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*Refoulement* under the European Convention on Human Rights' (2008) 10 *European Journal of Migration and Law* 277, 278.

<sup>154</sup> See e.g. Kolmannskog and Myrstad, note 1 above.

<sup>155</sup> In *BB v. France*, App. No. 30930/96 (Commission, 9 March 1998) the European Commission on Human Rights observed that facing AIDS alone at an advanced stage would constitute degrading treatment. Ultimately, a friendly settlement was reached in this matter so the Commission did not have to determine the issue definitively. See also *Ahmed v. Austria*; *HLR*; *Bensaid v. United Kingdom* (2001) 33 EHRR 205; *Henao v. The Netherlands*, App. No. 13669/03 (ECtHR, 24 June 2003); *Ndangoya v. Sweden* App. No. 17868/03 (ECtHR, 22 June 2004); *Amegnigan v. The Netherlands*, App. No. 25629/04 (ECtHR, 25 November 2004).

<sup>156</sup> The court noted that the sources of risk 'taken alone, do not in themselves infringe the standards of that Article': *D. v. United Kingdom* para. 49. See M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: CUP, 2007) 104. See also *BB v. France*, note 155 above; *Bensaid v. United Kingdom*, note 155 above and most recently *N. v. United Kingdom*.

<sup>157</sup> *D. v. United Kingdom*, para. 52.

<sup>158</sup> *D. v. United Kingdom*, para. 52.

<sup>159</sup> *N. v. United Kingdom*, para. 42 (emphasis added).

<sup>160</sup> *N. v. United Kingdom*, para. 20 (dissenting opinion).

<sup>161</sup> *N. v. United Kingdom*, para. 21 (dissenting opinion). This ties in with the majority's view (para. 43) and also the remarks of Baroness Hale (para. 70), that: '[t]here may, of course be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them ...'.

<sup>162</sup> *N. v. United Kingdom*, para. 44.

had to rectify global socio-economic disparities by granting a right to remain to disadvantaged people.<sup>163</sup> It has explained that '[o]n a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.'<sup>164</sup>

Similarly, the House of Lords has referred to 'the limits that must be set on practical grounds'.<sup>165</sup> Lord Hope has described the jurisprudence as setting 'limits ... on the extent to which [Contracting States] can be held responsible outside the areas that are prescribed by articles 2 and 3 and by the fundamental right under article 6 to a fair trial.' Those limits are set 'against the background of the general principle of international law that states have the right to control the entry, residence and expulsion of aliens.'<sup>166</sup> The trade-off for accepting that harm derives from a State's lack of resources to redress an applicant's predicament is that only the most exceptional cases receive international protection.<sup>167</sup>

Interestingly, Foster has identified recent UK authority that suggests there is a varying threshold in article 3 removal cases which is 'dependent upon the responsibility of the receiving state for the circumstances complained of'.<sup>168</sup> This may mean that a lower threshold would apply if it could be shown that the receiving State failed to mitigate against known harms, for example.

One can well imagine similar policy arguments being made in the context of climate change-related movement, especially in light of some of the alarmist predictions about large numbers of people who will be on the move. Indeed, some domestic complementary protection schemes deliberately 'carve out' protection exceptions where the risk is faced generally by the population as a whole, requiring the applicant to show an individual risk.<sup>169</sup>

Thus, although the European Court's jurisprudence on medical cases and health care provides a useful analogy for the climate change context, it is far from certain that such claims would (presently) succeed. The jurisprudential trend with respect to socio-economic rights suggests that people seeking to bring claims based on deprivation resulting in part from climate change will face considerable challenges. It seems unlikely that a lack of basic services alone would substantiate an article 3 claim, unless they were to render survival – on return – entirely impossible. Something else – a distinguishing feature that makes the lack of such services particularly deleterious on the applicant – would appear to be necessary. The court's exceptionally high threshold means that it will likely take some decades before the deleterious effects of climate change, interacting with underlying socio-economic vulnerabilities, will be seen as constituting a violation of article 3 giving rise to protection

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<sup>163</sup> *N. v. United Kingdom*, para. 44. Although as Foster notes: 'This certainly raises a question as to the universality of human rights': Foster, note 86 above, 276.

<sup>164</sup> *F v. United Kingdom*, App. No. 17341/03 (ECtHR, 22 June 2004) 12 in relation to art. 8 ECHR.

<sup>165</sup> *EM (Lebanon) v. Secretary of State for the Home Department (AF and others intervening)* [2008] UKHL 64 para. 10, referring also to the European Court's decisions in *F. v. United Kingdom* and *Z. and T. v. United Kingdom*, which were not available to the House of Lords when it was considering the cases of *Ullah* and *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 AC 368.

<sup>166</sup> *EM* para. 13.

<sup>167</sup> If anything, the anthropogenic basis of climate change should reinforce rather than undermine any claim, given that the States primarily responsible are not the ones from which movement is likely.

<sup>168</sup> *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, para. 254 citing an earlier decision of the AIT in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094 quoted in Foster, note 86 above, 300.

<sup>169</sup> For example Immigration and Refugee Protection Act (Canada) s 97(b)(ii); Qualification Directive art. 15(c) and recital 26.

from removal. This is because many effects will take years to manifest at a sufficiently harmful level to engage article 3 protection, or may be severe temporary effects which do not render return unlawful, or an internal flight alternative may be reasonable. Interestingly, however, an examination of *domestic* practice reveals more scope for extending protection in such cases, and at an earlier point in time. These are discussed below.

### 3.3.4 Domestic developments

The reasoning of the European Court suggests that a considerable expansion of the existing jurisprudence would be required for the same socio-economic deprivation to be found to preclude removal. As the court has repeatedly observed, the ECHR is not an instrument designed to achieve global equality.<sup>170</sup>

Nevertheless, there are signs that in practice, more expansive practices may be developing. These may, in turn, obviate the need for cases to be appealed to the European Court of Human Rights.<sup>171</sup>

In the United Kingdom, Discretionary Leave is not regulated by the Qualification Directive<sup>172</sup> but is a discretionary power of the Secretary of State for the Home Department. Its exercise is guided by asylum policy instructions.<sup>173</sup> A person is automatically considered for Discretionary Leave if his or her claim for international protection as a refugee or beneficiary of subsidiary protection is unsuccessful.<sup>174</sup> Discretionary Leave may be granted when return is not possible without prejudicing protected rights, such as:

- article 8 of the ECHR.
- article 3 of the ECHR where the need ‘does not arise from a need for protection as such, e.g. where a person’s medical condition or severe humanitarian conditions in the

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<sup>170</sup> *Bensaid v. United Kingdom*, para. 38. In *Salkic v. Sweden*, App. No. 7702/04 (ECtHR, 29 June 2004), the court reiterated that art. 3 will not be breached simply because the level of health care (including mental health care) in the receiving State is not of an equivalent standard to that available in the host State. See also *Amegnigan v. The Netherlands*. In *Januzi v. Secretary of State for the Home Dept* [2006] UKHL 5, the House of Lords held that a person may be removed where an internal flight alternative exists, even if the general standards of living in that part of the country are not as high as in the State where asylum was sought. The position would be different, however, ‘if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment’: para. 19 (Lord Bingham); see also para. 45 (Lord Nicholls). In *Z. and T. v. United Kingdom* 7 the court noted that a different standard of treatment applies in non-Contracting States to the ECHR, ‘[o]therwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of the world.’ The legal justification for the distinction between these provisions and articles 2 and 3 is said to be based on ‘the fundamental importance’ of the latter: see e.g. *F. v. United Kingdom* 12.

<sup>171</sup> See Foster, note 86 above, 303–07. This section draws on the cases she cites there. Legislation that may assist people displaced by climate change is discussed in section 4.1 below. Furthermore, in a 2009 study of complementary protection in Europe, most of the countries surveyed (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Switzerland, Sweden, United Kingdom) maintained mechanisms of complementary protection based on health issues: European Council on Refugees and Exiles (ECRE), ‘Complementary Protection in Europe’, July 2009, 6.

<sup>172</sup> It is not incorporated in either the Immigration Rules or the Qualification Regulations of 2006, but provisions of the 1971 Immigration Act allow the Secretary of State for the Home Office to grant leave to a person for a reason not covered by the Immigration Rules.

<sup>173</sup> ECRE, note 171 above, 67.

<sup>174</sup> Recognition of a subsidiary protection need under art. 15 of the Qualification Directive results in Humanitarian Leave in the UK.

country of return would make return contrary to Article 3.<sup>175</sup> In other words, they are deemed to be not protection-related cases.

- cases where there would be a flagrant violation of other ECHR rights.
- unaccompanied minors who do not qualify for asylum or Humanitarian Protection, where there are inadequate reception arrangements available in their own country.
- other cases where individual circumstances are so compelling that it is appropriate to grant some form of leave.
- people excluded from refugee or Humanitarian Protection status.

The duration of leave to remain depends on the reason why Discretionary Leave is granted.<sup>176</sup>

The relevant Asylum Policy Brief notes that:

There may be some extreme cases (although such cases are likely to be rare) where a person would face such poor conditions if returned - e.g. absence of water, food or basic shelter - that removal could be a breach of the UK's Article 3 obligations. Discretionary Leave should not be granted if the claimant could avoid the risk of suffering by leaving the UK voluntarily.<sup>177</sup>

This is significant because it recognizes that deprivation of the basic means for survival may preclude return under article 3, effectively transposing the 'inhuman or degrading treatment' standard in the domestic case of *Adam* to the non-removal context.<sup>178</sup>

However, by distinguishing between article 3 'protection' cases and 'non-protection' cases, the United Kingdom is trying to avoid entrenching socio-economic deprivation as an inherent part of 'inhuman or degrading treatment'. The United Kingdom can presumably justify granting a different type of residence permit on the grounds that beneficiaries of Humanitarian Leave and Discretionary Leave receive virtually identical rights, and the Qualification Directive leaves it to Member States' discretion as to how they implement the subsidiary protection regime.

As a matter of principle, this is concerning, given the indivisibility of rights discussed in section III.C.2 above. It may also contribute to what Durieux identifies as a shift away from a positive obligation of *protection*, in the refugee context, to non-removability in the human rights context.<sup>179</sup>

The United Kingdom's policy therefore explains why the AIT has recognized a right not to be removed in cases which would not meet the high threshold envisaged by the European Court of Human Rights in *D. v. United Kingdom*, even though such cases are still intended to be exceptional. The AIT has accepted that 'poor living conditions are capable of raising an

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<sup>175</sup> 'Asylum Policy Brief: Discretionary Leave' (last amended 27 October 2009).

<sup>176</sup> For details, see ECRE, note 171 above, 71.

<sup>177</sup> 'Asylum Policy Brief', note 175 above.

<sup>178</sup> In *R v. Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66, para. 7, Lord Bingham stated that the State would breach its obligations under art. 3 if an asylum seeker 'with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life'.

<sup>179</sup> J.-F. Durieux, 'The Elusive "War Refugee": Violence and Discrimination in the Construct of "Refugee" as a Legal Category', Refugee Studies Centre Lecture, University of Oxford, 10 November 2010.

issue under article 3 if they reach a minimum level of severity.’<sup>180</sup> Elsewhere, it stated that it is ‘uncontroversial that if as a result of a removal decision a person would be exposed to a real risk of existence below the level of bare minimum subsistence that would cross the threshold of Art 3 harm’.<sup>181</sup> While the use of the term ‘uncontroversial’ is perhaps premature,<sup>182</sup> the AIT has nonetheless accepted that removal would violate article 3 ECHR where it would result in:

- (a) return to ‘a camp where conditions are described as ‘sub-human’ and [the applicant would] face medical conditions described as some of the worst in the world’;<sup>183</sup>
- (b) the return of ‘an amputee who had serious mental problems who would not receive either financial or medical support in the Gambia, and would only have recourse to begging for his support’;<sup>184</sup>
- (c) a 16-year-old boy’s return where this would leave him destitute and without any protection;<sup>185</sup>
- (d) the return of an applicant and his family to Kabul where they would be ‘reduced either to living in a tent in a refugee camp or ... in a container with holes knocked in the side to act as windows’, and the applicant would be unlikely to find work and would ‘be competing with others for scarce resources of food and water as well as accommodation’. Concern was also expressed for the impact of these conditions on ‘five young (some of them very young) children’.<sup>186</sup>

In cases (b) and (c), and to some extent (d), a characteristic particular to the applicant (age, health) was pertinent to the claim’s success. However, cases (a) and (d) suggest that more general country of origin conditions may, if sufficiently severe, be able to form the basis of a protection claim.<sup>187</sup> Clearly, there is a considerable degree of inconsistency between the statements of principle in the higher courts of the European Court of Human Rights and the House of Lords, on the one hand, and domestic policy directives and (accordingly) practices of lower-level decision makers, on the other.

Finally, it is worth noting the UK’s case law on internal relocation with respect to quality of life and the meaning of ‘inhuman or degrading treatment’. Article 8(1) of the Qualification Directive, by which the United Kingdom is bound, provides that internal relocation is

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<sup>180</sup> *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, para. 59. The cases discussed here are referred to in Foster, note 86 above, 303.

<sup>181</sup> *Mandali v. Secretary of State for the Home Department* [2002] UKIAT 0741, para. 10.

<sup>182</sup> Foster also sees this as potentially ‘overstating the case’: Foster, note 86 above, 303.

<sup>183</sup> *Owen v. Secretary of State for the Home Department* [2002] UKIAT 03285, para. 27 cited in Foster, note 86 above, 304.

<sup>184</sup> *R v. Secretary of State for the Home Department, ex parte Kebbeh* (QBD, CO/1269/98, 30 April 1999, Hidden J) para. 58 cited in Foster, note 86 above, 304.

<sup>185</sup> *Korca v. Secretary of State for the Home Department* (UKIAT, Appeal No. HX-360001-2001, 29 May 2002) para. 9 cited in Foster, note 86 above, 304. See also *LM (Democratic Republic of Congo) v. Secretary of State for the Home Department* [2008] EWCA Civ 325.

<sup>186</sup> *GH (Afghanistan) v. Secretary of State for the Home Department* [2005] EWCA Civ 1603, para. 5. The Court of Appeal rejected an appeal by the government.

<sup>187</sup> In *NS (Relevance of Children to Removal – Art. 8)* [2005] UKAIT 00081, para. 55 it was held that the effect of the Asian tsunami in Sri Lanka did not interfere with telephone and other contact facilities such as to disrupt the continuation of family life, and thus removal did not breach art. 8 of the ECHR.

possible if (*inter alia*) there is ‘no real risk of [the applicant] suffering serious harm’, including inhuman or degrading treatment. However, in assessing this, the House of Lords has held that the quality of life in the receiving State does not have to be as high as that in the expelling EU Member State.<sup>188</sup> In other words, quality of life in the place of relocation is not assessed by whether it ‘meets the basic norms of civil, political and socio-economic human rights’. Rather, ‘the relevant comparisons are between those in the place of relocation and those that prevail elsewhere in the country of his nationality.’<sup>189</sup> Returning someone to hardship and poverty is not precluded unless ‘the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment.’<sup>190</sup> The fact that the country is poor and standards of social provision are low is insufficient to meet this threshold. Once again, there is an assumption that something ‘more’ than poverty alone is required to propel the case into the realm of article 3.

It is therefore instructive to examine the ‘lower’ threshold that the AIT has accepted in the internal relocation context:

Inevitably, it will be unduly harsh if an appellant is unable for all practical purposes to survive with sufficient dignity to reflect her humanity. That is no more than saying that if survival comes at a cost of destitution, beggary, crime or prostitution, then that is a price too high.<sup>191</sup>

This suggests an acknowledgement that removal to ‘destitution’ amounts, at the very least, to a *minimum* level of inhuman or degrading treatment.<sup>192</sup> If this reasoning were applied to the climate change-related displacement context, it may be possible to argue that the cumulative impacts of climate change on people’s ability to enjoy various socio-economic rights amounts to destitution.

Of course, the extent to which any of this reasoning can be successfully applied – and, moreover, extended – outside the jurisdictions in which it has developed remains to be seen. Other domestic provisions that may have relevance to climate change-related movement are discussed in section 4.1 below.

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<sup>188</sup> *Januzi* para. 45 (Lord Hope).

<sup>189</sup> *Januzi* para. 45 (Lord Hope), noting, however, that this may be very relevant when considering the impact of the ECHR or the requirements of humanity.

<sup>190</sup> *Januzi* para. 19.

<sup>191</sup> *FB* para. 39 (emphasis removed).

<sup>192</sup> The House of Lords accepted this within the UK: *R v. Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66. See also UNHCR, ‘Guidelines on International Protection’, 23 July 2003, para. 29: ‘It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. ... Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned.’ Is it justifiable to distinguish between these conditions in the case of internal relocation, on the one hand, and a general *non-refoulement* claim? Presumably, the difference is that for the former, the assessment involves assessing whether it is unduly harsh for a particular individual to relocate to a new part of the country, which in itself contributes to the unreasonableness factor, whereas for the latter, return would be back to the conditions in which the individual was already living – there is no added element of moving elsewhere. But is this alone sufficient to justify a different approach?



### 3.4 Other rights that may give rise to complementary protection

The UN Human Rights Committee,<sup>193</sup> the UN Committee on the Rights of the Child,<sup>194</sup> the European Court of Human Rights,<sup>195</sup> the UN Committee on the Elimination of Racial Discrimination<sup>196</sup> and the House of Lords<sup>197</sup> have all recognized that the principle of *non-refoulement* may extend beyond protection of the right to life (article 6 ICCPR, article 2 ECHR) and the right to be free from torture or cruel, inhuman or degrading treatment or punishment (article 7 ICCPR, article 3 ECHR, article 37 CRC). The Committee on the Rights of the Child has made clear that the *non-refoulement* obligation applies in any case where there are substantial grounds for believing that there is a real risk of ‘irreparable harm’ if the person is removed.<sup>198</sup> The language of ‘irreparable harm’ has been used by the Human Rights Committee to describe harm that is comparable to that contemplated by articles 6 and 7 ICCPR.<sup>199</sup> However, so far, no other provision has independently given rise to a non-

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<sup>193</sup> The Human Rights Committee recognizes, at least in principle, that States’ *non-refoulement* obligations may be triggered ‘when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise’: Human Rights Committee, ‘General Comment No. 15: The Position of Aliens under the Covenant’ (11 April 1986) para. 5. See also Human Rights Committee, ‘General Comment No. 18: Non-Discrimination’ (10 November 1989). See generally Human Rights Committee, ‘General Comment No. 31’, note 92 above, para. 12: ‘Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.’

<sup>194</sup> The Committee on the Rights of the Child has made clear that the obligation is ‘by no means limited to’ those provisions (and CRC art. 37): Committee on the Rights of the Child, ‘General Comment No. 6’, note 92 above, para. 27. The language of ‘irreparable harm’ has been used by the Human Rights Committee to describe harm that is comparable to that contemplated by ICCPR arts 6 and 7.

<sup>195</sup> *N. v. United Kingdom*. See e.g. art. 9 cases: *Razaghi v. Sweden*, App. No. 64599/01 (ECtHR, 11 March 2003); *Gomes v. Sweden*, App. No. 34566/04 (ECtHR, 7 February 2006); *Z. and T. v. United Kingdom*; art. 6 cases: *Drozd and Janousek v. France and Spain* (1992) 14 EHRR 745; *Einhorn v. France*, App. No. 71555/01 (ECtHR, 16 October 2001); *Mamatkulov and Abdurasulovic v. Turkey*, App. Nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) (Grand Chamber); *Tomic v. United Kingdom*, App. No. 17837/03 (ECtHR, 14 October 2003); *F. v. United Kingdom*; art. 4 cases: *Ould Barar v. Sweden* (1999) 28 EHRR CD 213.

<sup>196</sup> The Committee on the Elimination of Racial Discrimination has several times stated that: ‘The Committee also urges the State party to ensure, in accordance with article 5 (b), that no person will be forcibly returned to a country where there are substantial grounds for believing that his/her life or health may be put at risk. The Committee recommends that the State party seek cooperation with UNHCR in this regard’: e.g. Committee on the Elimination of Racial Discrimination, ‘Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan’, UN Doc. CERD/C/JPN/CO/3-6, 16 March 2010, para. 23. This seems an anomalous approach, since it is an unusually low threshold, but given its relevance it is noted here. See also Special Rapporteur on the Right to Food, ‘Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”’, UN Doc., A/HRC/4/30, 19 January 2007, para. 64: ‘Governments have a legal obligation to help the refugees from hunger’. See also Human Rights Council Advisory Committee, ‘Report to the Human Rights Council on the First Session of the Advisory Committee’, UN Doc. A/HRC/AC/2008/1/L.11, part 1/6, 15 August 2008.

<sup>197</sup> *Ullah; EM; Razgar*.

<sup>198</sup> Committee on the Rights of the Child, ‘General Comment No. 6’, note 92 above, para. 27.

<sup>199</sup> Human Rights Committee, ‘General Comment No. 31’, note 92 above, para. 12; *ARJ v. Australia* Communication No. 692/1996 (28 July 1997); *Judge v. Canada* Communication No. 829/1998, 5 August 2002. While neither Committee has commented further on the meaning of ‘irreparable harm’ in the context of removals, it has indicated in the case of interim measures that: ‘what may constitute ‘irreparable damage’ to the victim within the meaning of rule 86 [now rule 92] cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits’: *Stewart v. Canada* Communication No. 538/1993, 1 November 1996, para. 7.7 (emphasis added). The only dissent against the expansion of the

removal claim. In *Z. and T. v United Kingdom*, the European Court of Human Rights stated that ‘it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention.’<sup>200</sup> This is why analysis typically begins with that provision, and only if a violation is not made out are other articles even considered.<sup>201</sup>

Ever since *Soering* (the first case in which the European Court recognized the implied principle of *non-refoulement* in articles 2 and 3), the court has accepted that the same obligation may be implicit in other ECHR rights.<sup>202</sup> However, it has drawn a distinction between the ‘fundamental importance’ of articles 2 and 3 of the ECHR, which are absolute and non-derogable rights, and other provisions of the ECHR, where ‘[s]uch compelling considerations do not automatically apply’.<sup>203</sup>

The most detailed analysis of the issue was undertaken by the House of Lords in the parallel cases of *Ullah* and *Razgar*, where consideration was given as to whether articles 9 or 8 (respectively) of the ECHR could found a non-removal claim.<sup>204</sup> The court held that, as a matter of principle, any provision of the ECHR could do so,<sup>205</sup> but that the threshold in such cases would be very high.<sup>206</sup> The applicant would need ‘to establish at least a real risk of a flagrant violation of the very essence of the right’.<sup>207</sup> A ‘flagrant denial’ of a right is effectively a complete denial or nullification of the right.<sup>208</sup>

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principle of *non-refoulement* in this way was expressed in an individual opinion by Christine Chanet in *Judge v. Canada* 20 on the grounds that ‘legal and practical problems would immediately arise’. See Foster, note 86 above, 277.

<sup>200</sup> *Z. and T. v. United Kingdom* 7.

<sup>201</sup> Except in *Bader*, where the court found a violation of both arts 2 and 3.

<sup>202</sup> *Soering*, paras 113, 91; see also *Cruz Varas v. Sweden* (1991) 14 EHRR 1, paras 69–70; *Vilvarajah v. United Kingdom* (1991) 14 EHRR 248, para. 103. See generally J. McAdam, *Complementary Protection in International Refugee Law* (Oxford: OUP, 2007) ch 4. For a detailed discussion of the case law on provisions other than art. 3 in this context, see den Heijer, note 153 above, 280–85. In *Razgar*, Lord Bingham (para. 9) invoked *Bensaid v. United Kingdom* as authority for placing reliance on art. 8 ‘to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country.’

<sup>203</sup> *F. v. United Kingdom* 12.

<sup>204</sup> This appeal was heard immediately following the appeal in *Ullah*, and since it was ‘directly germane to the issue of principle in the present case ... [it] should be read, to the extent that [it is] relevant, as incorporated in this opinion’: *Razgar* para. 2. For art. 8, the possibility is also acknowledged: *Bensaid v. United Kingdom* 219–220, paras 46–49; *N. v. United Kingdom* 31, para. 26 (dissenting opinion of Judges Tulkens, Bonello and Spielmann).

<sup>205</sup> *Ullah* paras 21, 35, 39–49, 52, 53, 62, 67.

<sup>206</sup> *Ullah* para. 24. See also *Razgar* para. 10: ECHR art. 8 could ‘be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3... an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state.’

<sup>207</sup> *Ullah* para. 50 (Lord Steyn). In *Razgar* (para. 72), he used the term ‘fundamental breach’ synonymously: ‘In order to bring himself within such an exceptional engagement of article 8 the applicant has to establish a very grave state of affairs, amounting to a flagrant or fundamental breach of the article, which in effect constitutes a complete denial of his rights.’

<sup>208</sup> *Ullah* para. 24 (Lord Bingham), adopting the test of the AIT in *Devaseelan v. Secretary of State for the Home Department* [2002] UKIAT 702 (*Devaseelan*). This test derives from the partly dissenting opinion in *Mamatkulov v. Turkey* (2005) 41 EHRR 494 (*Mamatkulov v. Turkey*), which said it ‘is intended to convey ... a breach of the [right] ... which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed’: Judges Bratza, Bonello and Hedigan in *Mamatkulov v. Turkey* 537–39. Echoed by Lord Carswell in *EM* para. 54. Note that the standard of proof is the same as for an art. 3 claim, namely a ‘real risk’: *Mamatkulov v. Turkey* paras O-III17 and O-III19. See also *EM* para. 4 (Lord Hope); para. 34 (Lord Bingham); *Ullah* para. 50 (Lord Steyn).

According to Lord Bingham, the reason why a complete nullification of the right is required is that in the case of qualified rights, the State may have a ‘legitimate aim’ in restricting the right, such that

it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.<sup>209</sup>

This is said to be something that will manifest only in ‘very exceptional cases’.<sup>210</sup> It seems that to meet the exceptionality test, the House of Lords requires ‘the humanitarian grounds against ... removal’ to be ‘compelling’.<sup>211</sup> The European Court of Human Rights has suggested that the applicant must demonstrate ‘an added ‘measure of persecution, prosecution, deprivation of liberty or ill treatment’ beyond a ‘mere’ violation of the right.’<sup>212</sup> Again, the justification for this appears to be a policy one: the ECHR does not make Contracting States the ‘indirect guarantors of freedom of worship for the rest of the world’,<sup>213</sup> and thus a higher threshold of harm (beyond the absolute, non-derogable rights of articles 2 and 3) must be met.<sup>214</sup>

Applying this to the climate change context, it may be possible to show – in exceptional circumstances – that a right is violated if the very essence of the right is destroyed or nullified. In time, this could well become the case. To what extent it needs to remain ‘exceptional’ to qualify is unclear: as the House of Lords observed in *N’s case*, the sad irony was that the circumstances of the applicant were no longer exceptional, even though their impacts were very severe.<sup>215</sup> Advances in medical treatment mean that people will rarely now be close to death at the point of hearing, even though once treatment ceases they may rapidly become so. As Foster points out, ‘requiring the person to be effectively dying seems to ignore the fact that “degrading treatment” does not need to amount to a loss of life — otherwise Art 3 would have no independent operation’.<sup>216</sup> Further, it ignores the fact that the test relates to *foreseeability* of harm.<sup>217</sup>

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<sup>209</sup> *Ullah* para. 24 citing *Devaseelan* para. 111.

<sup>210</sup> *EM* para. 17; see also para. 60 (Lord Brown): ‘it is the highly exceptional facts of the case ... which in combination provide utterly compelling humanitarian grounds against removal.’ Here, the case was deemed ‘very exceptional’ for the following reasons (para. 18): ‘This is particularly so when the effects on the child are taken into account. His mother has cared for him since his birth. He has a settled and happy relationship with her in this country. Life with his mother is the only family life he knows. Life with his father or any other member of his family in Lebanon, with whom he has never had any contact, would be totally alien to him’; see also para. 47 (Baroness Hale).

<sup>211</sup> *EM* para. 17; see also para. 60 (Lord Brown).

<sup>212</sup> *Z. and T. v. United Kingdom* 7.

<sup>213</sup> *Z. and T. v. United Kingdom* 7.

<sup>214</sup> As Baroness Hale acknowledged in the House of Lords: ‘There clearly is some additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned’: *Razgar*, para. 42. See also *F. v. United Kingdom*. Den Heijer argues, though, that the article 3 threshold ‘is a jurisprudential construction which can very well be extrapolated to other provisions if considered necessary’: den Heijer, note 153 above, 294.

<sup>215</sup> *N. v. Secretary of State for the Home Department* paras 13 (Lord Nicholls), 50 (Lord Hope), 93 (Lord Brown).

<sup>216</sup> Foster, note 86 above, 294.

<sup>217</sup> *Ibid.*

### 3.5 The role of the ICESCR

The UN Committee on Economic, Social and Cultural Rights has not yet considered whether any rights in the ICESCR contain a *non-refoulement* obligation. This may be facilitated by the creation of an individual and group communications procedure, similar to that of the Committee against Torture and Human Rights Committee, but this is not yet operational.<sup>218</sup>

Foster, who has written extensively on socio-economic deprivation as a basis for international protection,<sup>219</sup> rejects the common assumption that the ICESCR is inapplicable in the asylum context. This view is based on the idea that the rights in the ICESCR are subject to progressive implementation, based on the resources of individual State parties. Foster argues that this approach is flawed for two reasons. First, some ICESCR rights are immediately binding.<sup>220</sup> Secondly, even where they are not, article 2 imposes ‘two key duties of an immediate nature’: (a) the obligation to ‘take steps’ to realize rights, which includes a ‘core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant’;<sup>221</sup> and (b) the duty to permit rights to be exercised without discrimination on specified grounds.<sup>222</sup> This means that ‘a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.’<sup>223</sup>

Accordingly, she suggests that:

Where the person fears a violation based on the receiving state’s failure to respect rights (by withdrawing or preventing access to rights or actively denying them to a particular segment of the population) or failure to protect rights (by being unable or unwilling to protect against violation by non-state actors), the assessment is arguably no more complicated than where a civil and political right is at issue.<sup>224</sup>

The focus is again on active deprivation of a right, rather than a general lack of resources. Even if decision makers were prepared to examine ICESCR rights directly in the *non-refoulement* context – and presently ‘there is insufficient authority at present for holding

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<sup>218</sup> As argued by Foster, note 86 above, 284, owing to the recent adoption by the General Assembly of an Optional Protocol to the ICESCR (to be opened for signature in 2009).

<sup>219</sup> Foster, note 156 above; Foster, note 86 above.

<sup>220</sup> Art. 3 (equality between men and women), art. 7(a)(i) (equal pay), art. 8 (right to form trade unions and to strike), art. 10(3) (protection of children from exploitation), art. 13(2)(a) (free primary education) and art. 13(3) (freedom of parents to choose the type of education for their children).

<sup>221</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2(1))’, UN Doc. E/1991/23, 14 December 1990, para. 10.

<sup>222</sup> Foster, note 86 above, 279.

<sup>223</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3’, note 221) para. 10. See respectively Committee on Economic, Social, and Cultural Rights, ‘General Comment No. 12: The Right to Adequate Food (Art. 11)’ UN Doc. E/C.12/1999/5, 12 May 1999; ‘General Comment No. 13: The Right to Education (Art. 13)’ UN Doc. E/C.12/1999/10, 8 December 1999; ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ UN Doc. E/C.12/2000/4, 11 August 2000; ‘General Comment No. 15 (2002): The Right to Water (Arts 11 and 12)’ UN Doc. E/C.12/2002/11, 20 January 2003; ‘General Comment No. 18 (2005): The Right to Work (Art. 18)’ UN Doc. E/C.12/GC/18, 6 February 2006.

<sup>224</sup> Foster, note 86 above, 281.

states accountable for *refoulement* on the basis of the ICESCR,<sup>225</sup> – it seems that the element of differential, individual harm would pose an obstacle in climate change-related claims.<sup>226</sup>

### 3.6 Conclusion

Violations of the rights outlined in the table above might (at some future point) reach the threshold of a ‘flagrant violation’.<sup>227</sup> However, both the European Court of Human Rights and the House of Lords have suggested that such violations would likely also breach article 3, which provides a much more straightforward basis for arguing a *non-refoulement* case. Since neither the ICCPR nor the ECHR explicitly protect the right to health, housing, food and so on, protection claims based on other civil and political rights are likely to be weaker than a straight ‘inhuman or degrading treatment’ argument. While the ICESCR may provide as yet untapped prospects for extending the principle of *non-refoulement*, does so, the jurisprudence requires considerable development to reach this point.

Accordingly, it seems that articles 2 and 3 ECHR, and articles 6 and 7 ICCPR, remain the strongest sources of protection for climate change-related claims. Drawing on the remarks of the European Commission in *BB v France*, factors which could not individually substantiate an article 3 ECHR claim might nonetheless do so when considered cumulatively, ‘in the light of all the circumstances’.<sup>228</sup> This also reflects the International Law Commission’s conceptualization of a ‘disaster’ as being comprised of an ‘event or series of events’ – in other words, impacts which ‘on their own, might not meet the necessary threshold, but which, taken together, would constitute a calamitous event for purposes of the draft articles.’<sup>229</sup> Thus, just as in refugee law, ‘persecution’ may be established either by a single severe act or by a series of lesser acts which cumulatively, by virtue of their nature or repetition, amount to persecution, breaches of a number of individual human rights might collectively found a protection claim.

## 4. State practice relating to complementary protection

### 4.1 Legislative protection responses

So far, most responses to cross-border climate-related or environmental displacement have been domestic ones rather than international agreements.<sup>230</sup> They include temporary

<sup>225</sup> Foster, note 86 above, 284 (fn omitted).

<sup>226</sup> See section 5.2 below.

<sup>227</sup> It is interesting to note Lord Brown’s conclusion in *EM* that ‘it is the highly exceptional facts of the case ... which *in combination* provide utterly compelling humanitarian grounds against removal’: para. 60 (emphasis added). If, like the HIV cases, they are no longer ‘exceptional’, would policy considerations stand in the way of recognition?

<sup>228</sup> *BB v. France* para. 53.

<sup>229</sup> International Law Commission (ILC), ‘Report on the Work of its Sixty-Second Session (3 May–4 June and 5 July–6 August 2010) UN Doc. A/65/10 (‘ILC Report’) 325; ‘Protection of Persons in the Event of Disasters: Statement of the Chairman of the Drafting Committee, Mr. Marcelo Vázquez-Bermúdez’ (31 July 2009) 9.

<sup>230</sup> An exception is the 2009 Kampala Convention adopted by the African Union, which includes an obligation to ‘take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change’: African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, not yet in force) (‘Kampala Convention’) art. 5(4). While this is the first treaty to expressly recognize climate change as a form of ‘natural or human made’ disaster, it essentially just elaborates on the description of an ‘internally displaced person’ in the Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, which refers to

humanitarian assistance, through schemes such as Temporary Protected Status in the United States; potentially temporary protection in the European Union; and longer-lasting refugee-like protection in countries such as Sweden and Finland. These are examined in turn below.

#### 4.1.1 Temporary protection

A number of countries have mechanisms for providing temporary protection to people displaced by sudden disasters. The scope of the protection is set out in law, but often, as in the case of the European Union and the United States, an executive decision is required before the protection can be accessed.<sup>231</sup>

##### 4.1.1.1 United States

Temporary Protected Status (TPS) is a discretionary status in the United States designed to provide safe haven for people who are fleeing, or reluctant to return to, potentially dangerous situations in their home country. Protection is not automatic: the Secretary of Homeland Security must first ‘designate’ a country before its nationals are eligible.

The Secretary of Homeland Security may ‘designate’ a country where there is an on-going armed conflict threatening people’s personal safety, or where:

- (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
- (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
- (iii) the foreign state officially has requested designation under this subparagraph. ...<sup>232</sup>

TPS is thus a blanket form of relief granted on the basis of objective country of origin conditions, rather than circumstances particular to the individual.<sup>233</sup> Crucially, it only benefits people already in the United States at the time of the disaster, *and* whose government requests assistance under this mechanism. A grant of TPS enables the beneficiary to work, and precludes deportation for the period of the designation.<sup>234</sup> TPS can be granted for periods between six and 18 months, and it can be extended if country conditions do not change. However, as its name implies, it is a temporary status, and people on TPS are not eligible to become legal permanent residents (LPRs) in the US without a special act of Congress.<sup>235</sup>

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‘natural or human-made disasters’), and only binds signatory countries with respect to people moving within their own borders, rather than across international frontiers.

<sup>231</sup> By the Council of the European Union and the Secretary of Homeland Security respectively.

<sup>232</sup> Immigration and Nationality Act § 244, 8 USC § 1254.

<sup>233</sup> See generally R. E. Wasem and K. Ester, ‘Temporary Protected Status: Current Immigration Policy and Issues’ Congressional Research Service, 9 September 2010.

<sup>234</sup> US Citizenship and Immigration Services, ‘Temporary Protected Status—Haiti’ (last updated 1 February 2010) available online at:

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=e54e60f64f336210VgnVCM100000082ca60aRCRD&vgnextoid=e54e60f64f336210VgnVCM100000082ca60aRCRD> (last accessed 3 January 2011). It has been reported that France, Canada and the Dominican Republic also eased their immigration rules in light of the earthquake: see M. B Farrell, ‘TPS: Haiti’s Illegal Immigrants Given Temporary Protection in US’ (15 January 2010) <http://www.csmonitor.com/USA/2010/0115/TPS-Haiti-illegal-immigrants-given-temporary-protection-in-US> (last accessed 17 May 2011).

<sup>235</sup> Wasem and Ester, note 233 above, 6. This occurred in 1992 when Chinese people on Deferred Enforced Departure (DED) were permitted to adjust to LPR status under the Chinese Student Protection Act of 1992: PL 102-404, 106 Stat 1969 (9 October 1992) and for Haitians under the FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act: PL 105-277, 112 Stat 2681, 105th Congress 2nd Sess (21 October 1998). Legislation for some other TPS groups has been introduced but not enacted, and included in

In January 2010, as a result of the earthquake in Haiti, the Department of Homeland Security determined an 18-month designation for Haitians who had continuously resided in the US since 12 January 2010. Haitians in the country unlawfully, as well as those living there on another visa, could apply for TPS. In the past there have been calls for TPS to be granted on account of natural disasters in Peru, Pakistan, Sri Lanka, India, Indonesia, Thailand, Somalia, Myanmar, Malaysia, the Maldives, Tanzania, Seychelles, Bangladesh and Kenya, but the Administration did not take a formal position on them.<sup>236</sup> Following Hurricane Mitch in 1998, the Attorney General indicated that the deportation of people from El Salvador, Guatemala, Honduras and Nicaragua would be temporarily suspended, and TPS was granted a month later to people from Honduras and Nicaragua on the grounds of the extraordinary degree of displacement and damage there.<sup>237</sup> In 2001, TPS was granted to people from El Salvador on account of two earthquakes there.<sup>238</sup>

There is, accordingly, nothing in principle which would prevent TPS from being granted to people fleeing a climate change disaster. However, it is unlikely to assist people facing slow-onset impacts of climate change, given the time they take to manifest and their ‘creeping’ effect, rather than their sudden nature. Furthermore, given that TPS is only available to designated nationals already in the US at the time of the disaster, not those who flee *after* an event, it may have little relevance to citizens of many affected countries, such as Kiribati, Tuvalu and Bangladesh. The US is not a common destination country for these communities, and many of the worst affected would lack the means to travel there in the first place. Nonetheless, opponents of TPS see it as an immigration amnesty for unauthorized migrants already in the US and as a magnet for further unauthorized movement.<sup>239</sup>

Apart from TPS, the Attorney General may provide discretionary relief from deportation. The policy is that ‘all blanket relief decisions require a balance of judgment regarding foreign policy, humanitarian, and immigration concerns.’<sup>240</sup> Work authorization is not automatic and must be applied for separately. It has at times been granted to people whose TPS has not been renewed.<sup>241</sup>

#### 4.1.1.2 European Union

The EU Temporary Protection Directive was designed as an exceptional mechanism<sup>242</sup> to respond to mass influx on account of armed conflict, endemic violence or generalized human

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comprehensive immigration reform legislation. In the 111th Congress, HR 264 would enable some current TPS holders to convert to LPR status if they have lived in the US for five years or more; are of good moral character; have no criminal convictions; have successfully completed a course on reading, writing and speaking in English (with exceptions on account of disability); have accepted the values and cultural life of the US; and have completed at least 40 hours of community service: see Wasem and Ester, note 233 above, 7.

<sup>236</sup> Wasem and Ester, note 233 above, 5.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.* 5, 6 referring to R. E. Wasem, ‘US Immigration Policy on Haitian Migrants’ (31 March 2010) Congressional Research Service Report RS 21349.

<sup>240</sup> This most commonly occurs as DED or Extended Voluntary Departure (EVD). See Wasem and Ester, note 233 above, 3.

<sup>241</sup> For example to 190,000 Salvadorans in 1992; to 3,600 Liberians (who present grant of DED runs until 30 September 2011): Wasem and Ester, note 233 above, 4.

<sup>242</sup> Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12, art. 2(a).

rights violations.<sup>243</sup> It could potentially be activated to respond to a sudden influx of people on account of environmental or climate change impacts, since article 2(c), which sets out the Directive's scope of application, does not exhaustively define it.<sup>244</sup>

The drafting history reveals that Finland sought have included in the definition recognition of displacement by natural disasters, but this was not supported by other Member States, with Belgium and Spain noting that 'such situations were not mentioned in any international legal document on refugees'.<sup>245</sup>

Given empirical evidence on the likely nature of climate change-related movement, it remains uncertain whether the EU would ever be faced by a 'mass influx' from a climate-affected country sufficient to overwhelm the regular asylum processing procedures and warrant the exceptional grant of temporary protection on a prima facie basis.<sup>246</sup>

#### 4.1.2 Asylum-type mechanisms

##### 4.1.2.1. European Union

The EU Qualification Directive, which provides the framework for individual protection in the European Union, does not contain an express provision on protection from environmental or climate change-related impacts, although the potential for such movement to be covered under 'inhuman or degrading treatment' (based on article 3 of the ECHR) has been discussed extensively above. Although the Commission had raised the possibility of including 'environmental disasters' as a ground of subsidiary protection,<sup>247</sup> this does not seem to have ever been entertained seriously in deliberations and certainly given the nature of negotiations, it was very unlikely to ever be adopted.<sup>248</sup>

##### 4.1.2.2. National laws

At the national level, Swedish asylum law contains a provision extending protection to people who are 'unable to return to the[ir] country of origin because of an environmental disaster'.<sup>249</sup> To date, however, it has never been used. In any case, it is unclear if this would extend to people displaced by climate change, since seems that it was only ever intended to cover people fleeing specific environmental disasters such as Chernobyl, rather than climate-induced displacement more broadly. Kolmannskog and Myrstad note that the drafting history reveals discussion of the fact that environmental displacement may include the so-called 'sinking' island States and longer-term solutions,<sup>250</sup> but commentary on the provision as

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<sup>243</sup> *Ibid.* art. 2(c).

<sup>244</sup> Kolmannskog and Myrstad, note 1 above, 316ff; UK Home Office, 'UK Plans in Place to Protect Victims of Humanitarian Disasters' (20 December 2004) Press Release referring to natural disasters; Kälin, note 40 above, 81.

<sup>245</sup> 'Outcome of Proceedings' (2001) Council Doc. 6128/01 <<http://register.consilium.europa.eu/pdf/en/01/st06/06128en1.pdf>> in Kolmannskog and Myrstad, note 1 above, 316. Interestingly, when the Temporary Protection Directive was concluded, the UK Home Office issued a press release stating that the Directive would 'ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war and natural disasters': 'UK Plans in Place to Protect Victims of Humanitarian Disasters' (20 December 2004) UK Home Office Press Release available online at: [http://press.homeoffice.gov.uk/press-releases/Uk\\_Plans\\_In\\_Place\\_To\\_Protect\\_Vic?version=1](http://press.homeoffice.gov.uk/press-releases/Uk_Plans_In_Place_To_Protect_Vic?version=1) (last accessed 3 January 2011).

<sup>246</sup> See e.g. McAdam and Saul, note 41 above.

<sup>247</sup> Council of Europe, 'Discussion Paper on Subsidiary Protection' (1999) 41 ASILE 6.

<sup>248</sup> See J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461.

<sup>249</sup> Swedish Aliens Act ch 4, s 2(3).

<sup>250</sup> Swedish *travaux préparatoires* (SOU) (1995) 75, 147 in Kolmannskog and Myrstad, note 1 above, 323.



adopted clarified that it was only intended to apply in cases of sudden disaster, and would only be available if there were no internal flight alternative.<sup>251</sup>

Finnish asylum law also provides that a person may be granted asylum if he or she faces a ‘threat of death penalty, torture or other inhuman treatment or treatment violating human dignity, or if they cannot return there [to the country of origin] because of an armed conflict or environmental disaster’.<sup>252</sup> This is available in individual cases (where it results in permanent residence), as well as in cases of mass influx (where up to a three year permit may be granted). Again, the law is untested in relation to climate change displacement.

According to Kälin, even though Swiss asylum law does not expressly mention natural or environmental disasters, legislation on temporary and subsidiary protection can be interpreted so as to accommodate climate-related scenarios.<sup>253</sup> Again, however, the focus is on *disasters* rather than slow-onset changes, and this creates an obvious protection gap.

In 2010, Argentina adopted new immigration legislation providing access to provisional residence permits for individuals who cannot return to their country of origin because of a natural or environmental disaster.<sup>254</sup> Additionally, international protection (through permanent residence) is available to people who are not refugees but who are protected by the principle of *non-refoulement* where their human rights would be at risk in the country of origin.<sup>255</sup> This also has the potential to apply to individuals affected by climate impacts.

#### 4.1.2.3 Legislative proposals

In 2006, the Belgian Senate adopted a resolution (introduced by Philippe Mahoux of the socialist party) calling for Belgium to agitate in the UN for the recognition of an international ‘environmental refugee’ status.<sup>256</sup> During debate, some Senators opposed the resolution because it did not sufficiently address the root causes of the problem, although none raised any technical or political difficulties with respect to amending the Refugee Convention. In 2008, two further resolutions were introduced in the lower house – one expressly calling for a Protocol to the Refugee Convention, the other not expressly mentioning this – but a vote on both is still pending.<sup>257</sup> Even if they were adopted, they would be non-binding on the Parliament.<sup>258</sup>

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<sup>251</sup> Prop 1996/97: 25, 100–01 in Kolmannskog and Myrstad, note 1 above, 323

<sup>252</sup> Aliens Act (301/2004, amendments up to 458/2009 included) (Finland) ss 88 (residence permits), 109 (temporary protection in cases of mass displacement)). See proposal discussed in Kolmannskog and Myrstad, note 1 above, 322 that they should be granted ‘humanitarian protection’ rather than ‘alternative protection’ under s 88a.

<sup>253</sup> Kälin, note 40 above, 100. He notes that this was the conclusion of an inter-departmental roundtable discussion by the Swiss Ministry of Foreign Affairs on 13 January 2009, at which he was present.

<sup>254</sup> Decree No. 616/2010 Official Bulletin (6 May 2010) s 24(h) (regulating immigration law 25.871 (2003)). The provision delimits its scope of application to foreigners who enter the country as ‘transit residents’.

<sup>255</sup> Decree No. 616/2010 Official Bulletin (6 May 2010) s 23m (regulating immigration law 25.871 (2003)).

<sup>256</sup> Sénat de Belgique, ‘Proposition de résolution visant à la reconnaissance dans les conventions internationales du statut de réfugié environnemental’ Doc. 3-1556/3 (21 March 2006) Belgian Senate in Gemenne, note 5 above, 300, 445–47 (for copy of text adopted by the Commission des relations extérieures et de la défense, ‘Proposition de résolution visant à promouvoir la reconnaissance dans les conventions internationales du statut de réfugié environnemental’).

<sup>257</sup> Chambre des Représentants de Belgique, ‘Proposition de résolution relative à la prise en considération et à la création d’un statut de réfugié environnemental par les Nations Unies et l’Union européenne’(déposée par M. Jean Cornil et consorts of the socialist party) Doc. 52-1451/001 (3 October 2008) (calling for a Protocol to the Refugee Convention) in Gemenne, note 5 above, 300, 469–78 (for copy of text).; Chambre des Représentants de Belgique, ‘Proposition de résolution visant à la reconnaissance d’un statut spécifique pour les réfugiés

Prior to being elected as the new Australian government in late 2007, the Australian Labor Party proposed the creation of a Pacific Rim coalition to accept climate change ‘refugees’, and encouraged the Australian government to lobby the United Nations to ‘ensure appropriate recognition of climate change refugees in existing conventions, or through the establishment of a new convention on climate change refugees.’<sup>259</sup> However, when a Greens Senator proposed the Migration (Climate Refugees) Amendment Bill 2007, calling for the issue of visas to people fleeing ‘a disaster that results from both incremental and rapid ecological and climatic change and disruption ...’, the Labor party was quick to note that its idea of an international response required a collaborative approach with other countries, rather than unilateral action by Australia.<sup>260</sup> In government, Labor has not formulated any policies on this issue. A recent Senate inquiry revealed that ‘[w]hen asked about the possibility of forced re-location from Pacific island countries such as Kiribati and Tuvalu, DFAT [the Department of Foreign Affairs and Trade] informed the committee that it was not aware of any government consideration of this matter. Invited to comment again on whether these two islands were under consideration, DFAT replied no.’<sup>261</sup>

## 4.2 Ad hoc humanitarian schemes

### 4.2.1 Group-based schemes

Even in the absence of specific legislation, a number of countries provide some form of protection to people fleeing natural disasters, for example.<sup>262</sup> For various reasons, States may prefer ad hoc humanitarian responses that permit them to determine on a situation-by-situation basis whether they wish to provide ‘protection’, for what duration and in what form. Typically, though, this is emergency protection after a particular event, rather than preemptive protection for projected longer term impacts.

Sometimes, special historical or cultural links may foster humanitarian goodwill towards people displaced by a sudden disaster. For example, the African community offered special protection to Haitians following the earthquake there in 2010.<sup>263</sup> Caribbean countries provided temporary asylum to Montserratians fleeing volcanic eruptions in the 1990s. Latin

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climatiques’ (déposée par Mme Juliet Boulet, M. Wouter Devriendt at Mme Zoé Genot of the Greens) Doc. 52-1478/001 (14 October 2008) in Gemenne, note 5 above, 300, 460–68 (for copy of text).

<sup>258</sup> Email correspondence with François Gemenne (4 January 2011).

<sup>259</sup> Australian Labor Party (ALP), 2006, *Our Drowning Neighbours: Labor’s Policy Discussion Paper on Climate Change in the Pacific*, ALP, Canberra at 10.

<sup>260</sup> Commonwealth of Australia, *Senate: Official Hansard* (9 August 2007) 100ff.

<sup>261</sup> Senate Foreign Affairs, Defence and Trade References Committee, *Economic Challenges facing Papua New Guinea and the Island States of the Southwest Pacific* (Commonwealth of Australia, November 2009), para. 6.60 (making reference to *Committee Hansard* (21 November 2008) 28). On 21 November 2009, a spokesperson for the Climate Change Minister, Penny Wong, was reported as acknowledging that permanent migration may eventually be the only option for some people, which will need to be dealt with by governments in the region: A. Morton, ‘Land of the Rising Sea’ *Sydney Morning Herald* (Sydney, 21 November 2009) available online at: <http://www.smh.com.au/environment/land-of-the-rising-sea-20091120-iqub.html> (last accessed 17 May 2011).

<sup>262</sup> Sometimes, this has been as a result of calls from UNHCR: High Commissioner’s Dialogue on Protection Challenges Report, note 3 above, 4

<sup>263</sup> The President of Senegal offered to resettle displaced Haitians as descendants of African slaves: ‘They have a right to return to Africa, their original land. They were colonized by the Americans. We will find them land.’ The African Union is reportedly considering a proposal to create a new country for them in Africa, citing ‘a sense of duty and memory and solidarity’. See ‘Haitians to Africa? Senegal Resettlement Plans Gain Steam’ (2 February 2010) available online at: <http://www.csmonitor.com/layout/set/print/content/view/print/277552> (last accessed 17 May 2011).

American countries offer asylum to extended categories of refugees on a regional basis. While not every country has the capacity to absorb large numbers of migrants, localized solutions may be able to provide more culturally appropriate responses than some universal sharing mechanism.<sup>264</sup>

UNHCR has also called for a discretionary response in situations of natural disaster. Following the 2004 Asian Tsunami, it called for a halt on returns to areas affected by the devastation.<sup>265</sup> The United Kingdom suspended involuntary returns of failed asylum seekers to India, Sri Lanka, Thailand and Indonesia, while Canada and Australia fast-tracked permanent and temporary visa applications for people coming from tsunami-affected regions, and offered permanent residents from these regions the opportunity to expedite the procedure for sponsoring family members.<sup>266</sup> In Germany, the Federal Ministry of the Interior indicated that returns should be stalled, although only some of the Bundesländer implemented this; the Netherlands halted deportations until March 2005.<sup>267</sup> France, Canada and the Dominican Republic reportedly also eased their immigration rules in light of the 2010 Haitian earthquake.<sup>268</sup> However, sometimes discretionary halts to removal may mean that people are able to remain, but do not have many substantive rights. These kinds of responses are not sustainable long term.

There are other examples of State practice extending special protection to particular groups, including for environmental or socio-economic reasons (which are pertinent to the climate change context). For example, between 2001 and 2006, it was Danish practice not to return young children to Afghanistan because of drought. This was subsequently extended to landless people from areas where there was a lack of food, and who would be especially vulnerable on return.<sup>269</sup> Denmark has also provided humanitarian asylum to single women and families with young children who would otherwise be returned to areas where living conditions are very harsh, such as on account of famine.<sup>270</sup> Unaccompanied minors may be granted complementary protection there if they will be placed in 'an emergency situation' if returned.<sup>271</sup> Australia has responded to particular crises (e.g. East Timor, Kosovo, China) by

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<sup>264</sup> See also the UK response to Montserrat: House of Commons, International Development Committee, First Report, *Montserrat: Report, together with the Proceedings of the Committee, Minutes of Evidence and Appendices* (18 November 1997); C. E. S. Hogan, 'Seeking Refuge in the Mother Country: UK Maintained Strict Exclusion Policy Despite Erupting Volcano' (2003) available online at: <http://www.cavehill.uwi.edu/BNCCde/montserrat/conference/papers/hogan.html> (last accessed 13 January 2011); A. Dummett and A. G. L. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weidenfeld and Nicolson, 1990).

<sup>265</sup> Kolmannskog and Myrstad, note 1 above, 323 citing ExCom Conclusion No. 103 (LVI) 'The Provision of International Protection including through Complementary Forms of Protection' (2005).

<sup>266</sup> B. Glahn, "'Climate Refugees'?: Addressing the International Legal Gaps – Part II' (undated) International Bar Association available online at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3E9DB1B0-659E-432B-8EB9-C9AEEA53E4F6> (last accessed 13 January 2011).

<sup>267</sup> Kolmannskog and Myrstad, note 1 above, 324.

<sup>268</sup> Farrell, note 234 above. See also *Shpati v. Canada (Minister of Public Safety and Emergency Preparedness)* [2010] FC 367, para. 47, stating: 'Nor do I rule out the possibility that an enforcement officer may defer removal in circumstances in which new events have occurred after the negative PRRA [Pre-Removal Risk Assessment] decision, such as natural disasters in the form of tsunamis or earthquakes or political upheavals such as "coup d'états."'

<sup>269</sup> Kolmannskog and Myrstad, note 1 above, 324.

<sup>270</sup> *Ibid.* citing Aliens Act, Law No 826 of 24 August 2005 (Denmark) para. 9(b)(1).

<sup>271</sup> Aliens Consolidation Act (Denmark) s 9(c)3 cited in ECRE, note 171 above, 7.

creating ad hoc visa categories.<sup>272</sup> Belgium created ad hoc temporary protection schemes during the crises in the Former Yugoslavia and Rwanda.<sup>273</sup>

Canada's Immigration and Protection Regulations provide that:

The Minister may impose stay on removal orders with respect to a country or place if the circumstances in that country or place pose a generalised risk to the entire civilian population as a result of a) an armed conflict within the country, b) an environmental disaster resulting in a substantial temporary disruption of living conditions, c) any situation that is temporary or generalised.<sup>274</sup>

Finnish law makes provision for immigration on humanitarian grounds, where, on the basis of a joint proposal from the Ministry of the Interior and the Ministry for Foreign Affairs, the government decides in a plenary session to admit aliens to Finland on special humanitarian grounds.<sup>275</sup> While initial admission is on a temporary basis, a continuous residence permit may be granted after three years if the grounds for issuing the temporary permit still exist.<sup>276</sup> A permanent residence permit may be granted four years after that.<sup>277</sup>

In Germany, the local state (*Land*) authorities may authorize a stay on removal on humanitarian or international law grounds for particular groups of people.<sup>278</sup> Swiss law provides provisional protection to people exposed to a serious general danger, especially during internal armed conflict or situations of generalized violence.<sup>279</sup> Although climate change is not expressly mentioned, the provision may cover this.<sup>280</sup> Provisional protection is granted for up to five years, after which time a resident permit is granted. This expires as soon as protection is withdrawn, but can be challenged on an individual case-by-case basis.<sup>281</sup> If protection has not been withdrawn after 10 years, an establishment permit may be granted.<sup>282</sup>

What most of these ad hoc schemes have in common is the designation of particular countries as demonstrating sufficient, objective characteristics that 'justify' movement, thereby obviating the need for people wishing to leave them to show specific reasons why climate change is personally affecting them.<sup>283</sup> Prima facie refugee status is similarly predicated on

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<sup>272</sup> See e.g. Migration Regulations 1994 (Cth) sch 2, Subclass 448 Kosovar Safe Haven (Temporary).

<sup>273</sup> D. Vanheule, 'The Qualification Directive: A Milestone in Belgian Asylum Law' in Karin Zwaan (ed), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2007) 71.

<sup>274</sup> Immigration and Refugee Protection Regulations (Canada) s 230(1) cited in *VL (Risk-Failed Asylum Seekers) Democratic Republic of Congo CG* [2004] UKAIT 00007 (28 January 2004) para. 61.

<sup>275</sup> Aliens Act (301/2004, amendments up to 458/2009 included) (Finland) s 93.

<sup>276</sup> Aliens Act (301/2004, amendments up to 458/2009 included) (Finland) s 113(2); ECRE, note 171 above, 37.

<sup>277</sup> Aliens Act (301/2004, amendments up to 458/2009 included) (Finland) s 56(1).

<sup>278</sup> Residence Act of 30 July 2004 (Federal Law Gazette I, p 1950), last amended by the Act on Implementation of Residence- and Asylum-Related Directives of the European Union of 19 August 2007 (Federal Law Gazette I, p 1970) (Germany) s 60a(1).

<sup>279</sup> Asylum Act of 26 June 1998 (as amended up to December 2008) ch 1, art. 4.

<sup>280</sup> Kälin, note 40 above, 100. He notes that this was the conclusion of an inter-departmental roundtable discussion by the Swiss Ministry of Foreign Affairs on 13 January 2009, at which he was present.

<sup>281</sup> Asylum Act of 26 June 1998 (as amended up to December 2008) ch 4, art. 74(2); ECRE, note 171 above, 62.

<sup>282</sup> Asylum Act of 26 June 1998 (as amended up to December 2008) ch 4, art. 74(3).

<sup>283</sup> Others have envisaged a similar mechanism: see Annex 2.

the fact that a person has fled a particular country (generally in conflict), and is deemed on that purely objective evidence to have a protection need.<sup>284</sup>

There are parallels here with the development of the international refugee protection regime began. A series of international agreements, based on the refugees' country of origin, was created in response to particular (albeit, politically selected) crises. Over time, the international community was able to articulate the fundamental characteristics of a person in need of protection in a more general form, embodied in the Convention 'refugee' definition. Perhaps this is a necessarily cautious way to respond to an emerging problem in order to understand it and the implications of responses.

#### 4.2.2 *Discretionary grounds for individual claimants*<sup>285</sup>

Many States have some form of discretionary leave to remain on humanitarian or compassionate grounds.<sup>286</sup> Their applicability to a person seeking protection on the basis of climate change-related displacement will vary from jurisdiction to jurisdiction, since each has different requirements as to eligibility for humanitarian protection and it remains to be seen whether the decision makers would be prepared to construe their circumstances as being of an exceptional humanitarian nature. Some humanitarian mechanisms can only be triggered once a failed asylum application has been made, or take into account the length of time a person has already spent in the country in which they are seeking to remain (and thus the level of integration there). Some statuses do not provide very extensive rights, or may be temporary. A temporary status does not solve the problem for those who are permanently displaced, although some may become permanent after a certain period of time.

### 4.3 Migration responses

Finally, even though it is not a protection visa, New Zealand's Pacific Access Category deserves a brief mention given widespread misunderstandings about its purpose. In 2002, New Zealand created a visa called the Pacific Access Category, which was based on an existing scheme for Samoans and replaced previous work schemes and visa waiver schemes for people from Tuvalu, Kiribati and Tonga.<sup>287</sup> This visa has mistakenly been hailed as an immigration response to people at risk of climate-induced displacement in the Pacific, both in media and academic circles.<sup>288</sup> Although the scheme was extended to citizens of Tuvalu after

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<sup>284</sup> The Migration (Climate Refugees) Amendment Bill 2007, proposed by the Australian Greens (discussed below), suggested a mechanism whereby an individual application for a 'climate change refugee visa' would trigger a requirement for the Minister for Immigration to make a declaration about the 'climate change circumstance' on which the application was based, thus creating a visa pathway for others similarly affected.

<sup>285</sup> See also discussion of UK Discretionary Leave above in section 3.3.3.

<sup>286</sup> For an analysis of State practice in 10 European countries, see ECRE, note 171 above, report. Of the 10 States surveyed by ECRE, only Switzerland did not have such a provision: 7. The New Zealand Immigration Act provides that a person may be permitted to remain in New Zealand if 'there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be deported from New Zealand', and it would not be contrary to the public interest to permit the person to remain: Immigration Act 2009 (NZ), s 207. In Australia, a failed asylum claimant may seek Ministerial intervention on public interest grounds, which include humanitarian and compassionate considerations: Migration Act 1958 (Cth) (Australia) s 417. In Canada, people may apply for Pre-Removal Risk Assessment or lodge a Humanitarian and Compassionate claim.

<sup>287</sup> L. Dalziel, 'Government Announces Pacific Access Scheme' (*Beehive*, 20 December 2001) available online at: <http://www.beehive.govt.nz/node/12740> (last accessed 17 May 2011).

<sup>288</sup> For example, it is relied upon in C. Boano, R. Zetter and T. Morris, 'Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration' (20 December

a plea from that country's government for special immigration assistance to enable some of its 12,000 citizens to relocate, it is a traditional migration programme rather than one framed with international protection needs in mind.<sup>289</sup>

The scheme permits an annual quota of 75 citizens each from Tuvalu and Kiribati and 250 each from Tonga (and previously Fiji), plus their partners and dependent children, to settle in New Zealand.<sup>290</sup> Eligibility is restricted to applicants between the ages of 18 and 45, who have a job offer in New Zealand, meet a minimum income requirement and have a minimum level of English. Selection is by ballot. The programme is well-known in Tuvalu and Kiribati: almost every person interviewed referred to and welcomed it, although noted that some improvements could be made.<sup>291</sup>

Though New Zealand does not formally have any humanitarian visas relating to climate change and displacement, it is developing a general policy on environmental migration. It has expressed its commitment to 'respond to climatic disasters in the Pacific and manage changes as they arise.'<sup>292</sup> In addition to complementary protection grounds, the New Zealand Immigration Act provides that a person may be permitted to remain in New Zealand if 'there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be deported from New Zealand', and it would not be contrary to the public interest to permit the person to remain.<sup>293</sup>

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2007) Policy Briefing by the Refugee Studies Centre for the Department for International Development in 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', *Les Cahiers du CEDEM* 2006, available online at: <http://www.cedem.ulg.ac.be/m/cdc/12.pdf> (last accessed 17 May 2011). See also Corlett's critique: D. Corlett, 'Tuvalunacy, or the Real Thing?' *Inside Story* (27 November 2008) available online at: <http://inside.org.au/tuvalunacy-or-the-real-thing/> (last accessed 28 January 2011). It appears that the misunderstanding was perpetuated by Al Gore's film, *An Inconvenient Truth* (2006).

<sup>289</sup> Interestingly, programmes like this may ultimately be the basis on which veiled assistance is afforded to those at risk of climate-induced displacement, since this may be politically more palatable than an explicit scheme to address the issue.

<sup>290</sup> 'Pacific Access Category' (*Immigration New Zealand*, last updated 29 November 2010) available online at: <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/> (last accessed 14 January 2011).

<sup>291</sup> People interviewed commented on difficulties in securing a job offer in New Zealand, and the fact that eligibility is only assessed after the ballot has been drawn. Although I did not encounter this view in my own interviews, one community leader reportedly condemned the scheme as a new type of 'slavery immigration', whereby educated Tuvaluans renounce stable, white-collar government employment at home to end up as cleaners or fruit-pickers in New Zealand quoted in Shawn Shen, 'Noah's Ark to Save Drowning Tuvalu' (2007) 10 *Just Change* 18, 19.

<sup>292</sup> 'Background: Environmental Migrants/Relocation/Displacement', New Zealand Government Poznan Delegation Brief for UNFCCC COP14, 343 (released pursuant to an Official Information Act request). The President of Kiribati has noted that so far, the country most receptive to his plea for more migration has been East Timor: see remarks quoted in Morton, note 261 above. This accords with comments made by the President of East Timor, Dr. José Ramos-Horta, at the Diplomacy Training Programme 20th Anniversary Public Lecture (Faculty of Law, University of New South Wales, 23 July 2009) available online at: <http://tv.unsw.edu.au/video/dr-jose-ramos-horta-dtp-20th-anniversary-public-lecture> (last accessed 17 May 2011). In 2009, Fiji's interim Minister of Foreign Affairs stated that his country would consider taking 'climate change refugees from Tuvalu and Kiribati in the future' on the basis of 'historical ties with both these two countries' and the fact that there are already Tuvaluans and i-Kiribati living in Fiji: Radio New Zealand, 2009, cited in R. Bedford and C. Bedford, 'International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu', in B. Burson (ed), *Climate Change and Migration: South Pacific Perspectives* (Victoria: Institute of Policy Studies, 2010) 90.

<sup>293</sup> Immigration Act 2009 (NZ) s 207.

## 4.4 Protection of persons in the event of natural disasters

### 4.4.1 Introduction

The recorded number of annual natural disasters has risen from 200 to 400 over the past 20 years.<sup>294</sup> Insurance company Munich Re reported that the number of extreme weather events had tripled since 1980, a trend it predicted would persist. It attributed 21,000 deaths from January-September 2010 to climate change, representing double the number of casualties from extreme weather events identified in 2009.<sup>295</sup> The UN Emergency Relief Coordinator has suggested that more frequent and severe disasters may be ‘the new normal’.<sup>296</sup>

In 2009, the Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council’s Internal Displacement Monitoring Centre (IDMC) sought to calculate the numbers of people displaced by sudden-onset natural disasters.<sup>297</sup> For 2008, it found that up to 36 million people had been displaced for this reason, of whom some 20 million people were displaced by *climate*-related sudden-onset disasters.

These calculations must be approached with caution given the methodological obstacles they entail. Some researchers suggest that they reflect increased population vulnerability rather than a higher number of natural hazards.<sup>298</sup> Nevertheless, a rising trend in the occurrence of natural disasters suggests that existing patterns of displacement are likely to continue, and possibly increase. This will predominantly mean an increase in *internal* displacement, although there may also be enhanced cross-border displacement (most likely where there are existing patterns of cross-border movement with family and kinship networks abroad).<sup>299</sup>

### 4.4.2 Normative frameworks

Norms relating to disaster response are of limited utility since they relate predominantly to relief and assistance, rather than ‘protection’ in the international refugee law sense, which implies the principle of *non-refoulement* and asylum. Disasters bring ‘another specialized conceptualization of protection, including, for example, humanitarian access to the victims, securing safe zones, the provision of adequate and prompt relief and ensuring respect for human rights.’<sup>300</sup>

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<sup>294</sup> Emergency Event Database available online at <http://www.emdat.be> (last visited 25 November 2009). For an overview of policy responses to natural disasters, see Gemenne, note 5 above, ch 5.

<sup>295</sup> Reported in A. Morton, ‘Believe It or Not, Climate Debate Heats Up’ *Sydney Morning Herald* (1–2 January 2011), *News Review* 10.

<sup>296</sup> Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, ‘Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition “DIHAD 2008 Conference”’ (Dubai, 8 April 2008) available online at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7DHL88?OpenDocument> (last accessed 17 May 2011).

<sup>297</sup> OCHA, the Internal Displacement Monitoring Centre (IDMC) and the Norwegian Refugee Council, *Monitoring Disaster Displacement in the Context of Climate Change: Findings of a Study by the United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre* (Geneva: IDMC, September 2009) 8–9.

<sup>298</sup> See R. J. T. Klein and R. J. Nicholls, ‘Assessment of Coastal Vulnerability to Climate Change’ (1999) 28 *Ambio* 182.

<sup>299</sup> See McAdam and Saul, note 41 above.

<sup>300</sup> ILC, ‘Protection of Persons in the Event of Disasters: Memorandum by the Secretariat’, Sixtieth Session UN Doc. A/CN.4/590, 11 December 2007, (‘ILC Memorandum’) para. 251, referring to Economic and Social Council, ‘Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Human Rights, Mass Exoduses and Displaced Persons’ UN Doc. E/CN.4/1995/50, 2 February 1995, para. 182. ‘Moreover, the substantive limits of this protection will differ in “simple” cases of disaster —where the focus will be on ensuring basic rights to food

There are a number of international disaster reduction and/or management frameworks.<sup>301</sup> All of these are non-binding on States, although a number of States have incorporated them into their national disaster plans.<sup>302</sup> Additionally, two human rights treaties expressly refer to disaster relief, focusing on the need to protect and assist particular groups affected by a disaster.<sup>303</sup>

Since 2007, the International Law Commission (ILC) has been drafting articles on the ‘Protection of persons in the event of disasters’.<sup>304</sup> Given the large numbers of people affected by disasters annually, and the increased need for international cooperation in the provision of disaster relief assistance, the ILC perceived the need to clarify the legal regulation of such assistance. It noted that international law had developed a complex set of rules governing the initiation of disaster relief, questions of access, issues of status and the provision of relief itself. It regarded consideration of the protection of people in disasters as ‘a necessary component for a complete international disaster relief regime’.<sup>305</sup>

However, as noted above, ‘protection’ in this context relates to relief and assistance. The Draft Articles are *not* about responding to disaster-related displacement, but rather about the protection of people affected by a disaster, whether displaced or not. Article 2 explains that their purpose is ‘to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.’ The key duty-bearer is the affected State, although wider obligations are also recognized through the duty to cooperate articulated in draft article 5. Indeed, during deliberations it was noted that if a State refused assistance in certain circumstances, this ‘could lead to the existence of an internationally wrongful act if such refusal undermined the rights of the affected individual under international law’.<sup>306</sup> Thus, while this normative framework may provide a useful conceptualization of relevant human rights in the disaster context,<sup>307</sup> it is not a ready-made tool for addressing disaster-related displacement.

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and shelter — as compared to complex emergencies in which questions of access predominate (*ibid.* para. 181).’

<sup>301</sup> For example Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters (World Conference on Disaster Reduction, Hyogo, 18–22 January 2005); IASC Operational Guidelines on Human Rights and Natural Disasters (Brookings-Bern Project on Internal Displacement 2006); Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IFRC 2007).

<sup>302</sup> Gemenne, note 5 above, 234.

<sup>303</sup> International Convention on the Rights of Persons with Disabilities art. 11; African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (adopted 11 July 1990, entered into force 29 November 1999) arts 23 and 25.

<sup>304</sup> For text and commentary to date, see ILC Report, note 229 above, 321ff. See also ILC Memorandum, note 300 above; ILC, ‘Protection of Persons in the Event of Disasters: Memorandum by the Secretariat: Addendum’ Sixtieth Session, UN Doc. A/CN.4/590/Add.1, 26 February 2008, which contains definitions from various international and national instruments; ILC, ‘Preliminary Report on the Protection of Persons in the Event of Disasters by Mr. Eduardo Valencia-Ospina, Special Rapporteur’, Sixtieth Session, UN Doc. A/CN.4/598, 5 May 2008.

<sup>305</sup> ILC Memorandum, note 300 above, 3.

<sup>306</sup> ILC Report, note 229 above, para. 318. In 2009, the Commission excluded the applicability of the ‘responsibility to protect’.

<sup>307</sup> The draft articles do not refer to human rights ‘as set out in international instruments’, in order not to overlook ‘human rights obligations applicable on States by way of customary international law’, and ‘assertions of best practices for the protection of human rights included in non-binding texts, of which there exist a relatively large number relevant to disaster relief and assistance’: ‘Protection of Persons in the Event of Disasters: Statement of the Chairman of the Drafting Committee’, 20 July 2010, 8. Indeed, the Committee was



Article 3 defines a ‘disaster’ as ‘a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.’ The provision covers natural and human-made disasters, and disasters ‘may include both wholly natural elements and contributions from human activities.’<sup>308</sup> It is intended to include all phases of disasters,<sup>309</sup> although the primary focus is on the post-disaster and recovery phase.<sup>310</sup>

The qualifier ‘calamitous’ stresses the extreme nature of the events covered by the draft articles.<sup>311</sup> To be ‘calamitous’, a disaster must result in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage,<sup>312</sup> and also meet the high threshold requirement of seriously disrupting the functioning of society.<sup>313</sup> In other words, widespread loss of life alone is not enough – there must be an additional social impact.<sup>314</sup>

This is a very legalistic approach to disasters which does not necessarily sit comfortably with other contemporary conceptualizations. The ILC noted that the predominant conceptualization of a disaster in the humanitarian assistance community was ‘the *consequence* of an event, namely the serious disruption of the functioning of society caused by that event, as opposed to being the event itself’, an approach reflected *inter alia* in the Hyogo Framework and the 2007 IFRC Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance. Nevertheless, it chose to return to an earlier conception of a disaster as a ‘specific event’, ‘since it was embarking on the formulation of a legal instrument, which required a more concise and precise legal definition, as opposed to one that is more policy-oriented.’<sup>315</sup> It felt that the additional threshold in the definition of a ‘disaster’ – namely, the need to show that the disaster caused serious social disruption – was where it reflected the humanitarian assistance approach of looking to *consequences* of the disaster.<sup>316</sup>

This is both the difficulty and the danger of tailoring legal norms to a new context. The difficulty is in specifying with sufficient clarity a legal definition that is workable and that will get buy-in from States. The danger is that the law then responds only to a narrow subset of disasters, or does not facilitate a holistic response to disasters but rather one in which traditional disciplinary boundaries remain entrenched. It also highlights the risk of developing legal responses in the abstract, without a fuller understanding of the underlying

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inspired by a similar provision recently drafted in the context of ‘expulsion of aliens’. This is an important drafting point to bear in mind if guiding principles are to be drafted for the climate displacement context.

<sup>308</sup> Commentary, draft article 3, para. 3: ILC Report, note 229 above, 325.

<sup>309</sup> ‘Protection of persons in the event of disasters: Statement of the Chairman of the Drafting Committee, Mr. Marcelo Vázquez-Bermúdez’, 31 July 2009, 3.

<sup>310</sup> Commentary, draft article 1, para. 4: ILC Report, note 229 above, 322.

<sup>311</sup> Commentary, draft article 3, para. 3: ILC Report, note 229 above, 325. ‘This was inspired by the definition adopted by the Institute of International Law at its 2003 Bruges session, which deliberately established such higher threshold so as to exclude other acute crises’. For other examples of how ‘disaster’ has been defined, see ILC Memorandum Addendum, note 304 above, 5–8. There is no reference to climate change in any of the instruments cited there.

<sup>312</sup> The last of these is intended to cover the human impact of environmental damage rather than actual economic loss: Commentary, draft article 3, para. 7: ILC Report, note 229 above, 326.

<sup>313</sup> See discussion above at section 2.5 on OAU Convention – ‘seriously disturbing public order’.

<sup>314</sup> Commentary, draft article 3, para. 4: ILC Report, note 229 above, 326.

<sup>315</sup> Commentary, draft article 3, para. 2: ILC Report, note 229 above, 325.

<sup>316</sup> Commentary, draft article 3, para. 4: ILC Report, note 229 above, 326.

empirics. There is a risk that without an integrated approach, the law becomes meaningless because it does not respond adequately to the problems at hand.

Accordingly, analysis of the ILC's deliberations in identifying the international legal norms applicable to disasters may be instructive if a similar process is to occur in the displacement context, not least because they highlight some of the difficulties in translating policy concerns into sufficiently specific legal rules. Even though the draft articles do not directly bear on the *displacement* of people as a result of natural disasters, their normative underpinning is very important and would be equally applicable in the displacement context. In particular, the ILC has emphasized that the principle of humanity is 'the cornerstone for the protection of persons in international law since it place[s] the affected person at the centre of the relief process and recognize[s] the importance of his or her rights and needs.'<sup>317</sup> Similarly, human dignity is 'a principle underlying all human rights'<sup>318</sup> which should guide legal and policy outcomes.

#### 4.5 Conclusion

It is likely that some people fleeing the impacts of climate change will need permanent solutions (such as those displaced from small island States or by rising sea levels).<sup>319</sup> Nonetheless, the creation of temporary protection schemes may be one way of eliciting initial international support for managing climate change-related displacement within a rights-based framework for protection and assistance, since it does not require States to permanently resettle people. An instrument modelled in its content on the Guiding Principles on Internal Displacement<sup>320</sup> could identify the specific needs of the displaced within the framework of States' existing international human rights obligations. This would also help to formalize long-standing ad hoc schemes of temporary protection.<sup>321</sup>

Having a foothold via a temporary protection mechanism may also help to sure up a subsequent, more permanent status. Of course, it would be preferable to circumvent the political charade of insisting on temporary protection if it is likely, in the longer term, to become permanent in any event, and this is why principled advocacy for lasting immigration options is also very important (especially in contexts such as the Pacific where numbers are very small, and debates about international treaties are ill-suited to the particulars of that situation).

International disaster frameworks may be helpful to the extent that they identify needs and rights at particular stages of a disaster, much like the Guiding Principles on Internal Displacement do.<sup>322</sup> Unlike the Guiding Principles, however, their focus is on assistance and

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<sup>317</sup> Commentary, draft article 3, para. 4: ILC Report, note 229 above, para. 310.

<sup>318</sup> 'Protection of Persons in the Event of Disasters', note 307 above, 7.

<sup>319</sup> See McAdam, "Disappearing States", *Statelessness and the Boundaries of International Law* in McAdam (ed.), note 34 above.

<sup>320</sup> See further Annex 1.

<sup>321</sup> See e.g. G. S. Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers' (1986) 26 *Virginia Journal of International Law* 897; D. Perluss and J. F. Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 *Virginia Journal of International Law* 551.

<sup>322</sup> See ILC Secretariat Memo, note 300 above, para. 253 for human rights affected at the emergency and recovery phases of the disaster. While it may be tempting to view these rights as providing a rights hierarchy for people displaced across an international border as well, this reasoning is flawed. This is because in the disaster context, this rights 'distinction' is partly justifiable on account of which human rights can be derogated from during a state of emergency. Additionally, the State's ability to provide rights is hampered by the very fact

protection of disaster victims per se, irrespective of whether or not they are displaced.<sup>323</sup> Accordingly, they do not address the particular responsibilities of States and other actors which may arise in the event of disaster-related displacement. Fundamentally, they do not respond adequately to movement in response to slow-onset changes. This is where there is a clear protection gap.

## 5. Analytical assessment

In light of the analysis above, this section raises some thematic issues highlighting gaps in the existing normative framework, particularly in relation to rapid versus slow-onset climate processes.

### 5.1 Timing

The protection possibilities discussed above may assist in cases of sudden movement in response to a disaster or emergency, but are a very uneasy fit for slow-onset climate processes. Even those who have called for a considerable widening of the Refugee Convention framework seem to assume protection must be linked to ‘flight’, rather than to departure ‘before the circumstances degenerate to life-threatening proportions’.<sup>324</sup>

Existing international refugee and complementary protection frameworks do not adequately address the time dimension of pre-emptive and staggered movement. Even though it is the severity of harm,<sup>325</sup> and not the timing of it, determines a protection need, the two are necessarily interrelated. Since the impacts of slow-onset processes may take some time before they amount to sufficiently serious harm, the timing of a protection claim is crucial.<sup>326</sup> The ability of existing legal mechanisms to respond to climate-related movement—through complementary protection in particular—would depend on the point in time at which protection is sought, based on the severity of the immediate impacts on return. These are matters that any new protection or migration agreement, whatever its form, would need to address.

In a case concerning the right to life and the potential use of nuclear weapons, the UN Human Rights Committee held that for a person to be considered a ‘victim’ of a violation of the ICCPR,<sup>327</sup> and thus eligible to bring an individual complaint, ‘he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of

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of the disaster, whereas a receiving State not affected by the disaster has no valid reason to withhold rights on the basis that some go beyond ‘basic’ survival rights.

<sup>323</sup> Indeed, in many disaster-related agreements, provisions on freedom of movement relate solely to the rights of relief personnel to gain access to affected areas: see ILC Secretariat Memo, note 300 above, paras 110ff.

<sup>324</sup> Kibreab, note 27 above, 398 referring to A. R. Zolberg *et al.*, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford: OUP, 1989) 31, who advocate that the term ‘refugee’ should encompass any flight from life-threatening violence.

<sup>325</sup> In refugee law, to constitute ‘persecution’ acts must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, or they must amount to an accumulation of measures of equivalent severity: Goodwin-Gill and McAdam, note 50 above, 91.

<sup>326</sup> This is apparent in some of the cases that have already been brought before the Refugee Review Tribunal in Australia and the Refugee Status Appeals Authority in New Zealand: see e.g. 0907346 [2009] RRTA 1168 (10 December 2009). For other cases, see J. McAdam, ‘Review Essay: From Economic Refugees to Climate Refugees?’ (2009) 10 *Melbourne Journal of International Law* 579.

<sup>327</sup> Protocol to the ICCPR, UNGA Res. 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976) 999 UNTS 302, art. 1.

such right, *or that such an effect is imminent*'.<sup>328</sup> This was so despite the very strong statement of the Committee in General Comment 14 that 'the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today' and that 'the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity'.<sup>329</sup> The refusal of the Committee to find a claim admissible on the basis of a potential threat to life, despite its recognition of the very serious threat that nuclear weapons pose to it, does not augur well for a successful claim on the basis of potential, slow onset climate change impacts, especially given the far less forceful comments of the Committee about the links between climate change and the right to life.<sup>330</sup>

The European Court of Human Rights has also insisted on a requirement of imminence and directness of a threat. In *Gounaridis v. Greece*, a case relating to potential environmental damage arising from the construction of a new road, the European Commission held that the applicants needed to show in a defensible and detailed way that the probability of the potential harm would directly affect them such that it amounted to a violation, not just a general risk.<sup>331</sup> Likewise, in *Tauira v. France*, the Commission found that there was insufficient evidence to show that French nuclear testing in the Pacific would *directly* affect the applicants' right to life, private life and property.<sup>332</sup> In a case concerning the impact of a nuclear power plant on the right to life, the court said the applicants were alleging 'not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants'.<sup>333</sup> The dissenting judges noted the irony that 'it is virtually impossible to prove imminent danger in the case of inherently dangerous installations'.<sup>334</sup> Elsewhere, European Court of Human Rights noted that the applicants 'failed to show that the operation of the power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent'.<sup>335</sup>

Similarly, a crucial factor in the article 3 ECHR health/medical cases that have not succeeded before the European Court of Human Rights is that at the time when they were brought, the applicant's condition was not sufficiently 'advanced' or 'terminal', and the cases were thus declared inadmissible.<sup>336</sup> Such cases were distinguished from *D.* on the grounds that 'the applicant's illness had not yet reached such an advanced stage that his deportation would amount to treatment proscribed by Article 3'.<sup>337</sup> It was the already terminal condition of the applicant in *D. v. United Kingdom* which made his case 'exceptional'.<sup>338</sup>

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<sup>328</sup> *Aalbersberg v. The Netherlands* Communication No. 1440/2005, 14 August 2006, para. 6.3 (emphasis added).

<sup>329</sup> General Comment No. 14, note 91 above.

<sup>330</sup> See Office of the High Commissioner for Human Rights, note 96 above, paras 21–24.

<sup>331</sup> *Gounaridis and others v. Greece*, App. No. 41207/98 (Commission) in L. G. Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights' in L. G. Loucaides, *The European Convention on Human Rights: Collected Essays* (Leiden: Mart.inus Nijhoff, 2007) 169.

<sup>332</sup> *Tauira and others v. France*, App. No. 28204/95 (Commission, 4 December 1995). See also *LCB v. United Kingdom*, App. No. 23413/94 (ECtHR, 9 June 1998). These cases are cited in Loucaides, note 331 above, 169.

<sup>333</sup> *Athanassoglou and others v. Switzerland*, App. No. 27644/95 (ECtHR, 6 April 2000).

<sup>334</sup> *Athanassoglou v. Switzerland*, note 333 above (joint dissenting opinion).

<sup>335</sup> *Balmer-Schafroth v. Switzerland*, App. No. 22110/93 (ECtHR, 26 August 1999).

<sup>336</sup> See e.g. *Karara v. Finland*, App. No. 40900/98 (Optional Commission, 29 May 1998); *SCC v. Sweden*, App. No. 46553/99 (ECtHR, 15 February 2000); *Arcila Henao v. The Netherlands*, App. No. 13669/03 (ECtHR, 24 June 2003); *Ndangoya v. Sweden*, App. No. 17868/03 (ECtHR, 22 June 2004).

<sup>337</sup> *Karara v. Finland* cited in *N. v. United Kingdom*, para. 36. In *N. v. United Kingdom*, the applicant was not expected to survive for more than one to two years if removed. Although Lord Nicholls pondered 'why is it unacceptable to expel a person whose illness is irreversible and whose death is near, but acceptable to expel a

In *N.*'s case, the court stated:

The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support, and care, including help from relatives, *must involve a certain degree of speculation*, particularly in view of the *constantly evolving situation* as regards the treatment of HIV and AIDS worldwide.<sup>339</sup>

One could imagine a similar rationale being used in the climate change context, given uncertain timescales about when climate change impacts will be most severe, and the 'constantly evolving situation' with respect to human adaptation and resilience. This is where the standard of proof from refugee law may be instructive. A 'well-founded fear of persecution' can be less than a 50 per cent chance of harm.<sup>340</sup> Any refugee determination is therefore necessarily an 'essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin'.<sup>341</sup> A degree of speculation about future risk does not preclude a protection need from being recognized. Thus, the assessment of the intensity, severity and nature of *future harm*, based on the individual's circumstances, is the key factor that leads to refugee status being granted. That assessment is not a prediction, but rather a *supposition*, based on the available evidence. Foster has argued that the approach in *N. v United Kingdom* ignores the fact that the test relates to *foreseeability* of harm.<sup>342</sup>

## 5.2 The individual nature of the harm

The traditional western approach of individualized decision-making about protection on technical legal grounds seems highly inappropriate to the situation of climate-induced displacement, in which the responsibility for displacement is highly diffuse (attributable to a large number of polluting States over many years, rather than to direct ill-treatment of a particular person by a certain government) and the numbers of those displaced may require group-based rather than individualized solutions.

Existing jurisprudence relating to socio-economic-based protection and environmental claims requires some *individual* factor that makes the situation intolerable for the particular applicant.<sup>343</sup> A considerable relaxation of this requirement would be needed if the ECHR is to protect against return to climate change-related harms.

That said, special characteristics of the applicant may improve the possibility of protection being granted.<sup>344</sup> For example, the child-centric approach advocated by Baroness Hale in *EM*

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person whose illness is under control but whose death will occur once treatment ceases (as well may happen on deportation)?', he still refused the appeal: *N v. Secretary of State for the Home Department* para. 13.

<sup>338</sup> *N. v. Secretary of State for the Home Department* para. 36 (Lord Hope).

<sup>339</sup> *N. v. United Kingdom* para. 50 (emphasis added).

<sup>340</sup> *INS v. Cardoza-Fonseca*, 480 US 421, 431 (1987); *Chan v. Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para. 42, states: 'In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.'

<sup>341</sup> Goodwin-Gill and McAdam, note 50 above, 54.

<sup>342</sup> Foster, note 86 above, 294.

<sup>343</sup> See section 5.1 above on 'timing'.

<sup>344</sup> *N. v United Kingdom* para. 29. See also *Adam*. See e.g. *Fadele v. United Kingdom* (1990) HRC vol 1(1) 15, cited in N. Blake and R. Hussain, *Immigration, Asylum and Human Rights* (Oxford: OUP, 2003) 100; *Taspinar v. The Netherlands* (1984) 8 EHRR 47; *Mayeka v. Belgium* (2008) 46 EHRR 23, cited in Foster, note

(*Lebanon*)<sup>345</sup> based on the fact that the ‘best interests of the child’ must be a ‘primary consideration’ in any decision affecting a child means that children may have a higher chance of being granted protection under article 3. This is apparent in some of the cases already cited above.<sup>346</sup> As the Scottish Inner House (court of final instance) recently affirmed:

Best interests [of the child] are not merely relevant. They are given a hierarchical importance. The decision maker is being told by Article 3 [of the CRC] that they are not just something to be taken into account but something to be afforded a grander status. They are to be regarded as a matter of importance. That having been said, the measure of that importance in the final balance will depend upon the facts and circumstances of the particular case.<sup>347</sup>

The Canadian courts have found that in the consideration of a humanitarian and compassionate claim, an immigration official erred by failing to give ‘due consideration to the best interests of the applicants’ three young Canadian-born children’, including failing ‘to mention the serious issues facing children in Bangladesh, such as poor educational opportunities, diseases and natural disasters.’<sup>348</sup>

However, a word of caution is needed when it comes to special characteristics generally. There is an important difference between assessing risk on the basis of the applicant’s particular circumstances, and requiring an applicant to show ‘further special distinguishing features’, which ‘might render the protection offered by [article 3] illusory’.<sup>349</sup> Just as in cases of generalized violence it is wrong in principle to limit the concept of ‘persecution’ to measures immediately identifiable as direct and individual,<sup>350</sup> so in the case of broad-ranging climate impacts, the relevant question is whether the applicant faces a real risk of serious harm if removed, not whether the applicant is at greater risk than others.<sup>351</sup>

### 5.3 The role of climate change in legal analysis of ‘harm’ feared

Finally, it is important to examine the relevance of ‘climate change’ in any legal analysis of harm. Kälin suggests that ‘it is conceptually sounder to look at sudden-onset disasters as a cause of displacement, and not to limit the focus to those triggered by global warming’.<sup>352</sup> Similarly, in the slow-onset context, Kolmannskog and Trebbi argue that the focus should not be on why someone left their home initially, ‘but rather whether the gradual degradation has

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86 above, 306. See also Committee on the Rights of the Child, ‘General Comment No. 6’, note 92 above, para. 27.

<sup>345</sup> Para. 28.

<sup>346</sup> For example *ZK (Afghanistan) v. Secretary of State for the Home Department* [2010] All ER (D) 265 (Jun) paras 25 and 26.

<sup>347</sup> *HS v. Secretary of State for the Home Department* [2010] CSIH 97 (Scottish Extra Division, Inner House, Court of Session) para. 15.

<sup>348</sup> *Mazharul Hasan v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1100, para. 5.

<sup>349</sup> *Salah Sheekh v. The Netherlands*, App. No. 1948/04 (ECtHR, 11 January 2007) para. 148. See also UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive* (UNHCR 2007) 74.

<sup>350</sup> Goodwin-Gill and McAdam, note 50 above, 129. See the reference there in fn 364 to *R v. Secretary of State for the Home Department, ex parte Jeyakumaran* (No. CO/290/84, QBD, unreported, 28 June 1985).

<sup>351</sup> See also *Elgafaji v. Staatssecretaris van Justitie*, Case C-465/07, Judgment of the European Court of Justice (Grand Chamber, 17 February 2009) para. 39: ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.’ See also Hathaway, note 62 above, 97.

<sup>352</sup> Kälin, note 40 above, 85.

reached a critical point where they cannot be expected to return now.’<sup>353</sup> Thus, in a complementary protection claim, the focus is the nature of potential *harm*, not its cause. In a human rights analysis, whether the source of that harm is attributable to climate change or other socio-economic or environmental pressures is immaterial (and misplaces the focus of the inquiry);<sup>354</sup> what matters is the harm likely to be faced by the individual if removed. This is what Kälin describes as the ‘returnability test’, which emphasizes the ‘prognosis’ – whether it is safe to return – rather than the underlying motivations for movement. Such a test would be based on the ‘permissibility, feasibility (factual possibility) and reasonableness of return’.<sup>355</sup>

Thus, a decision maker’s task is to determine whether returning the particular individual to the conditions overall in the country of origin will amount to a breach of a protected right, *not* the precise cause of that harm.<sup>356</sup> Focusing on the latter may complicate and narrow climate change-related claims: the ability to take into account the full range of country and personal conditions, irrespective of their cause, may in fact enhance the claim.

## 6. Conclusion and policy options

### 6.1 Concluding remarks

Legal and policy responses must involve a combination of strategies, rather than an either/or approach. Physical adaptation needs to be financed and developed, and migration options, including opportunities for economic, family and educational migration, need to be accepted as a rational and normal adaptation strategy, rather than as a sign that adaptation has failed. While movement can be a sign of vulnerability, it can also be a means to achieve security and attain human rights, especially when it is able to be planned.

Localized or regional responses may be better able to respond to the particular needs of the affected population in determining who should move, when, in what fashion, and with what outcome. Staggered migration, circular migration, or the promise of a place to migrate to should it become necessary might be welcome measures that could appeal both to host and affected communities alike.<sup>357</sup> Furthermore, by contrast to many other triggers of displacement, the slow onset of some climate change impacts, such as rising sea levels, provides a rare opportunity to *plan* for responses, rather than relying on a remedial instrument in the case of spontaneous (and desperate) flight.

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<sup>353</sup> V. Kolmannskog and L. Trebbi, ‘Climate Change, Displacement and Protection: A Multi-Track Approach’ (2010) 92 *International Review of the Red Cross* 713.

<sup>354</sup> An exception would be if the harm could be directly linked back to the action or negligence of the home State, in which case it could be a juridically relevant fact. See e.g. *Budjeva*.

<sup>355</sup> Kälin, note 40 above, 98.

<sup>356</sup> Although note recent UK authority which suggests a varying threshold in art. 3 removal cases ‘dependent upon the responsibility of the receiving state for the circumstances complained of’: *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, para. 254 citing an earlier decision of the AIT in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094 (quoted in Foster, note 86 above, 300).

<sup>357</sup> This is the preferred approach of the government of Kiribati, for example. See e.g. author interview with President Anote Tong (Kiribati, 12 May 2009); comments of Kiribati’s Foreign Secretary, Tessie Lambourne cited in L. Goering, ‘Kiribati Officials Plan for “Practical and Rational” Exodus from Atolls’ (*Reuters AlertNet*, 9 December 2009) available online at: <http://www.trust.org/alertnet/news/kiribati-officials-plan-for-practical-and-rational-exodus-from-atolls/> (last accessed 14 January 2011).

International protection frameworks, underscored by refugee and human rights law, provide important benchmarks for assessing needs and responses. They provide an existing body of rules and principles to guide and inform policymaking, with identifiable rights-bearers and duty-bearers. Though ‘the scope for activating human rights *law* is probably limited’ in the climate change context,<sup>358</sup> its normative framework can guide policy development, highlight issues that might be obscured by a purely environmental or economic analysis, and help to articulate claims about access, adaptation and balance.

The following section sets out some possible legal and policy responses to climate change-related movement. At present, protection options may only be available under existing legal frameworks in cases of sudden disaster (typically temporary protection) or where there is a particular individualized risk.

## 6.2 Policy options

At the outset, it should be noted that these options are not mutually exclusive. For example, migration options should be explored for pre-emptive movement, but this should not rule out a parallel humanitarian response for rapid-onset disasters or for people facing slow-onset change who are unable or unwilling to migrate. Such a framework may be a preliminary step towards a binding legal instrument. A range of options should be utilized which are country/region-specific and attuned to their particular needs.

### 6.2.1 Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement may provide countries facing internal movement with a blueprint for assisting and protecting people displaced internally by climate impacts, within a rule of law and human rights-based framework. Some countries, such as Colombia, have incorporated substantial parts of the Guiding Principles into domestic law, while in Africa there is now a regional treaty for the protection of IDPs.<sup>359</sup> By encouraging affected States to domestically implement the Guiding Principles, the international community could help build their capacity to rationally and responsibly deal with the plight of climate-related IDPs.

### 6.2.2 A new treaty<sup>360</sup>

There have been calls for a new international treaty to address the movement of people displaced by climate change. Proposals vary from creating a protocol to the 1951 Refugee Convention, a protocol to the UN Framework Convention on Climate Change (UNFCCC),<sup>361</sup> or a stand-alone treaty,<sup>362</sup> to provide so-called ‘climate refugees’ with international protection, including a legal status and resettlement/integration solutions.

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<sup>358</sup> S. Humphreys, ‘Competing Claims: Human Rights and Climate Harms’ in Humphreys (ed), note 68 above, 39.

<sup>359</sup> See e.g. Kampala Convention art. 5(4).

<sup>360</sup> For a critique of this idea, see McAdam, note 41 above. For a summary of the various treaty proposals, see Annex 2.

<sup>361</sup> UN Framework Convention on Climate Change (adopted 9 May 1992) UNTS 107, 1771. See e.g. Biermann and Boas, note 33 above; for criticism of their approach, see M. Hulme, ‘Commentary: Climate Refugees: Cause for a New Agreement?’ *Environment* (November–December 2008). For another UNFCCC-based proposal, see A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008) 30 *Law & Policy* 502.

<sup>362</sup> ‘Draft Convention on the International Status of Environmentally-Displaced Persons’ (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) (2008) 4 *Revue Européenne de Droit de l’Environnement* 375; B. Docherty and T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review* 349, 350, 373; ‘A Convention for



However, there are a number of shortcomings to creating a new treaty.<sup>363</sup> First, as discussed above, it is difficult to isolate climate change from other factors as the main cause of movement, which may create problems in defining the legal scope/application of the instrument, and ensuring that those intended to be covered by it actually are. Secondly, it would privilege those displaced by climate change over other forced migrants (such as those escaping poverty), perhaps without an adequate (legal and/or moral) rationale as to why.<sup>364</sup> Thirdly, it may be premised on a model of individual status determination, which is unsuited to mass displacement scenarios and may impose a high threshold on applicants in terms of linking displacement to climate change. Fourthly, defining ‘climate refugees’ may harden the category and exclude some people from much-needed assistance. Fifthly, there would seem to be little political appetite for a new international agreement. As one analyst in Bangladesh pessimistically observed, ‘this is a globe for a rich man’.<sup>365</sup>

A particular challenge for any new treaty is adequately accounting for slow-onset movements brought about by gradual environmental deterioration, as opposed to flight from sudden disasters. The refugee paradigm, which premises protection needs on imminent danger, does not capture the need for safety from longer-term processes of climate change which may ultimately render a person’s home uninhabitable.

While lobbying for such an instrument may help to generate attention and place climate change-related movement on the international agenda, it is imperative that advocacy is well-informed. If analysis is not rigorous and supported by empirical evidence, then it will not achieve its ends and could ultimately backfire.<sup>366</sup> There is also a danger that, however well-intentioned, instruments may be created that are ill-fitting and which do not adequately address the nature or location of most movement.

Certainly, a treaty that recognizes a duty to assist could help to encourage international cooperation on sharing the responsibility for displaced people, and may facilitate the establishment of institutional mandates (such as by creating a lead UN agency or focal point). However, a treaty is necessarily an instrument of compromise, and even once achieved, States must demonstrate sufficient political will to ratify, implement and enforce it. While international law provides important benchmarks and standards to regulate State action, they must be supported by political will and action to be fully effective. As Aleinikoff argues, ‘there can be no monolithic approach to migration management. Some areas might well benefit from norms adopted by way of an international convention; other instruments might work best for areas in which a consensus is further away’.<sup>367</sup>

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Persons Displaced by Climate Change’ (last updated 2010) available online at: <http://www.ccdpconvention.com/> (last accessed on 7 December 2009); Equity BD, note 35 above; author interview with SM Munjurul Hannan Khan, note 39).

<sup>363</sup> See further McAdam, note 41 above.

<sup>364</sup> For criticism of this approach, see Betts and Kaytaz, note 40 above; Betts, note 40 above.

<sup>365</sup> Author interview with Abu M Kamal Uddin, Comprehensive Disaster Management Programme (CDMP) (Dhaka, 16 June 2010).

<sup>366</sup> For example, there is some discussion that the ‘sinking’ of the Carteret Islands is not being caused by sea-level rise attributable to climate change, but rather to subsidence: J. Campbell, ‘Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land’ in McAdam (ed), note 34 above, 68.

<sup>367</sup> T. A. Aleinikoff, ‘International Legal Norms on Migration: Substance without Architecture’ in R. Cholewinski, R. Perruchoud and E. MacDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (The Hague: TMC Asser Press, 2007) 476.

### 6.2.3 Global guiding framework on climate change-related movement

A global guiding framework may usefully assist States dealing with cross-border movement. Based on existing refugee and human rights law principles, they would not only help to clarify the current scope of human rights-based *non-refoulement*, but would also provide guidance on its potential scope, especially in light of some of the contradictory jurisprudence outlined in this paper. By drawing together relevant law derived from States' existing treaty obligations, they would not require States to assume new obligations, but clarify how those obligations might apply in the climate change displacement context. They would gain authority from the fact that they would reflect, and be consistent with, binding human rights law.<sup>368</sup> In addition, such a framework could usefully point to other types of solutions that would facilitate planned and orderly movement. For example, as UNHCR has itself noted: 'Beyond the traditional refugee framework, state migration management systems might provide for the entry and temporary protection of people who are affected by climate change, natural disasters and other forms of acute distress.'<sup>369</sup>

Finally, over time, such framework may facilitate the implementation of such norms into domestic law, or inform, with the benefit of State practice, new multilateral instruments.<sup>370</sup>

Annex 1 examines this option in greater detail, since it has been raised by UNHCR as something worthy of further discussion at its expert meeting on climate change displacement in Bellagio.

### 6.2.4 Managed migration

Indeed, managed international migration provides a safer and more secure mechanism for enabling people to move away from the effects of climate change, without artificially treating people as in need of international 'protection' (from a persecutory or abusive State) in the traditional sense of refugee or human rights law. Managed migration pathways are also better suited to respond to slow-onset climate change impacts, which are unlikely to trigger existing (or future) temporary protection mechanisms designed for sudden disasters. A major reason why there are pressures on asylum systems in some industrialized countries is that avenues for 'regular' economic or other independent migration are very restricted for poor people from developing countries.<sup>371</sup>

Overseas employment provides a way of possibly improving the economic condition and social status of the family, and in this regard may provide a short-term strategy to secure marriage or education opportunities.<sup>372</sup> It is therefore a livelihood diversification and risk management tool, although it is vulnerable to shocks in the global economy.<sup>373</sup> However, domestic migration laws and bilateral agreements generally entrench low-skilled work as a temporary option, with return to the home country compelled once the contract ends. Long-term migration is therefore only an option for people of a higher economic status.

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<sup>368</sup> Kälin, note 40 above, 93.

<sup>369</sup> UNHCR, 'Climate Change, the Environment, Natural Disasters and Human Displacement: A UNHCR Perspective', 29 October 2008, 9. Interestingly, this was removed from the revised version of the paper: UNHCR, 'Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective', August 2009.

<sup>370</sup> See e.g. Kampala Convention art. 5(4). See also Betts, note 40 above.

<sup>371</sup> For analysis of this in the Bangladeshi context, see McAdam and Saul, note 41 above.

<sup>372</sup> S. R Rashid, 'Migration for Livelihood: Social Protection Issues of Rural Bangladeshis' in C. R. Abrar and J. Seeley (eds), *Social Protection and Livelihoods: Marginalised Migrant Workers of India and Bangladesh* (Dhaka: University Press, 2009) 166.

<sup>373</sup> Author interview with Dr Hameeda Hossain (Dhaka, 14 June 2010).

Global labour migration does not provide a solution for everyone. It is unlikely to provide a mobility pathway for the poorest people affected by climate change. As one Bangladeshi NGO stated, ‘those who will be affected the most unfortunately are not the skilled, so for them, the ability to move beyond the national boundary would be very difficult.’<sup>374</sup> However, the poor may benefit indirectly through remittances, which bring net wealth to the country, and as the better educated and financed people depart cities for overseas opportunities, so the capacity of urban centres to support internal migrants may gradually increase.

In this way, ‘climate change migration’ is likely to be an invisible phenomenon: those who do move abroad may not be directly affected by the impacts of climate change, but rather indirectly – as cities become overpopulated, resources are increasingly strained, and life becomes increasingly intolerable. In other words, climate change-related movement is likely to have a domino effect. Highly skilled, professional or business migration is likely to increase as internal rural–urban movement (or movement from outer islands in the Pacific to the main atolls) places acute pressure on the infrastructure of cities and ‘pushes’ the relatively wealthy—eligible for education and work visas—to move abroad. This is not inappropriate: to relocate a poor farmer to a capital city in an industrialized country would not serve either well,<sup>375</sup> yet to enhance migration options for the educated and well-resourced may in turn open up greater opportunities for those moving within climate-affected countries. Finally, it should be noted that bilateral and regional migration agreements can be developed even if a global ‘umbrella’ protection-like agreement is also pursued.

#### 6.2.5 Relocation

A related issue, and one perennially discussed in the ‘sinking State’ context, is the *en masse* relocation of a State’s population to another country. Both Kiribati and Tuvalu have raised this on occasion with Australia and New Zealand,<sup>376</sup> but most recently, and most vocally, it has been embraced by the President of the Maldives who, on coming to office, boldly stated that he was seeking to purchase land in India or Australia to which to relocate his nation.<sup>377</sup> Subsequently, although it is unclear whether this was in direct response, the Indonesian Maritime Minister announced that Indonesia was considering renting out some of its 17,500 islands to ‘climate change refugees’.<sup>378</sup>

There is much more to relocation than simply securing territory, however. Those who move need to know that they can remain and re-enter the new country, enjoy work rights and health

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<sup>374</sup> Author interview with Rizwana Hasan, Bangladesh Environmental Lawyers Association (Dhaka, 16 June 2010); see also author interview with SM Munjurul Hannan Khan, note 39 above.

<sup>375</sup> Author interview with Sultana Kamal, Director General of Ain o Salish Kendra (ASK) (Dhaka, 21 June 2010).

<sup>376</sup> See e.g. Senate Foreign Affairs, Defence and Trade Committee, *A Pacific Engaged: Australia’s Relations with Papua New Guinea and the Island States of the South-West Pacific* (Commonwealth of Australia, 2003) para. 6.78; author’s interviews with Aote Tong, President of Kiribati, note 357 above; Sir Kamuta Latasi, Speaker of the Tuvaluan Parliament (and former Prime Minister) (27 May 2009).

<sup>377</sup> R. Ramesh, ‘Paradise Almost Lost: Maldives Seek to Buy a New Homeland’ *The Guardian* (10 November 2008) available online at: <http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change> (last accessed 17 May 2011).

<sup>378</sup> ‘Indonesia Offers Pacific Climate Refugees Island Rental’ *Pacific Beat, Radio Australia* (3 June 2009) available online at: <http://www.radioaustralia.net.au/pacbeat/stories/200906/s2588395.htm> (last accessed 17 May 2011) citing Secretary-General of the Maritime Affairs Ministry, Dr Syamsul Maarif; see also Steve Holland, ‘Indonesia’s Rent-an-Island Answer to Climate Change’ *ABC News*, 3 June 2009) available online at: <http://www.abc.net.au/news/stories/2009/06/03/2588165.htm> (last accessed 17 May 2011).

rights there, have access to social security if necessary, be able to maintain their culture and traditions,<sup>379</sup> and also what the status of children born there would be. The acquisition of land alone does not secure immigration or citizenship rights, but is simply a private property transaction.<sup>380</sup> Unless individuals personally acquire such rights (and in some cases, even if they do but retain dual nationality<sup>381</sup>), there is little in international law that would prevent a host country from expelling them should it wish to do so, provided there is another country obliged to admit them. This poses an on-going risk as long as the home State continues to exist. Even if the latter does ‘disappear’, its relocated citizens would not automatically have the same rights as the nationals of their new host country. It is only with formal cession of land at the State-to-State level that one State acquires the lawful international title to it and nationals can move to that area as part of their own national territory. The likelihood of this happening today is remote.<sup>382</sup> Thus, if *en masse* relocation to another country is to be considered as a permanent solution, then issues other than land alone need to be considered in order to provide security for the future.<sup>383</sup>

Even when such legal issues are resolved, relocation may still not be a popular option.<sup>384</sup> Concerns about the maintenance of identity, culture, social practices and land tenure are very real to those whose movement is proposed, and these may not be readily understood by outsiders. This, in turn, may lead to misunderstandings and misguided policies, which can have negative long-term, inter-generational affects.

Finally, there remains the fundamental question of how to balance the human rights of relocating groups with those of the communities into which they move. ‘Any relocation that involves moving away from a group’s traditional territory and into that of another is likely to be highly fraught and will require considerable consultation and negotiation.’<sup>385</sup> The effects of dislocation from home can last for generations, and can have significant ramifications for the maintenance and enjoyment of cultural and social rights by resettled communities.<sup>386</sup>

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<sup>379</sup> See UN Doc. A/HRC/10/61, note 14 above, 17–18; Economic and Social Council, Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights), ‘Prevention of Discrimination: Prevention of Discrimination and Protection of Indigenous Peoples’ Expanded Working Paper by F. Hampson on the Human Rights Situation of Indigenous Peoples in States and Other Territories Threatened with Extinction for Environmental Reasons, UN Doc. E/CN.4/Sub.2/2005/28, 16 June 2005; Humphreys (ed), note 68 above.

<sup>380</sup> Examples include the purchase of Rabi island in Fiji by the Banabans (from Kiribati) and the purchase of Kioa island in Fiji by the Vaitupu people of Tuvalu. As Crawford notes, ‘the persistent analogy of territorial sovereignty to ownership of real property is misguided’, indicating the vastly different functions that State links to territory serve: J. Crawford, *The Creation of States in International Law* (2<sup>nd</sup> edn, Oxford: OUP, 2006).

<sup>381</sup> For example, Britain can revoke citizenship from nationals (albeit in limited circumstances) if doing so would not render them stateless: British Nationality Act 1981 (as amended in 2002 and 2006) s 40.

<sup>382</sup> Although following the 2010 Haitian earthquake, the African Union was reported to be considering a proposal to create a new State for them in Africa, citing ‘a sense of duty and memory and solidarity’ given that Haitians are descendants of African slaves: ‘African Union to Consider “Land for Haitians” Plan’ (*Reuters*, 31 January 2010) available online at: <http://www.reuters.com/assets/print?aid=USTRE60U0IV20100131> (last accessed 30 October 2010). Arguably, this is a special case given historical links.

<sup>383</sup> Furthermore, as Campbell discusses, the ability of States to give away land is itself may raise serious human rights considerations for those already inhabiting (or with claims to) that land: Campbell, note 366 above.

<sup>384</sup> See discussion of the case of Nauru in McAdam, ‘Disappearing States’, note 319 above.

<sup>385</sup> J. R Campbell, M. Goldsmith and K. Koshy, ‘Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)’ (Asia-Pacific Network for Global Change Research 2005) 5.

<sup>386</sup> Campbell, note 366 above.

### 6.2.6 Advantages and disadvantages of the various options

<b>Option</b>	<b>Advantages</b>	<b>Disadvantages</b>
Treaty	<ul style="list-style-type: none"> <li>• Global consensus</li> <li>• Universal application</li> <li>• Normative framework</li> <li>• Legally binding</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of political will</li> <li>• Ineffective in practice if not implemented</li> <li>• Problems of definition, conceptualization</li> <li>• May narrow concept</li> </ul>
Global Guiding Framework	<ul style="list-style-type: none"> <li>• Based on legal existing obligations</li> <li>• Clarifies applicability to climate change context</li> <li>• Useful first step: gives States time to understand and apply (consensus/State practice may develop)</li> </ul>	<ul style="list-style-type: none"> <li>• Non-binding per se (although underlying obligations may be binding)</li> </ul>
Migration pathways	<ul style="list-style-type: none"> <li>• Permits planned movement (for slow-onset changes)</li> <li>• Discretionary (flexible) (from State perspective)</li> <li>• Recognizes human agency</li> <li>• Degree of choice to migrant</li> <li>• Remittances (adaptation)</li> <li>• Migration eases population pressure at home</li> <li>• Creates diaspora communities (facilitates future movement)</li> <li>• May fill employment needs in receiving States</li> </ul>	<ul style="list-style-type: none"> <li>• Discretionary (flexible) (from migrant perspective)</li> <li>• Absence of protection element (<i>non-refoulement</i>)</li> <li>• Exploitation</li> <li>• May be temporary only</li> </ul>
Relocation	<ul style="list-style-type: none"> <li>• Option for very vulnerable communities</li> <li>• Keeps communities together</li> </ul>	<ul style="list-style-type: none"> <li>• Balancing needs of existing communities with relocating communities</li> <li>• Break with land, culture</li> <li>• Self-determination?</li> <li>• Sovereignty?</li> </ul>

## Annex 1

### Global guiding framework on climate change-related movement

The question remains whether it is appropriate to develop a normative framework focusing solely on climate change-related movement, or whether the scope should be broader, based on the *needs* and *rights* of the displaced irrespective of the cause.<sup>387</sup> This would help to shift attention away from a (necessarily flawed) ‘single cause’ approach to instead acknowledge the interlocking and underlying socio-economic causes of movement, such as the ‘structural problems of development’.<sup>388</sup>

Alternatively, a global guiding framework on climate change-related movement might form one of a number of such instruments focusing on different kinds of displacement. The elaboration of a variety of instruments would only be useful were they distinguished on the basis of the *nature* and *consequences* of movement, rather than attempts to isolate specific causes. For example, the categories suggested by Betts – stranded migrants, survival migrants, forcibly deported people or people who develop vulnerabilities in transit – relate to distinct contexts in which different kinds of vulnerabilities come to the fore, rather than trying to disentangle the underlying reasons for movement. In his view, this could better facilitate ‘focused and clear sets of principles’ for ‘manageable and meaningful areas’, enabling ‘each area of protection to be implemented by different sets of collaborative partners, depending on the type of collaboration germane to the issue.’<sup>389</sup> While the underlying human rights focus would remain for each, the application and focus may vary depending on the nature of the movement and the particular issues it raises. Realistically, however, it is unlikely that States would be willing to conclude numerous instruments relating to irregular movement and it may remain for advocates to highlight the specific human rights concerns which arise in particular cases.

Since the possibility of elaborating a framework on climate change-related movement has been raised in the context of UNHCR’s expert roundtable in Bellagio, this section puts forward suggestions about the kinds of provisions that such a framework should contain. It does so bearing mind the caveats above.

First, it draws on relevant principles from the Guiding Principles on Internal Displacement, which are particularly helpful in identifying needs during different phases of movement – from preventing displacement, to addressing needs during displacement and in the return and recovery phases. Secondly, it considers some older proposals relating to the protection of people on the move. Although these were not framed with climate change-related movement in mind, they are helpful because they elucidate broader human rights and other international law principles that should underpin any agreement to assist people in distress. Finally, it draws on relevant principles contained in the various treaty proposals on climate change-

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<sup>387</sup> Betts advocates the creation of Guiding Principles on the Protection of Vulnerable Irregular Migrants, based on the Guiding Principles on Internal Displacement model: Betts, note 40 above, 215. At 226, he suggests that a series of instruments could be developed, for example for stranded migrants, survival migrants, forcibly deported people or people who develop vulnerabilities in transit.

<sup>388</sup> UNGA, ‘International Co-operation to Avert New Flows of Refugees: Note by the Secretary-General’ UN Doc. A/41/324, 13 May 1986, para. 38. At para. 43, it noted that natural disasters are more likely to result in displacement in developing countries because they ‘often lack the economic resources, infrastructure and service base (health, sanitary service, water supply, medical service, etc.) needed in order to deal fully with the crisis caused by the natural disasters.’

<sup>389</sup> Betts, note 40 above, 226.

related movement to identify common themes and rights which may also have relevance to a soft law framework.<sup>390</sup>

A decision needs to be made about whether new such principles would simply frame existing legal norms in the specific context of climate change-related movement, or whether they would seek to progressively develop the law.

## 1. Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement identify three phases of displacement: the pre-displacement phase, the phase of actual displacement, and the resettlement or relocation phase. They also have a section dealing with the provision of humanitarian assistance to the displaced. Particular rights and needs are articulated as being pertinent to each phase.

The Guiding Principles remain relevant in the context of internal displacement relating to climate change, and arguably require little alteration for that context. The following analysis therefore highlights provisions which would usefully also inform a framework relating to cross-border movement, while section III.E below sets out climate-specific elements which may sharpen their application in both contexts.

The first section of the Guiding Principles concerns the pre-displacement phase. Principle 7 states that where displacement occurs ‘other than during the emergency stages of armed conflict and disasters’ – in other words, where it is planned – individuals should have access to information about the reasons and procedures for their movement, and, where applicable, on compensation and relocation. They should also be able to participate in the planning and management of their movement, and have the right to life, dignity, liberty and security respected.<sup>391</sup>

The second section concerns protection during displacement. It sets out a human rights framework for ensuring that a wide range of civil, political, economic, social and cultural rights are respected.<sup>392</sup> In effect, it is a human rights charter focusing specifically on the needs of the displaced.

The third section deals with the provision of humanitarian assistance to IDPs. Though noting that the primary responsibility for this rests with national authorities, Principle 25 explains that international assistance may be offered, and if it is, it should not be viewed as an unfriendly act and consent should not be arbitrarily withheld. National authorities should also ensure that the distribution of assistance is not impeded.<sup>393</sup>

The final section contains principles relating to return, resettlement and integration. This section provides that the competent authorities should ensure that the displaced are able to return home voluntarily – or resettle elsewhere in the country – in safety and with dignity, and be able to participate fully in the planning and management of their return or resettlement

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<sup>390</sup> These are summarized in Annex 2.

<sup>391</sup> Guiding Principles on Internal Displacement, Principles 7–9.

<sup>392</sup> *Ibid.* Principles 10–27.

<sup>393</sup> *Ibid.* Principle 25. The prompt provision of adequate assistance can reduce longer-term migration and avert the need for more disruptive resettlement elsewhere.

and subsequent integration.<sup>394</sup> The competent authorities should facilitate access for international humanitarian organizations to assist IDPs in this process.<sup>395</sup> The competent authorities are also obliged to assist IDPs to recover property and possessions, or be compensated for their loss.<sup>396</sup>

Resettlement should not be forced, but voluntary, rights-respecting, and based on the provision of full information about options.<sup>397</sup> Resettlement locations need to be selected in full consultation with existing communities in those areas as well as with the potential new settlers.<sup>398</sup> For relocation to have the best chance at working, it has to be owned by the affected communities, not imposed from above.

## 2. Guidance from other protection frameworks

In addition to the relevance of the Guiding Principles on Internal Displacement, this section examines three earlier frameworks relating to displaced people which may provide guidance in the present context. These frameworks are analysed in terms of the rights and principles considered pertinent to the treatment of people who are not considered to be Convention refugees, but who nonetheless are in need of assistance.

### 2.1 1986 Report by Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees<sup>399</sup>

First, a report of a Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees in 1986, prepared for the General Assembly, stressed the importance of taking a ‘principled and future-oriented approach leading to recommendations on appropriate means of international co-operation in order to avert new massive flows of refugees’,<sup>400</sup> rather than concentrating on remedying refugee situations that already exist. This is an important principle in the context of climate change-related movement. While any such framework should be informed by existing international law standards, they should not be limited by them.

This is particularly so when it comes to framing ‘solutions’. In the refugee context, solutions denote resettlement, voluntary repatriation and local integration. In the climate change-related movement context, solutions should be conceived more broadly – and, fundamentally, as complementary and not mutually exclusive. Protection remains important, but it should not foreclose pre-emptive measures of adaptation and/or migration. Rather, it should guide and underpin humanitarian solutions.

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<sup>394</sup> *Ibid.* Principle 28.

<sup>395</sup> *Ibid.* Principle 30.

<sup>396</sup> *Ibid.* Principle 29.

<sup>397</sup> Evidence shows that adaptation strategies will be most successful where they are based on meaningful community participation, such as in constructing embankments: see Habibullah *et al.*, ‘Participatory Water Management: A Strategy for Climate Change Adaptation in Coastal Bangladesh’ (2009) in IOM, note 2 above, 17.

<sup>398</sup> As the Inter-American Court of Human Rights observed, it is necessary to ‘obtain their free, prior, and informed consent, according to their customs and traditions’: *Saramaka People v. Suriname* (IACtHR, 28 November 2007) Series C No. 172, para. 134.

<sup>399</sup> I express my thanks to Guy Goodwin-Gill for drawing my attention to this report.

<sup>400</sup> UNGA, note 388 above, para. 17. The report was prepared in accordance with UNGA Res. 40/166 of 16 December 1985, para. 5.



The report contains the following principles which could usefully be reflected in a new global guiding framework on climate change-related movement:

- it noted the multicausality of flows;<sup>401</sup>
- it underscored the importance of international cooperation, noting in particular that it extends ‘to all areas of international relations and especially to political, economic, social and humanitarian co-operation and hence also to the prevention of new massive flows of refugees’;<sup>402</sup>
- it emphasized the importance also of greater cooperation between States and UN institutions, and ‘more timely and better co-ordinated action’ on the part of those institutions,<sup>403</sup> also noting that ‘measures of improving international co-operation must be taken in order to be prepared for the requirements of each specific situation’;<sup>404</sup>
- it suggested that the Secretary-General ‘take appropriate steps with a view to improving international co-operation for the prevention of new flows of refugees, such as by offering his good offices and by bringing the problem to the attention of the relevant United Nations organs and agencies’;<sup>405</sup>
- it stated that ‘co-operation should also address natural causes with a view to contributing to reducing and, where possible, even to preventing the consequences of natural disasters’.<sup>406</sup>

## 2.2 Suggested Principles for Avoiding and Resolving Problems arising from the Transfrontier and Internal Displacement of People in Distress

In 1986, a series of three articles in the Virginia Journal of International Law examined the extent to which States provided protection beyond the ‘refugee’ definition in the Refugee Convention.<sup>407</sup> In an Annex to his article, Guy Goodwin-Gill put forward a list of ‘Suggested Principles for Avoiding and Resolving Problems arising from the Transfrontier and Internal Displacement of People in Distress’.

These principles, which would usefully inform a new instrument on climate change-related movement, included:<sup>408</sup>

- expressly invoking the ICESCR to ensure that States ensure people the enjoyment, *inter alia*, of ‘the rights to work and to just and favorable conditions of employment, to an adequate standard of living, to health, to education and to participation in cultural life.’ (principle 1)
- expressly invoking the ICCPR to ensure that States ensure people the enjoyment, *inter alia*, of ‘the rights to life, liberty and security of person, to freedom from torture, cruel, inhuman or degrading treatment or punishment, to freedom from slavery and

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<sup>401</sup> *Ibid.* para. 44.

<sup>402</sup> *Ibid.* para. 49, referring to the UN Charter, arts 1(3), 2(5), 55, 56; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) of 24 October 1970.

<sup>403</sup> UNGA, note 388 above, para. 58.

<sup>404</sup> *Ibid.* para. 64.

<sup>405</sup> *Ibid.* para. 58.

<sup>406</sup> *Ibid.* para. 64.

<sup>407</sup> Perluss and Hartman, note 321 above; K. Hailbronner, ‘Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ (1986) 26 *Virginia Journal of International Law* 857; Goodwin-Gill, note 321 above.

<sup>408</sup> *Ibid.* 916–18.

servitude, to freedom of movement and freedom to leave and return to their own country, to freedom from arbitrary arrest and detention, to equality before and equal protection of the law, to freedom of thought, conscience and religion, and the rights to participate in public affairs and to vote.’ (principle 2)

- reiterating the principle of non-discrimination. (principle 4)
- reiterating the prohibition on the collective expulsion of aliens. (principle 4)
- calling on States, both individually and in cooperation with each other, to ‘strive to create the conditions necessary that their people may enjoy the right to belong and not to be compelled to take flight in search of decent living conditions or freedom from strife. In particular, states shall co-operate in the establishment of a just and equitable international economic order.’ (principle 5)
- invoking the principles of international solidarity and burden-sharing to require States to take ‘all necessary measures to assist, at their request, other states in which people may be found or admitted in distress.’ This includes people displaced by natural disasters. (principle 7)
- requiring States to admit people in distress who present themselves at a national frontier, and render them ‘such assistance as is necessary.’ (principle 8) Goodwin-Gill suggests that in the case of disasters, a parallel can be drawn with States’ obligations with respect to the plight of ships under *force majeure*. Where such ships are in ‘urgent distress’ – a situation of ‘grave necessity’ – they are immune from the exercise of jurisdiction of receiving States.<sup>409</sup> Goodwin-Gill suggests that the principle could helpfully underscore the reception and assistance of people fleeing from disasters (e.g. by not penalizing them for ‘unlawful’ entry).
- requiring States to cooperate with the UN to ‘take appropriate interim steps to promote a durable solution.’ (principle 8)
- prohibiting the *refoulement* of a person in distress if doing so would ‘expose him or her to a threat to life or liberty for reasons of race, religion, national or ethnic origin, social group or political opinion, *or would be otherwise inhumane.*’ (principle 9, emphasis added)
- requiring States to accommodate people in distress ‘until such time as they are able to return to their homes’. ‘They shall be treated with humanity and in accordance with the human rights and fundamental freedoms recognized by general international law.’ (principle 10)
- mandating international solidarity and burden-sharing, especially with respect to solutions. (principles 11 and 12)

### 2.3 Executive Committee Conclusion No. 22

Executive Committee Conclusion No. 22 was drafted to deal with the large-scale exodus from Indo-China that occurred from the mid-1970s, rendering individual processing impossible.<sup>410</sup> It sought to provide a temporary status for Convention refugees from that region, as well as persons seeking refuge due to ‘external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their

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<sup>409</sup> *Ibid.*, 909, referring to *The Eleanor* (1809) Edw 135. With respect to invoking *force majeure* as a defence to wrongful conduct, the Articles on State Responsibility expressly cite ‘earthquakes, floods or drought’ as circumstances that would justify this: ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 23, Commentary para. 3, in ILC, ‘Report on the Work of its Fifty-Third Session (23 April–1 June and 2 July–10 August 2010) UN Doc. A/56/10, 76.

<sup>410</sup> ExCom Conclusion No. 22 (XXXII) ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx’ (1981).

country of origin or nationality'.<sup>411</sup> It provides a set of basic standards drawn from human rights and humanitarian law principles, including the principle of *non-refoulement*.<sup>412</sup>

The status it provides was summarized and endorsed in a 1992 UNHCR discussion note proposing a minimum content for complementary protection:

- (a) No penalty for illegal presence.
- (b) Respect for fundamental civil rights [especially those in the UDHR].
- (c) Food, shelter and other basic necessities of life [including sanitary and health facilities].
- (d) No cruel, inhuman or degrading treatment.
- (e) No discrimination.
- (f) Considered as persons before the law.
- (g) Safe and secure location.
- (h) Respect for family unity.<sup>413</sup>
- (i) Assistance in tracing relatives.
- (j) Protection of minors and unaccompanied children.
- (k) Provision for sending and receiving mail.
- (l) Permission for friends and family to assist.
- (m) Arrangements to register births, deaths, and marriages.
- (n) Necessary facilities for obtaining durable solution.
- (o) Permission to transfer assets.
- (p) Facilitation of voluntary repatriation.<sup>414</sup>

The particular value of ExCom Conclusion 22 to the present context is that it was crafted for a context in which the frontline States were not parties to the Refugee Convention. It therefore filled a gap by identifying existing normative standards for States not bound by the Convention or Protocol.<sup>415</sup> Goodwin-Gill describes the ExCom Conclusion as outlining 'minimum requirements geared to an acute problem [which] represent a point of departure only'.<sup>416</sup> In different circumstances, he argues, even temporary solutions may require more comprehensive provisions, 'including the opportunity to earn a living and to have access to education, housing, and social assistance'.<sup>417</sup> Given the significant development of socio-economic rights in the intervening 30 years, and the recognition that the ICESCR imposes an immediate 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party',<sup>418</sup> these rights necessarily also comprise part of the basic human rights framework today.

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<sup>411</sup> *Ibid.* para. I.1.

<sup>412</sup> *Ibid.* para. II(B)(2)(b) refers to 'the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights'.

<sup>413</sup> This is particularly important in the context of displacement and is not elucidated expressly in the general human rights treaties (although see CRC, arts 8, 10, 16, 20, 22).

<sup>414</sup> UNHCR, 'Protection of Persons of Concern to UNHCR Who Fall Outside the 1951 Convention: A Discussion Note' UN Doc. EC/1992/SCP.CRP.5, 2 April 1992, paras 17, 19–21.

<sup>415</sup> J. Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 *American Journal of International Law* 279, 295.

<sup>416</sup> Goodwin-Gill, note 321 above, 906.

<sup>417</sup> *Ibid.*, 906.

<sup>418</sup> Committee on Economic, Social and Cultural Rights, 'General Comment No. 3', note 221 above, para. 10.

### 3. Suggested elements

Without prejudice to the principles already outlined above, which would usefully be reflected in principles on Climate Change-Related Movement, this section summarizes the basic elements that should be included in such a framework.

#### 3.1 Actors

The instrument should be addressed to:

- States facing potential internal displacement (e.g. Bangladesh);
- States planning for the possible displacement/relocation of their people (e.g. Kiribati and Tuvalu);
- States which may need to respond to (potentially) displaced people from other States, including through relocation.

It should articulate States' obligations in each of these cases, and also note the importance of the duty to cooperate,<sup>419</sup> which is a well-established principle of international law.<sup>420</sup> International cooperation is 'indispensable for the protection of persons in the event of disasters',<sup>421</sup> although it is complementary to the primary duty of an affected State to protect victims of disasters occurring in its territory.<sup>422</sup>

In the area of disasters assistance, international and non-governmental organizations have a particular role to play.<sup>423</sup> Accordingly, it should also provide a useful framework for other actors involved in humanitarian assistance, including NGOs, institutional actors, and so on.

#### 3.2 Phases of movement

To be most effective, the provisions of a possible instrument should address three phases of movement: pre-movement/prevention, movement, and relocation/resettlement.<sup>424</sup> In particular – and to respond to the protection gap identified in this paper – they should distinguish between slow-onset and rapid-onset (disaster) events. They should do so both in

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<sup>419</sup> See e.g. ILC Draft Articles on Disasters, note 300 above, art. 5; Goodwin-Gill's framework in section 1.2 above; also Guiding Principles on Internal Displacement, Principle 3.

<sup>420</sup> See e.g. UN Charter, art. 1(3), where it is expressed as one of the UN's objectives: 'To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.' See also UN Charter, arts 55, 56; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, note 402 above, Annex, para. 1; ICESCR, arts 11, 15, 22, 23; Committee on Economic, Social and Cultural Rights, General Comments No. 2 (E/1990/23), No. 3 (E/1991/23), No. 7 (E/1998/22), No. 14 (E/C.12/2000/4), note 223 above, and No. 15 (E/C.12/2002/11), note 223 above. Most recently, the 2006 Convention on the Rights of Persons with Disabilities states that the right to cooperate applies 'in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters' (art. 11). In the context of natural disasters specifically, see UNGA Res. 46/182, Annex, para. 5. See generally H. Fischer, 'International Disaster Response Law Treaties: Trends, Patterns, and Lacunae' in IFRC, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (Geneva, IFRC and Red Crescent Societies, 2003) 24–44.

<sup>421</sup> Commentary, draft article 5, para. 1: ILC Report, note 229 above, 329.

<sup>422</sup> Commentary, draft article 5, para. 4: ILC Report, note 229 above, 329 referring to Res. 46/182 of 19 December 1991, Annex para. 4. See also Hyogo Framework, note 301 above.

<sup>423</sup> UNGA Res. 46/182 of 19 December 1991, Annex para. 5; ECOSOC Res. 2008/36 of 25 July 2008, para. 7.

<sup>424</sup> Like the Guiding Principles on Internal Displacement.

terms of the timescale over which movement may occur, and the types of policy responses appropriate to these different types of movement.

### 3.3 Nature of movement

The instrument should apply to internal and international movement. Although this spatial element is relevant to which State bears what obligations, it does not affect the basic needs of those who move. As such, the same rights framework should apply to both groups. However, whereas those who move internally remain citizens of their country, those who cross an international border will be regarded as illegal migrants unless they are accorded a status. Accordingly, there need to be additional provisions for cross-border migrants with respect to non-rejection at the frontier, provisions for regularization of status, and protection against expulsion.

Accordingly, the instrument should acknowledge (in a preambular section) that:

- migration is a normal form of adaptation;
- pre-emptive movement is a rational adaptive response that may avoid creating or exacerbating a disaster situation later on;
- climate change is rarely, if ever, the sole cause of movement, and the application of principles should not depend on isolating it as *the* cause;
- planned movement can avoid disruption, loss of life and sudden influxes of displaced people;
- migration can be forced even where a person is not moving in response to *imminent* harm (think of it as staggered flight);
- responses to forced migration can be planned (as refugee resettlement demonstrates);
- there is considerable State practice on providing humanitarian assistance to groups other than those to whom States have formal international protection obligations;
- the importance of geographical/ historical ties when it comes to facilitating planned movement through the creation of special visa categories, or extending existing visa categories;
- for many people, movement will be a matter of last resort (so concluding a soft law framework will not ‘open the floodgates’).

### 3.4 Substantive rights

In terms of substantive rights, and in addition to the other principles mentioned in the various frameworks discussed above, a global guiding framework or instrument should, at a minimum:

- reflect and be consistent with international human rights law, international refugee law and international humanitarian law (noting, in particular, any elements of customary international law which apply to all States);
- reaffirm the principle of non-discrimination (noting statements by the UN Human Rights Committee about the application of human rights to all people, including irregular migrants);
- identify any special protection that may apply to particular groups (e.g. children, women, the disabled, and so on, on the basis of specialist human rights treaties);
- respect the cultural and self-determination rights of communities, especially indigenous groups, and note that these need to be fostered in the place of relocation;

- recognize that States' *non-refoulement* obligations under human rights law are broader than article 33 of the Refugee Convention, and affirm that the principle of *non-refoulement* entails non-rejection at the border;
- respect the principle of family unity, with due regard to different cultural conceptions of 'family', and with the best interests of the child a primary consideration;
- apply the principle of *force majeure* in cases where people seek assistance and protection from a sudden disaster;<sup>425</sup>
- facilitate access to rights by providing displaced people with a legal status (limbo is in no-one's interests);
- note that any derogations must be compliant with States' obligations under human rights law;<sup>426</sup>
- provide people who may be displaced – and the communities into which they may move – with access to information about potential movement;<sup>427</sup>
- provide people who may be displaced – and the communities into which they may move – with opportunities to participate in discussion about and management of potential movement;<sup>428</sup>
- with respect to relocation (whether internal or international), identify human rights-centric mechanisms for resolving potential disputes about land tenure and access to resources, as well as associated economic, social, cultural and spiritual costs;<sup>429</sup>
- facilitate humanitarian assistance to displaced populations;<sup>430</sup>
- facilitate return, where possible,<sup>431</sup> but also acknowledge the possibility for permanent settlement.

### 3.5 Climate change-specific elements

Specifically in the context of climate change-related movement, a global guiding framework or instrument should:

- acknowledge migration as a form of adaptation;
- acknowledge the responsibility of the home State to implement adaptation programmes;
- suggest that States' duty to cooperate under international law,<sup>432</sup> and the ICESCR in particular, may impose a responsibility on States to facilitate adaptation through

<sup>425</sup> Goodwin-Gill, note 321 above, 909.

<sup>426</sup> In the emergency context, the priority is normally addressing people's immediate needs through short-term solutions, with attention given to longer-term solutions only once these immediate needs have been met. However, the rationale for a staggered approach, in terms of according rights, does not make sense in the context of movement in response to slow-onset climate change: see Goodwin-Gill, note 321 above, 904 for the problems with justifying a temporary-style approach in the slow-onset context.

<sup>427</sup> See e.g. Guiding Principles on Internal Displacement.

<sup>428</sup> Guiding Principles on Internal Displacement; see also *Saramaka People v. Suriname*, note 398 above, para. 134: consultation alone is insufficient: the State must 'obtain [a people's] free, prior, and informed consent, according to their customs and traditions.'

<sup>429</sup> J. Campbell, M. Goldsmith and K. Koshy, 'Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)' (Asia-Pacific Network for Global Change Research, 2005) 42–43. Human rights law already contains mechanisms designed to assist in balancing rights, but these are often used to weigh up the rights of particular individuals, or the rights of an individual vis-a-vis the broader public interest.

<sup>430</sup> Guiding Principles on Internal Displacement; ILC Draft Articles on Disasters, note 300 above.

<sup>431</sup> Guiding Principles on Internal Displacement. Mass influx often solved by mass repatriation once conditions improve, but this may not be possible where climate change renders the former habitat uninhabitable.

<sup>432</sup> See e.g. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, note 402 above: 'States have the duty to co-

migration where *in situ* adaptation to climate change cannot remedy the pressures on the local population;

- if protection is envisaged as temporary, provide a period after which access to permanent residence is made available;
- during the pre-movement/prevention phase, States should consider directing financing for adaptation to relocation and resettlement initiatives within countries;
- where cross-border movement is inevitable and no internal relocation is possible in a way that safeguards human rights, also direct financing for adaptation towards international migration options (including providing for a social security fund for those who move), including to possible host States (e.g. financing burden-sharing)<sup>433</sup> consider the creation of an international institutional focal point for coordinating multilateral efforts to assist people displaced on account of climate change, with a mandate (a) for coordinating humanitarian and emergency relief efforts; (b) for longer-term planning for relocation from slow-onset processes; and (c) with a specific human rights protection-orientation in addition to relief and assistance (like UNHCR).

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operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relation, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.’

<sup>433</sup> Rayfuse has suggested that if small island States were to merge with larger States, conditions of merger could include a requirement that any revenue generated from these territorial acquisitions (such as via their extensive Exclusive Economic Zones) be placed into a trust fund to pay for the resettlement of the merging State’s population (including on-going costs that might normally be borne by the State, such as pensions): R. Rayfuse, ‘W(h)ither Tuvalu? International Law and Disappearing States’ (2009) *University of New South Wales Faculty of Law Research Series Working Paper No. 9*, 11 available online at: <http://law.bepress.com/unswwps/flrps09/art9/> (last accessed 17 May 2011).