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**Climate change-related disasters and human displacement:  
towards an effective management system**

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## INTRODUCTION

Among the negative effects of climate change, human displacement is one of the most complex to face, since it encompasses extremely delicate political topics, such as migration, protection of people in need and liability for climate change damage. This paper, consisting of three sections, aims to critically analyse the existing legal framework and to provide some suggestions for its reform.

In the first part, a conceptual background will be provided for the understanding of the connections between climate change and migration (leading to the phenomenon of the so-called “climate refugees”). The second part aims at showing that the legal instruments that may (potentially) protect affected persons are, as a matter of fact, currently not up to the task. This is because of various reasons and, above all, due to the historical novelty of climate change. Hence, also bearing in mind that migration fluxes are expected to significantly increase as a result of climate change-related disasters, it is argued that the international community should create and implement a system for the management of the phenomenon, with the overall objective of protecting the basic rights of the affected people.

The last section proposes some changes to the current rules so to make the protection of displaced persons more effective. On the one hand, in the following decades, the most involved countries should adopt dedicated migration policies designed to prevent massive forced migrations; on the other hand, the international community should craft, on different levels, new legal protection instruments.

## A SOUND CONCEPTUAL FRAMEWORK

### The actual scientific knowledge

On the basis of the multi-disciplinary contributions to the subject,<sup>1</sup> it is appropriate to outline, at the outset, the most relevant scientific discoveries concerning the “climate refugees” question, with the purpose of providing a sound framework for its conceptualization.

First, substantial research underlines that the causal nexus between climate change and human displacement is *complex* and not linear. In other words, the negative effects of climate change cannot be considered, in the vast majority of cases, as the primary or prevalent cause of displacement. In the decision to migrate, environmental factors, as important as they may be, concur with others of different nature (e.g., economic, demographic or familial). In the current state of present scientific knowledge, it is consequently not demonstrable that climate change and subsequent environmental degradation are the only cause of massive human displacement. It is better, instead, to conceive of climate change as a *threat multiplier*, a

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<sup>1</sup> See G Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*; J Barnett and M Webber, *Migration as Adaptation: Opportunities and Limits*; W Kälin, *Conceptualizing Climate-Induced Displacement*, in J McAdam (eds.), *Climate Change and Displacement, Multidisciplinary Perspectives*, Hart Publishing, Oxford (UK), 2010. See also: G Hugo, *Environmental Concerns and International Migration*, (1996) 30 *International Migration Review* 105; EACH-FOR, *Synthesis Report*, (14 May 2009) 72 (<http://cordis.europa.eu/documents/documentlibrary/126792421EN6.pdf>, last access 5 January 2015); F Laczko and C Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence*, IOM 2009; S. Henry, B Schoumaker and C Beauchemin, *The impact of Rainfall on the First Out-Migration: A Multi-Level Event-History Analysis in Burkina Faso*, (2004) 25 *Population and Environment*; Chairperson’s Summary, *Nansen Conference on Climate Change and Displacement in the 21<sup>st</sup> Century*, (Oslo 6-7 June 2011), para 4.

factor that exacerbates already fragile situations.<sup>2</sup> Through this perspective, it is possible to avoid simplistic and trivial interpretations imputing to environmental factors an exclusive importance and ending up predicting the appearance of hundreds of millions of “climate refugees” in a short period of time.<sup>3</sup>

Second, it is extremely difficult to trace a precise line of distinction between voluntary and forced migration. As regards human displacement related to climate change, especially in cases of slow degradation processes, migration is (and will be) in fact prevalently preventive and voluntary. Hence, it is useful to conceive of the individual choice of migrating on a *continuum*, on whose first extremity is situated purely voluntary migration and, on the opposite one, totally forced migration. The border between the two is blurred and a precise distinction between them is not easily identifiable.

Last, there is *consensus* among experts that the majority of climate-induced displacement is (and will be) internal, as opposed to international. As empirical studies show, when migrating, individuals tend to prefer destinations with strong cultural and personal links.<sup>4</sup> Although internal and international displacement induced by climate change may be, on an ontological level, difficult to differentiate, the implications linked to the differences between them are, on a legal and political level, very significant indeed. In case of internal displacement, the primary responsibility to protect an internally displaced person (IDP) is obviously on the national State that, through its policies (as well as through the important model provided by the Guiding Principles on Internal Displacement “GPID”),<sup>5</sup> has the duty to protect its citizens and every other forcibly displaced subject under its jurisdiction.<sup>6</sup> On the other hand, when an international displacement occurs, given the normative gaps that will be analysed further on, the attribution of such responsibility is much less straightforward.

### **Climate change-related disasters that can lead to human displacement**

For the purposes of this paper a broad definition of disaster and, more precisely, of climate change-related disaster (CCRD) will be adopted. A CCRD is herein defined as a natural event or series of events in whose causation or manifestation climate change plays a role and which “result in human suffering and distress or large-scale material or environmental damage,

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<sup>2</sup> “Climate-related hazards exacerbate other stressors, often with negative outcomes for livelihoods, especially for people living in poverty (high confidence)”, IPCC, 2014: Summary for policymakers. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectorial Aspects. Contribution of Working Group II to the Fifth Assessment Report of the IPCC*, 6-8.

<sup>3</sup> See Christian Aid, *Human Tide: The Real Migration Crisis*, 2007; Friends of Earth in Australia, *A Citizen’s Guide to Climate Refugees*, 2007; R McKie, *Climate Change will Cost a Billion People their Homes*, says report, *The Observer* (UK), 28 November 2010; N Myers, *Environmental Refugees in a Globally Warmed World*, 43 *Bioscience* 752; N Myers, *Environmental Refugees: An Emergent Security Issue*, 13. *Economic Forum* (Prague, 23-27 May 2005).

<sup>4</sup> See n 1.

<sup>5</sup> UN Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2).

<sup>6</sup> See *ibid*, Principle 3: “National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request”; African Union Convention for the Protection and Assistance of Internally Displaced Persons In Africa (adopted 22 October 2009, entered into force 6 December 2012) (Kampala Convention), article 5 para 1: “States Parties shall bear the primary duty and responsibility for providing protection of and humanitarian assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind”.

thereby seriously disrupting the functioning of society”.<sup>7</sup> Through this perspective, it is possible to consider both sudden-onset events and slow-onset processes as disasters.

In this regard, although it is impossible to trace a linear cause-effect link between climate change and displacement, a typology of CCRD having the potential to lead to human displacement can be outlined.<sup>8</sup>

Sudden-onset disasters are abrupt events (e.g., floods, windstorms, heavy rain, mudslides) that can determine the forced movement of masses of individuals. Regarding this kind of events, climate change cannot be considered as *the* causal factor; nonetheless, given that climate change is increasing their frequency and intensity,<sup>9</sup> it is possible to insert sudden-onset disasters in the CCRD definition. Events of this first kind provoke usually forced, temporary and short-ranged displacement, because individuals (when capable) prefer to go back to their original homes once reconstructed. Obviously, such an opportunity depends largely on the reaction and resilience capacities of the affected regions and societies involved.

The second type consists of slow-onset disasters, which are natural disasters determined by gradual environmental degradations. This category encompasses, among others, phenomena like desertification, sea level rise, and soil erosion. Such processes can considerably weaken the livelihood and the economic opportunities of the affected regions. Hence, human displacement driven by such difficulties can essentially be of two kinds. On the one hand, slow-onset degradation contributes to voluntary migration towards less degraded regions; on the other hand, it can lead to the definitive uninhabitability of some others. It seems clear that these two classes of movement require different political and legal reactions, in light of their evident differences both from the sociological and legal points of view.

Lastly, particular mention is warranted of the insular microstates that could be submerged by sea level rise.<sup>10</sup> The territory of some States (such as Kiribati, Tuvalu, and the Maldives for example) could be (almost) completely submerged or compromised within this century, and consequently rendered uninhabitable. In the long term, displacement related to this process could be entirely cross-border and permanent. Furthermore, it is not only the safeguard of individual rights that will be at stake, but also the collective and cultural rights of entire nations.

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<sup>7</sup> International Law Commission, *Draft Articles on the Protection of Persons in Event of Disasters*, article 3.

<sup>8</sup> See W Kälin e N Schrepfer, *Protecting People Crossing Borders in The Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Research Series, PPLA/2012/01 (February 2012). Kälin and Schrepfer present five different categories. For the purposes of this article it is possible to omit the last two, dealing with authoritative displacement decided by governments and with displacement from violent conflicts determined (also) by CCRDs.

<sup>9</sup> “Changes in many extreme weather and climate events have been observed since about 1950. [...] It is likely that the frequency of heat waves has increased in large parts of Europe, Asia and Australia. There are likely more land regions where the number of heavy precipitation events has increased than where it has decreased. The frequency or intensity of heavy precipitation events has likely increased in North America and Europe. In other continents, confidence in changes in heavy precipitation events is at most medium”. IPCC, 2013: Summary for Policymakers. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the IPCC*, 5.

<sup>10</sup> “Due to sea level rise projected throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion (very high confidence)”. IPCC, 2014: Summary for policymakers. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectorial Aspects. Contribution of Working Group II to the Fifth Assessment Report of the IPCC*, 17.

## Categorisation of “climate refugees”

While there is no lack of proposals to create one,<sup>11</sup> there is at present no accepted legal definition of “climate refugees”. In order to make a contribution, this paper opts for a subdivision of this larger category into three groups based on the degree of voluntariness/duress of the displacement.<sup>12</sup>

“*Environmentally motivated migrants*” (EMMs) are individuals who *choose* to migrate preventively in order to distance themselves from future significant environmental degradation. Their decision is taken because of socio-economic difficulties existing in their regions and because of the fear that they will become even worse due to CCRDs. The crucial aspect here is that EMMs are not living, at the moment of their migration, in a situation of actual or imminent danger. Furthermore, environmental/climatic factors play, in this respect, a role alongside other (economic, social, familial, *etc.*) factors. Thus, EMMs are (and will be) considered prevalently as migrant workers: as persons who choose to leave their country seeking better opportunities. Given that they had the possibility (albeit limited) to stay in their home country and their condition is neither extreme nor exceptional, it is unlikely that receiving States would be willing to provide them with incisive protection.

“*Environmentally forced migrants*” (EFMs) are persons who abandon their homes *mainly* due to environmental factors and for whom the possibility to stay is (even though still accessible) decisively limited because of exacerbated environmental conditions. In such cases, in light of the higher degree of duress of the displacement, a greater assistance (both on an international and national level) should be foreseen.

“*Environmental emergency migrants*”, or EEMs, are people forced to abandon their homes because of *extremely serious* environmental or climate impacts that render the “staying option” not possible. Such a hypothesis is linked to disasters (that may be either rapid-onset or slow-onset) capable of threatening the very survival of the affected individuals. To these, a further higher level of protection should be accorded, since their situation is dramatic and assistance-worthy. In case of international migrations (especially when determined by slow degradations not covered by international disaster law), it is hence necessary to build dedicated protection instruments.

## THE (LITTLE) RELEVANCE OF THE EXISTING LEGAL FRAMEWORKS

Broadly speaking, the existing international legal system is, for the purpose of protecting the core of the human rights of “climate refugees”, inadequate. With the exception of the GPIDs (that are not legally binding and need though much stronger internal implementation) and some regional agreements,<sup>13</sup> there are no legal instruments that can adequately face the

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<sup>11</sup> See E El-Hinnawi, *Environmental Refugees*, (1985) UNEP 4; N Myers and J Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute (Washington DC 1985); IOM, Discussion Note: *Migration and the Environment*, 94<sup>th</sup> Session of the IOM Council, Doc. No. MC/INF/288, 2007, para 6; IOM, *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration*, International Symposium (Geneva, 21-24 April 1996); B. McKinley’s (IOM’s General Director) Opening Statement, *Conference on Climate Change, Environmental Degradation and Migration: Addressing Vulnerabilities and Harnessing Opportunities* (Geneva, 19 February 2008).

<sup>12</sup> See F Renaud, J.J Bogardi, O. Dun and K Warner, *Control, Adapt or Flee: How to Face Environmental Migration?*, UNU-EHS, InterSecTions Nr 5/2007; *A Decision Framework for Environmentally Induced Migration*, International Migration, Vol 49 (2011).

<sup>13</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Cartagena Declaration on Refugees (adopted 22 November 1984) OAS Doc OEA/Ser.L/V/II.66/doc 10.

challenge, especially in case of cross-border migrations. Such normative *lacunae* are essentially due to the novelty of the phenomenon and, conversely, to the anachronism of the existing legal instruments.

## Refugee law

Even though the topic under consideration is commonly referred to as one relating to “climate refugees”, the term “refugee” is in fact improper here. “Climate refugees” can undoubtedly present, in some cases, extremely urgent needs, exactly like “traditional” refugees. However, the needs of the latter, as intended under international law, are almost exclusively caused by political, social or civil reasons. The legal concept of a refugee is stated by article 1A(2) of the 1951 Convention Relating to the Status of Refugees, as someone who,

“owing to a 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>14</sup>

Three key elements emerge from this definition: presence outside the country of origin, caused by persecution based on discrimination and accompanied by an impossibility – or unwillingness – to receive the protection of the home country. Not considering the geographical limits for the application of the Convention (which requires cross-border migration, rendering it inapplicable to IDPs), it is useful to briefly analyse the element concerning discrimination and persecution.

In order to be recognized as a refugee in accordance with the 1951 Convention the persecuted person must prove that a public authority is committing or failing to prevent persecutory acts motivated by a particular characteristic of the protection seeker. CCRDs hit (and will hit) indiscriminately different categories of the population, and can thus not satisfy the discriminatory element required under refugee law. Concerning this last aspect, case law in New Zealand has stated the following as regards a claimant’s plea for refugee status based on climatic-environmental reasons: “In any event, the appellant’s claim under the Refugee Convention must necessarily fail because the effects of environmental degradation on his standard of living were, by his own admission, faced by the population generally.”<sup>15</sup> The same conclusions were reached in all the other similar cases: since 2000 different individuals from insular microstates surrounding New Zealand and Australia have tried to obtain the refugee status in order to be protected from CCRDs.<sup>16</sup> Each plea has been rejected since the harm feared did not amount to persecution and since discriminatory motives against the applicants were missing. For instance, the New Zealand Refugee Status Appeals Authority has stated the following: “This is not a case where the appellant can be said to be differentially at risk of harm amounting to persecution due to any of the one of these five

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<sup>14</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (together “Refugee Convention”).

<sup>15</sup> New Zealand Immigration and Protection Tribunal (NZIPT) Decision [2013] 800413, para 75 ([https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20130625\\_800413.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20130625_800413.pdf) last access 16 September 2014).

<sup>16</sup> In Australia: 1004726/2010, RRTA 845 (Tonga); 0907346/2009, RRTA 1168 (Kiribati); N00/34089/2000, RRTA 1052 (Tuvalu); N95/09386/1996, RRTA 3191 (Tuvalu). In New Zealand: Refugee Appeal No 72719/2001, RSAA (Tuvalu); Refugee Appeal No 72316/2000, RSAA (Tuvalu).

grounds. [...]. [As for the environmental problems and social deficiencies,] these apply indiscriminately to all citizens of Tuvalu and cannot be said to be forms of harm directed at the appellants for reason of their civil or political status”.<sup>17</sup>

On the other hand, as regards *persecution* under the 1951 Convention, it may be inferred from article 33 (“No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”) that a threat to life or freedom on account of the five grounds is always persecution. Moreover, an act is also generally considered persecutory if it entails particularly serious violations of human rights. Identification criteria in this regard have been established by several international organizations protecting refugees regionally.<sup>18</sup> Therefore, broadly speaking, an act can amount to persecution depending on the nature of the act itself or on its repetition (e.g., the accumulation of violations that, alone, would not be particularly serious, but that, together, amount to grave violations). Now, even though CCRDs are harmful and, in some cases, even fatal, they do not amount, except in exceptional cases, to persecution as presently intended under international law.

Furthermore, concerning “climate refugees” and persecution, another basic element is missing: the persecutor.<sup>19</sup> Under refugee law, the persecuting body is usually the State of the harmed person, but as regards “climate refugees”, the government of the affected subjects remains presumably willing to protect its citizens (although its capacity to do so has to be verified). Theoretically, persecutors would be, on the contrary, industrialized and newly industrialized States, guilty of their greenhouse gases emissions. Now, refugee law is rooted in the idea that a person persecuted from his government cannot, by definition, avail himself of its protection and depends, therefore, on the assistance of the host country, or of the international community as a whole. Regarding “climate refugees”, there would be no rupture of the relationship of “trust, loyalty, protection and assistance”<sup>20</sup> between the State and its citizens. In this sense, “in an event that is fought by the State of origin, the refugee status is not applicable, since there would be no reason for the individual in difficulty to not avail himself with the protection conceded by his State”.<sup>21</sup> Consequently, identifying a persecutor in a place dislocated from the one which the persecuted is fleeing would entail “a complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government, a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from – yet within – countries that have contributed

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<sup>17</sup> Refugee Appeal No 72189/2000, RSAA (17 August 2000), para 13: (<http://www.refworld.org/docid/4d08cf7f2.html>, last access 1 January 2015).

<sup>18</sup> See, eg, European Union’s Directive 2004/83/CE (so-called Qualifications Directive), article 9: “Acts of persecution within the meaning of article 1A of the Geneva Convention must: (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)”.

<sup>19</sup> In this regard, see 0907346 [2009] Australian Refugee Review Tribunal (RRTA) 1168 (10 December 2009) para 51, (<http://www.refworld.org/pdfid/4b8fdd952.pdf>, last access 2 September 2014). The RRTA rejected the refugee status to an I-Kiribati with the following motivation (among others): “There is simply no basis or 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>20</sup> AE Shacknove, *Who is a Refugee?*, 95 *Ethics* 275 (1985).

<sup>21</sup> N Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation, A Commentary*, Geneva, 1953.

to climate change”.<sup>22</sup> In conclusion, this would provoke “a revolution, rather than an evolution, of refugee law”.<sup>23</sup>

Hence, the limits regarding the applicability of this framework to “climate refugees” are evident. The 1951 Convention was written after World War II with the purpose of protecting individuals from discriminatory persecutions, prevalently rooted in nationalism and racism. At that time, climate change was not even a mirage.

### **Complementary Protection**

So-called complementary protection is the normative framework originating from international humanitarian law and international human rights law and that extends the international protection regime beyond the 1951 Convention’s umbrella.<sup>24</sup> Although not explicitly recognized under specific international treaties, the existence of a protection regime that is complementary to the 1951 Convention can be inductively acquired through several international and regional provisions protecting human rights.

Among these, the most basic is the right to life, which is granted, at the international level, by article 3 of the Universal Declaration of Human Rights,<sup>25</sup> article 6 of the International Covenant on Civil and Political Rights<sup>26</sup> and by article 6 of the Convention on the Rights of the Child.<sup>27</sup> Moreover, the main regional human rights instruments worldwide protect it as well, thereby constituting a significant normative basis.<sup>28</sup>

Complementary protection is here relevant because in case of forced migrations due to CCRDs the *non-refoulement* principle could be applicable: an individual fleeing a disrupted environmental context and being abroad could impede foreign authorities to return him/her to the country of origin if return would entail the risk of going through inhuman or degrading treatment. These usually consist in grave violations of primary human rights: “Inhuman treatment must attain a minimum level of severity and involve actual bodily injury or intense physical or mental suffering. [...] Degrading treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity”.<sup>29</sup> Deprivations of this kind can arise in different ways: for instance, risk of death or torture, detention in unacceptable circumstances, and exceptionally dramatic socio-economic life conditions. Broadly speaking, it is this last hypothesis that could make it compulsory for States to apply *non-refoulement* to “climate refugees” seeking better life conditions abroad. Given that CCRDs have the potential to render certain regions of the world extremely poor and unhealthy, deeply exacerbated situations could make it unacceptable, from a human rights perspective, to return a person to such regions.

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<sup>22</sup> J McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, Oxford (UK), 2012, p. 45.

<sup>23</sup> P Cashman e R. Abbs, *Liability in Tort for Damage arising from Human-Induced Climate Change*, in R Lyster (eds), *In the Wilds of Climate Law*, Australian Academic Press 245 (2010).

<sup>24</sup> International subjects that have created systems for the domestic implementation of norms concerning complementary protection are Australia, Canada, EU, Hong Kong, Mexico, New Zealand and USA.

<sup>25</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217A (III).

<sup>26</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>27</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, article 2; American Convention on Human Rights, article 2; African Charter on Human and Peoples’ Rights, article 4; Arab Charter on Human Rights, article 4.

<sup>29</sup> See *Pretty vs UK* [2002] 35 EHRR 1, para 52.

As regards EMMs, it is difficult (if not impossible) to apply complementary protection. This is because the activation of the *non-refoulement* principle requires the imminence of the harm feared by the applicant. The temporal factor is crucial; as currently intended under international law, *non-refoulement* arising from complementary protection provisions is inadequate for granting assistance to a vast majority of “climate refugees”, namely to EMMs, because a hypothetical future risk is insufficient for its application. Preventive movements based on the expectation of the worsening of life conditions are not considered as originating from human rights deprivations capable of activating the *non-refoulement* principle.<sup>30</sup> Consequently, pleas raised in the absence of an actual or imminent threat will be considered inadmissible.

There is hope, however, in the case of environmentally forced migrations. Theoretically, by adopting a *holistic* approach to the interpretation of the right to life, the following can be maintained: if “[such a] right encompasses existence in human dignity with the minimum necessities of life”<sup>31</sup>, then it is only respected if the enjoyment of primary necessities is not compromised (health, adequate nutrition, housing...).<sup>32</sup> In this way, it appears clear that CCRDs have the potential, even though indirectly, to violate the right to life. In other words, through the reduction of ecosystemic services, CCRDs may determine deprivations of inalienable human rights. Thanks to the holistic approach, social and economic rights could hence be considered as integrating elements of primary human rights, factor that would enable the activation of *non-refoulement*.

To understand properly the problems related to the applicability of this principle, it is useful to look at the European Convention on Human Rights (ECHR), one of the most evolved legal systems for the protection of individual fundamental rights.<sup>33</sup> The ECHR jurisdictional system consists of the Convention and a jurisdictional body, the Court of Strasbourg, which can interpret its content. *Non-refoulement* under ECHR originates from articles 2 and 3 of the Convention:

“Everyone’s right to life shall be protected by law”;

“No one shall be subjected to torture or inhuman or degrading treatment or punishment”.

The scope of application of article 3 may extend, beyond torture, also to cases of *extremely* poor life conditions. However, answers given by the Court concerning the possible applicability of *non-refoulement* to migrations forced by environmental factors are not promising, at least for the short-term. It has stated that there is *no* violation of article 3 in circumstances entailing a significant decline in the life conditions of the applicant, including life expectancy. Furthermore, the application of article 3 in case of socio-economic deprivations is “only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State. [...] An Article 3 case

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<sup>30</sup> In this regard, see UN Human Rights Committee referring to the right to life and the potential use of nuclear in *Aasberg vs Netherlands*, Communication No 1440/2005 (12 July 2006) UN Doc CCPR/C/87/D/1440/2005 (14 August 2006) para 6.3.): a person can be considered victim of violations of the right to life when “he or she can show either that an act or omission of a State has already affected his or her enjoyment of such right, or that such an effect is imminent”.

<sup>31</sup> UN Human Rights Commission, *Human Rights and Extreme Poverty*, Human Rights res 2005/16 (14 April 2005) para 1b.

<sup>32</sup> See 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: “The right to life has to be implemented holistically, through the enforcement of all the other provisions of the CRC, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment”.

<sup>33</sup> See n 28.

of this kind must be based on facts which are not only exceptional, but extreme”.<sup>34</sup> Hence, in order to activate *non-refoulement*, the following is necessary: a situation of *extreme* distress characterized, in the particular case, by *exceptional* circumstances. In this regard, the United Nations High Commission for Refugees (UNHCR) has reached similar conclusions: “A simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned”.<sup>35</sup>

To conclude, complementary protection is, at present, inadequate to protect the great majority of people induced to migrate by CCRDs, since their individual situations would be neither exceptional nor extremely dramatic. Considering these factors, alongside with the requirement of the imminence of the harm risked, it is clear that no EMM could be protected through the *non-refoulement* principle.

The same could be maintained as regards the majority of EFMs, apart from exceptional cases. Nevertheless, it should not be excluded that the complementary protection regime might be extended to such subjects in the future, thanks to an evolving interpretation from the relevant jurisdictional bodies, such as the Court of Strasbourg. In other terms, thanks to the already mentioned holistic approach, it would be possible to broaden the protection umbrella to cases of migrations forced by CCRDs. Currently, such interpretation is not yet established, also because the “climate refugees” question is at its beginning. Reasonably, with the proliferation and the worsening of the phenomenon in the next decades, interested courts might progressively start to apply *non-refoulement* also to EFMs.

### Law on Stateless Persons

The law on stateless persons is sometimes regarded as the solution to displacement from “disappearing” insular microstates. A State without its territorial element would lose its international subjectivity, rendering its citizens stateless and therefore covered by the 1954 Convention, in which a stateless person is defined as

“[a] person who is not considered as a national by any State under the operation of its law”.<sup>36</sup>

However, the applicability of such an instrument to people migrating as a reaction to sea level rise is, in reality, extremely remote. A State’s extinction not followed by the succession or union by another State is, in effect, a total legal novelty, and it seems reasonable to conclude that a submerging State would not lose, at least for a *considerable* period, its subjectivity,<sup>37</sup> since it would fight for its survival, even though perhaps only on a symbolic level. For example, it would be possible for the government to transfer its bodies on reduced emerging parts of the “drowning” territory, or even to transfer its location onto other States.<sup>38</sup>

Furthermore, the political and ethical difficulties arising from the “drowning” States question are relevant. It is very unlikely that an affected government would be disposed to declare

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<sup>34</sup> N vs Secretary of State for the Home Department, [2003] EWCA Civ 1369, paras 38-40 (<http://www.bailii.org/ew/cases/EWCA/Civ/2003/1369.html>, last access 30 December 2014).

<sup>35</sup> UNHCR, *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Refugee Convention and/or 1957 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/03/04, 23 July 2003, par. 29.

<sup>36</sup> Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117, article 1.

<sup>37</sup> See S Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*, UNHCR Legal and Protection Research Series, PPLA/2011/04; Kälin and Schrepfer (n 8) 37-40; McAdam (n 22) Ch 5.

<sup>38</sup> Some governments, as the Maldives’ for example, have discussed about the possibility of buying new lands from India or Sri Lanka in case theirs would disappear.

itself extinguished as a result of climate change effects just to render its citizens covered by the 1954 Convention. On the other hand, it is hard to imagine that any other State would advocate for the extinction of a microstate “cancelled” by sea level rise, a phenomenon in which its responsibility is almost none. In the hypothesis that States’ recognition had a significant impact on the microstate’s subjectivity, the legal extinction of the affected State would come true only after the definitive acknowledgement of such an occurrence by a large part of the international community. There seem to be numerous doubts about the feasibility of such a political move and, even if it were to be taken, it appears clear that States would carry it out only long after the recession of the territorial and demographic elements of the affected microstate. In the meantime, its citizens would remain its nationals and, therefore, the 1954 Convention would not be applicable.

At this point, one could argue that a State nearly losing its territory, even though still surviving as an international legal subject, would not be able, *de facto*, to grant citizenship rights to its nationals, since its survival would merely be formal and not substantial. In this regard, the definition of stateless person adopted by international law is not helpful for “climate refugees”, because it expressly protects only *de jure* stateless persons, not *de facto* ones. The definition does not look into the effectiveness of citizenship, but only into its formal existence for the individual. Therefore, the law on stateless persons does not cover situations of substantial statelessness (when there is a formal nationality that is in practice ineffective). The only dispositions ruling *de facto* statelessness are contained in non-binding instruments: in the Final Act of the 1954 Convention and in a resolution attached to the Final Act of the Convention on the Reduction of Statelessness.<sup>39</sup> In other words, being stateless “means being without a nationality, not without a State”.<sup>40</sup> In conclusion, the law on stateless persons is not fit to grant assistance to individuals affected by sea level rise, because it would be applicable only at the moment of the legal extinction of the insular State: long after the phase of most urgent need.

Lastly, it is important to highlight that States’ adherence to the regime is relatively weak (80 ratifications as of January 2015 to the 1954 Convention, 63 to the 1961 Convention). Thus, even if the conventions were applicable, people migrating from “drowning” microstates would need a much broader participation in order to be protected.

## **TOWARDS A MANAGEMENT SYSTEM FOR THE PHENOMENON**

Regardless of the number of people that will be effectively displaced in the next decades, the international community should start implementing a system meant to protect the human rights of the involved persons.

This system should consist of two complementary branches. The first, the “migration option”, should grant decent and safe migratory schemes for voluntary and preventive migrants. The latter should comprise the adoption of new legal instruments for the protection of forced migrants.

### **The migration option**

It has been shown that it is very burdensome on States to insist on international protection for EMMs. Such individuals, who could be countless over the next decades, configure the so-called “invisible migration” related to climate change. EMMs’ displacement should be

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<sup>39</sup> Adopted 30 August 1961, entered into force 13 December 1975, 989 UNTS 175.

<sup>40</sup> Kälin e Schrepfer (n 8) 38.

managed through the creation and the improvement of migration policies aimed at rendering migratory fluxes safe and decent and at preventing, in a forward-looking way, the potential massive exodus of innumerable people in the future, when environmental degradation might have rendered some regions of the world uninhabitable, thereby transforming displacement from them forced and protection-worthy. The International Organization for Migration estimates, in this regard, that “migration management should be one element of a holistic approach to addressing the human security implications of environmental events and processes, including the consequences of climate change”.<sup>41</sup>

In other words, involved countries should advocate for migration agreements with the purpose of rendering existing migration processes safer and of creating gradual migration schemes capable of assuring progressive and non-traumatic integration between migrating and hosting communities. If intergovernmental migration policies were to be improved, it would be possible to create a system effective in increasing the probability of successfully protecting the rights of the affected people.<sup>42</sup>

The model in this field is the government of Kiribati, an insular microstate in the Pacific, which is trying to convince its principal migration partners, above all New Zealand and Australia, to agree to gradual and constant migration schemes for the short and long-term. In a nutshell, the government of Kiribati wants to grant each year, for decades, access to foreign countries to limited numbers of its citizens. Gradual migration would allow host States to adapt with due calm to immigrant communities and prevent massive forced displacement in the future.<sup>43</sup> In the decades to come, a significant relocation of I-Kiribatis could be managed in a collaborative atmosphere, before the excessive weakening of the insular State. The opposite extreme alternative would consist instead of future mass migrations of tens of thousands that, pushed by extreme degradation, would move in a relatively short time onto foreign territories, thereby creating enormous integration difficulties. In this sense, the words of the former I-Kiribati President, Anote Tong, appear far looking: “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, 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>44</sup>

Some migration schemes that might serve as a model for tomorrow’s intergovernmental policies already exist,<sup>45</sup> such as the Pacific Access Category agreement (PAC) between New Zealand and some Pacific island countries. PAC establishes a specific annual quota for

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<sup>41</sup> International Organization for Migration, *Assessing The Evidence: Environment, Climate Change and Migration in Bangladesh* (IOM, 2010) 26.

<sup>42</sup> “Managed international migration can provide a relatively safe mechanism for enabling people to move away from the effects of climate change without artificially treating them as being in need of international protection (from a persecutory or abusive State) in the traditional sense of refugee or human rights law”, McAdam (n 22) 201.

<sup>43</sup> “In my view, it’s actually better for the receiving country to have people from that country already there in well-established [communities], so that when the rest follow, it won’t be such a burden on the receiving country”. Interview with President Anote Tong (Tarawa, Kiribati, 12 May 2009) cit. in McAdam (n 22) 205.

<sup>44</sup> President Anote Tong in D. Wilson, *Climate Change: Nobody is Immune*, (Island Business 2008) ([http://www.pacificdisaster.net/pdnadmin/data/original/KIR\\_Interview\\_Climate\\_Change\\_nobody\\_immune.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/KIR_Interview_Climate_Change_nobody_immune.pdf), last access 29 September 2014).

<sup>45</sup> See New Zealand’s five year Strengthened Cooperation Programme with Niue, (born in 2004 and renovated in 2009); South Pacific Work Permit Scheme; Pacific Access Category; cooperation agreements adopted under the Pacific Islands Forum.

citizens of Tuvalu, Kiribati, Fiji and Tonga to be granted residence in New Zealand. More specifically, it allows annual immigration for individuals coming from microstates (each year 75 citizens from both Tuvalu and Kiribati, and 250 from both Tonga and Fiji), aged between 18 and 45, who have an acceptable offer of employment in New Zealand, and meet a minimum level of English-language skills. PAC does not refer explicitly to climate change or environmental-related migration, mainly because of the political difficulties that would hinder the adoption of agreements of this kind. However, this silence may not be of concern: given the existing uncertainties, it is not necessary for today's migration agreements aimed (also) at preventing future forced environmental migrations to expressly focus on climate/environmental-related movements.

They can, more feasibly, grant to individuals coming from environmentally fragile regions access and residence onto foreign territories, without addressing the *particular* causes of their migration. By so doing, it is possible to reduce demographic pressure in the affected countries and, at the same time, to gradually create well-established migration networks that could be exploited more sensibly in the future, when the "climate refugees" question will gain much more significance. Hence, the discussion about the real nature of agreements like PAC loses centrality: are they special deals enabling "climate refugees" to move to less degraded environments, or merely pacts allowing emigration from economically depressed countries?<sup>46</sup> If the objective of the "migration option" is to permit preventive and voluntary migration from countries affected by CCRDs, instruments like PAC seem, as limited as they may be, a significant start. However, it is clear that they need to be further strengthened and implemented, since they seem deeply insufficient for the medium and long-term, when CCRDs might be capable of determining more conspicuous and emergency displacement.

Significant research should be devoted to the issue of the rights that such migration agreements should (and could) accord to preventive "climate refugees". In the first place, it appears obvious that such programmes should acknowledge access and the right to stay in the receiving country. Effective agreements should also grant participation in the economic, political and civic life of the host country, thereby favouring the integration between the involved communities, and avoiding the marginalization of the migrant one. It seems clear that such an opportunity depends largely on the institutional and economic capacities of the receiving States. As regards emigration from insular microstates in the Pacific, for example, receiving countries should prevalently be "first world" democratic countries, as the United States, Australia and New Zealand. In these contexts, "high level" migration agreements in terms of rights for immigrants might be reached more easily, since host States would have sufficient capacities and willingness to help. In other regional contexts, such as the East Asia for example, where countries like Bangladesh, India, the Philippines or China are increasingly concerned by environmental migrations, reaching agreements of this kind could (and should) be much more problematic due to two main reasons. First of all, the economic and institutional weakness of some involved countries could make it difficult to effectively implement safe and decent migration fluxes, since political authorities might not have the capacity (or even the willingness) to promote such policies, given that migration between them is largely not officially controlled or controllable. Second, countries not grounding their political life in democratic values might not be interested in granting strong rights to individuals coming from neighbouring States.

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<sup>46</sup> See A Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law, Law & Policy*, Vol 30 No 4 (October 2008) 515: "It may be argued that the environmental significance of PAC has been exaggerated and that the agreement represents little more than an economically oriented immigration move to bolster New Zealand's workforce, given the variety and class of conditions attached to the category".

Nonetheless, given that CCRDs should increase the number of international migrations in several regions around the world and considering the problems that could arise from closing borders to face them,<sup>47</sup> the “migration option” appears clearly, from a human rights perspective, a wise solution, since others would provoke definitely more suffering, both in the short and long-term. Hence, broadly speaking, international migration policies and agreements are, alongside with the necessity of granting legal protection, the other pillar of the strategy aimed at solving the “climate refugees” question.

### **Towards new, necessity-based protection instruments**

Given the normative *lacunae* surrounding the phenomenon, a commonly proposed solution calls for the creation of a new *one-size-fits-all* international agreement that should specifically address “climate refugees”.<sup>48</sup> However, such approach is largely problematic.

This is mainly because of the insufficient scientific knowledge that is available today. The complex relationship between CCRDs and displacement makes it extremely difficult to find shared legal definitions. Today, this level of accuracy is not accessible, and this situation allows governments to approach the phenomenon on relatively arbitrary grounds. It is therefore reasonable to predict that numerous States will not be willing to limit their sovereignty in favour of foreign citizens in the absence of a solid understanding of the phenomenon. As a consequence of this lack of participation, even protection-keen States will not be encouraged to stick to a hypothetical treaty, since there would be no effort-sharing with other countries and, consequently, adhering States might be overwhelmingly exposed to environmental immigration.<sup>49</sup>

Furthermore, in the light of the difficulty in proving that climate change is the primary triggering factor of displacement, it is equally reasonable that States will not follow an instrument that addresses the problem through a responsibility-based approach, since climate change remains highly controversial from this point of view. “Attempts to attribute rights and responsibilities in relation to the climate change displacement problem would require certain States to accepting responsibility for environmental damage and thus, recognizing the consequent costs [...]. While, in theory, such policy initiatives present an ideal solution, their reality appears less than likely”.<sup>50</sup> A responsibility-based treaty would require, in each individual case, to determine whether a given event that pushed an individual to leave his/her home can be attributed to climate change and, consequently, to the polluting countries. Such a determination is scientifically far from provable and, even if it were so, legal obligations relating to climate change cover just a relatively brief period of the history of anthropogenic pollution to the atmosphere (namely through the Kyoto Protocol). Consequently, hope that a specific treaty for the protection of climate refugees could be reached by focusing on liability for climate change is probably misplaced; many scientific and legal uncertainties would lead to a political stalemate.

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<sup>47</sup> See, generally, P Penz, *International Ethical Responsibilities to “Climate Change Refugees”* and L Elliott, *Climate Migration and Climate Migrants: What Threat, Whose Security?*, in McAdam (n 1). See also T Todorov, *The fear of Barbarians*, University of Chicago Press, Chicago (US), 2010.

<sup>48</sup> See eg B Docherty and T Giannini, *Confronting a Rising Tide: A proposal for a Convention on Climate Refugees*, (2009) 33 *Harvard Environmental Law Review* 349, 350, 373; D Hodkinson *et al*, *The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change*, (2010) 36 *Monash University Law Review* 69.

<sup>49</sup> See “An individual State might perceive a need to respond to a potential arrival of “climate refugees”, but be unwilling to unilaterally create legal avenues for their protection”, McAdam (n 22) 198.

<sup>50</sup> Williams (n 46) 517.

Considering these problems, a one-size-fits-all global treaty would be a positive element only if it could be grounded on shared and precise definitions and, above all, only if it could be widely ratified and implemented. In the opposite case, which is the most likely, it would just create a legal *vacuum* for the vast majority of the affected people, thereby distancing them from the needed protection.

A regional necessity-based approach focusing on environmental displacement appears hence sounder. Even though this paper focuses on those displaced because of CCRDs, this kind of displacement will invariably be considered part of the broader family of the “environmental refugee” discourse, and in many ways cannot be delinked from it. New protection instruments should therefore preferably be built with the aim of managing environmental displacement as a whole, rather than solely climate-induced displacement. Bearing in mind the complexity in identifying the exact importance of climate change factors in migration decisions, it seems wise to advocate for the creation of instruments focusing on environmental degradation independently from its causes. This element is crucial to the effectiveness of the necessity-based approach, in which the exact etiologic link between the different triggering factors of environmental degradation (anthropogenic climate change, natural climate change, geophysical events, and pollution) *is not central*, being the primary objective to protect people fleeing environmentally disrupted areas.

A necessity-based approach requires the international community to create protection for “climate refugees” on the basis of three elements: the regional context in which the displacement takes place, the degree of duress of the displacement, and the importance of environmental factors to it. Whereas the last two would allow the assessment of the real needs of the individual seeking protection, the first permits involved countries to address the question according to their specific regional characteristics.

Climate change-induced displacement is surely an issue of international interest, but its impacts will be felt prevalently at a regional level. A global one-size-fits-all treaty would not adequately consider the regional character of current and future environmental migration fluxes. It seems consequently sounder to advocate for the adoption of regional agreements operating under an international umbrella framework. Moreover, regionalism appears fitter because more flexibility and subsidiarity should grant a higher level of commitment from States. Regional agreements exploiting existing geopolitical relationships adopted by international organizations such as the European Union, the African Union, the Organization of American States, and the Association of South East Asian Nations would permit different levels of engagement, depending on the capacities of each State and on the particular situations of the involved regions.

Indeed, regional programmes under an international framework are no novelty in the international legal system,<sup>51</sup> since regional cooperation strengthens and complements international law. Hence, displacement induced by CCRDs could be dealt with, regionally, under the auspices of the UNFCCC, which promotes regional policy development by focusing, among other things, on adaptation. In particular, negotiations under the UNFCCC concerning climate change and displacement have reached an important result in 2010: section 14 of the Cancún Adaptation Framework (COP 16) represents the first legal recognitions of the link between the negative effects of climate change and human migrations. It invites States to

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<sup>51</sup> See the Regional Seas Programme (RSP), which started more than two decades ago under the umbrella of the United Nations Law of the Sea Convention (UNCLOS). RSP (with more than 140 participating States) consists in 13 regional programmes aimed at protecting shared marine environment through regional treaties and action plans.

“Enhance action on adaptation [...] by undertaking, inter alia: f) measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels”<sup>52</sup>.

While not legally binding, this clause can be considered as the embryo of a new body of international law intended to protect “climate refugees”. Hence, among the various treaties that have been considered as a possible umbrella for the management of climate-induced displacement, UNFCCC seems to be the most appropriate. However, there is still need for more explicit and detailed mandates.

In this regard, there seems to be a need for a permanent coordination and discussion body for the different regional programmes, the involved countries and organizations.<sup>53</sup> Such a body should be responsible for information exchange, interaction and for providing general indications to be followed by the various programmes. A similar coordination authority is foreseen, for example, by article 2 of the Kampala Convention:

“States Parties shall: b) Designate an authority or body, where needed, responsible for coordinating activities aimed at protecting and assisting internally displaced persons and assign responsibilities to appropriate organs for protection and assistance, and for cooperating with relevant international organizations or agencies, and civil society organizations, where no such authority or body exists”.<sup>54</sup>

Regional initiatives and legal instruments can surely achieve a broader participation of States thanks to their flexibility and subsidiarity. For instance, the different definitions of “climate refugees” and the exact rights to be granted to these should be selected at a regional level. However, some general conceptual pillars should be common. An international overarching definitional approach could be the one described above, which, depending on the degree of voluntariness/duress of the displacement, identifies different classes of “climate refugees”. This criterion is not only important to the conceptualization of the phenomenon, but it can also be a useful legal tool, since different levels of protection might be envisaged for diverse types of displacement. In other words, it appears clever to adopt a “sliding scale mechanism” for the protection of the affected individuals: “an approach whereby climate change refugees identified along a graduating scale [determine] differing degrees of protection to be accorded depending on the severity of the situation”.<sup>55</sup>

In situations where displacement becomes unavoidable due to CCRDs, EEMs have no opportunity to remain in their areas of origin. To these persons, when migrating abroad, should be granted the highest level of protection possible and, therefore, they should be granted a permanent right to stay in the host country, with the prospect of enjoying the same rights of the host country’s citizens (e.g., access to the labour market, to health facilities, right to participate in political and civic life). Moving on, a weaker level of protection should be

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<sup>52</sup> Cancun Adaptation Framework, Decision 1/CP.16, available at: <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=4> (last access 29 December 2014).

<sup>53</sup> King’s proposal of a so-called International Coordinating Mechanism for Environmental Displacement (ICMED) can be here recalled, at least for what concerns its conceptual value. T King, *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 Geo. International Environmental Law Review 543 (2005-2006). See also, *Projet de Convention de Limoges relative aux déplacés environnementaux*, article 6, which calls for the creation of an *Agence Mondiale pour les Déplacés Environnementaux* (<http://www.cidce.org/pdf/Projet%20de%20convention%20relative%20au%20statut%20international%20des%20d%C3%A9plac%C3%A9s%20environnementaux%20%28deuxi%C3%A8me%20version%29.pdf>, last access 22 January 2015).

<sup>54</sup> See n 6.

<sup>55</sup> Williams (n 46) 522.

granted to those migrating due to environmental degradation, but whose possibility of remaining in their original environment is existent. To these should be offered a temporary or permanent stay according to the specific conditions of their areas of origins, and, at least, access to the labour market without discrimination.

In order to render such a system possible, regional (or even national) assessment bodies should be created within the various regional programmes with the task of determining the “prevalent status” of the displaced persons. Such entities should determine the level of duress of the displacement (i.e., stating whether a migrant is an EEM or an EFM), the possibility of return to the original region, and, depending on these factors, the level of protection to be granted. In this regard, the Draft Convention of Limoges seems particularly helpful.<sup>56</sup> The document, drafted by international law experts, is in some parts excessively accusatory and demanding and, in this sense, appears to be a “stillborn” instrument.<sup>57</sup> However, some of its contributions are surely valuable. For instance, as regards assessment authorities specifically addressing environmental displacement, the document envisages “National Commissions for Environmentally Displaced Persons” and “High Authorities” in each participating State (articles 17, 18, 22). Such bodies would specifically be entitled to assess whether a protection request determined by environmental degradation is to be accepted or not. Now, following this idea, regional (or national) programmes for the protection of “environmental/climate refugees” should foresee the creation of dedicated technical bodies, and should adopt a sliding scale protection mechanism that, depending on the real needs of the migrating individual, would be capable of granting different levels of protection.

Moreover, it is also possible to provide some indications about the assessment procedure that should be undertaken. It appears clear that any decision concerning the protection of “environmental/climate refugees” should largely depend (among other factors, e.g., the duress of the displacement) on the possibility of return of the subject. To this scope, a useful tool may be the “returnability test”,<sup>58</sup> which suggests that a permanent stay and a high level of protection should be offered to people who cannot return to their original homes. The test is based on three different criteria: permissibility, feasibility, and reasonableness. As regards the first, the same considerations relating to the application of the complementary protection *non-refoulement* principle can be advanced. If return to a particular country puts an individual in a situation of risk of inhuman or degrading treatment, then there is no legal permissibility for a *refoulement*. The criterion of feasibility relies, on the other hand, on factual impediments. In particular cases, CCRDs can render an individual’s return to his/her country factually impossible; for instance, through the disruption of viability infrastructure or the collapse of the administrative system. Lastly, return could be permissible and feasible but not reasonable from a human rights perspective. Relying on humanitarian and compassionate considerations, host countries should not deny protection to those subjects who face a real risk, in their original regions, of living under adequate life standards, as presently considered in “civilized” nations. This appears a moral rather than a legal imperative, however, in order to grant protection in the absence of precise and definitive certainties, it might prove itself useful.

If the “returnability test” fails, local assessment bodies could be able to provide specific protection to the different categories of individuals in need. For example, if return is impossible just temporarily, protection should be assured for a limited period, whereas in

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<sup>56</sup> See n 53.

<sup>57</sup> *Ibid*, article 5, which requires States to receive displaced persons also depending on the principle of common but differentiated responsibilities, and article 9 which absolutely forbids to State Parties the possibility of denying shelter to environmentally displaced persons.

<sup>58</sup> Kälin and Schrepfer (n 8) 65-66.

case of irremediable degradation, a permanent stay is preferable. Hence, to subjects in extreme need (“permanent EEMs”) should be granted the highest level of protection possible, and, proceeding, dedicated bodies should grant to EFMs at least one further level of protection.

Through these elements, attention tends to move from the causes of displacement towards the needs and necessities of the involved persons. The dedicated authorities should only evaluate whether persons seeking protection abroad are effectively displaced because of environmental deficiencies (irrespective of their causes), the duress of his/her displacement and, complementary, if return to the original areas is possible relying on the “returnability test” concepts.

## **CONCLUSION**

This paper has addressed the so-called “climate refugees question”, with a prevalent focus on cross-border movements. Given the current normative gaps and the incomplete scientific knowledge, it advocates for the implementation of a double-oriented strategy dedicated to the management of displacement induced by CCRDs.

On the one hand, preventive and voluntary international migrations based on future expectations should be managed through collaborative migration agreements, especially between the most involved countries. Through policies of this kind, it will be possible to prevent more conspicuous and dangerous displacement in the next decades, when CCRDs are expected to exacerbate socio-economic situations in several regions of the world. At the same time, depending on the regional context and capacities, they should try to improve the quality of the migration fluxes that will be most stressed by environmental and climate factors.

On the other hand, there is a need for creating protection instruments and programmes for those who will be forcibly displaced by CCRDs. In the light of States’ reluctance to adopt a dedicated global treaty, it appears sounder to advocate for the creation of regional necessity-based instruments to be adopted under the UNFCCC’s umbrella. Through such an approach, flexibility and subsidiarity should assure sufficient participation from States, which is, in the opposite scenario, extremely remote. Nonetheless, even though regional, such agreements should follow some overarching and general principles. Among these, a “sliding scale mechanism” that identifies different levels of protection according to the needs of the protection-seeking individuals appears to be the most important.

In conclusion, it seems clear that the issue at stake requires many more research efforts. Given that climate change-induced displacement will inevitably increase its negative political and humanitarian significance in the following years, and that there is the rare opportunity to prepare responses before the most urgent time, the management structure envisaged by this paper might prove itself a useful starting point.