



Swiss Initiative to Commemorate the 60th Anniversary of the UDHR

Protecting Dignity: An Agenda for Human Rights

RESEARCH PROJECT ON CLIMATE CHANGE:

"Climate change and Human Rights: The Status of Climate Refugees in Europe"
by Margit Ammer, Ludwig Boltzmann Institute of Human Rights (BIM), Austria.

JUNE 2009

The year 2008 marked the 60th Anniversary of the Universal Declaration of Human Rights. To commemorate this occasion, and in order to make a meaningful contribution to the protection of human rights, the Swiss Government decided to launch "An Agenda for Human Rights". The initiative aims to explore new ways of giving human rights the weight and place they deserve in the 21st century. It is designed as an evolving and intellectually independent process.

The text *Protecting Dignity: An Agenda for Human Rights* was authored by a Panel of Eminent Persons, co-chaired by Mary Robinson and Paulo Pinheiro. This *Agenda* and the Swiss Initiative are designed to achieve two objectives: firstly, to set out some of the main contemporary challenges on the enjoyment of human rights, and secondly, to encourage research and discussion on a number of separate topics linked to the *Agenda*. These include: Human Dignity – Prevention – Detention – Migration – Statelessness – Climate Change and Human Rights – the Right to Health – and A World Human Rights Court.

The project is sponsored and financed by the Swiss Federal Department of Foreign Affairs. The Ministry of Foreign Affairs of Norway and the Ministry of Foreign Affairs of Austria have actively supported the project. The Geneva Academy of International Humanitarian Law and Human Rights is responsible for the coordination and organisation of the Initiative.

TABLE OF CONTENTS

List of Abbreviations	5
Overview: How impacts of climate change lead to human displacement	7
1 Introduction: Climate Change and Displacement	8
1.1 Repercussions of climate change impacts on the human being	9
1.2 Displacement scenarios.....	11
1.2.1 ‘Hydro-meteorological disasters’ (e.g. hurricanes, cyclones, flooding, mudslides)	12
1.2.2 ‘Environmental degradation and slow onset disaster’ (e.g. reduction of water availability, desertification, salinisation of coastal zones, recurrent flooding).....	12
1.2.3 Sea-level rise	13
1.2.4 Conclusion.....	13
1.3 What is the current (legal) response to climate change, in particular to climate change-induced displacement?	15
1.3.1 International responses (universal level).....	15
1.3.1.1 International environmental law: Focus on prevention.....	15
1.3.1.2 International peace and security	17
1.3.1.3 International human rights framework: A response to the impacts on the individual and regarding the role of the individual	17
1.3.2 European response (European Union, Council of Europe)	19
1.3.3 National responses.....	20
1.4 Structure of this study	20
2 ‘Climate refugees’	22
2.1 Overview over existing definitions: ‘environmental refugees’, ‘climate refugees’	22
2.1.1 ‘Environmental refugees’	22
2.1.2 ‘Environmental displacees’	24
2.1.3 ‘Climate refugees’	24
2.2 Preliminary Working Definition.....	24
2.2.1 Personal scope	25
2.2.2 Material scope: The cause of displacement	25
2.2.3 Consequences (Displacement)	26
2.2.4 Summary.....	26
3 Human rights law and ‘international climate displacees’	28
3.1 Introduction: The impacts of climate change on human rights in the country of origin	28
3.1.1 Excursion: Rights of indigenous peoples.....	28
3.2 The country of origin as the primarily responsible actor for human rights protection.....	30
3.2.1 A healthy environment as a precondition for the enjoyment of human rights	32
3.2.2 Disasters and emergency clauses	33
3.2.3 Conclusion.....	34
3.3 Human rights obligations of third countries?	35
3.3.1 Extraterritorial obligations regarding economic social and cultural rights	36
3.3.1.1 Existence of extraterritorial obligations	36
3.3.1.2 Scope of extraterritorial obligations	38
3.3.1.3 Summary	39
3.3.2 Excursion: An obligation of third States to deliver humanitarian aid in the event of disasters?	39
4 Protection obligations.....	42
4.1 Refugee law.....	42
4.1.1 ‘Well-founded fear of persecution’	42
4.1.1.1 Infliction of serious harm (act/omission)	43

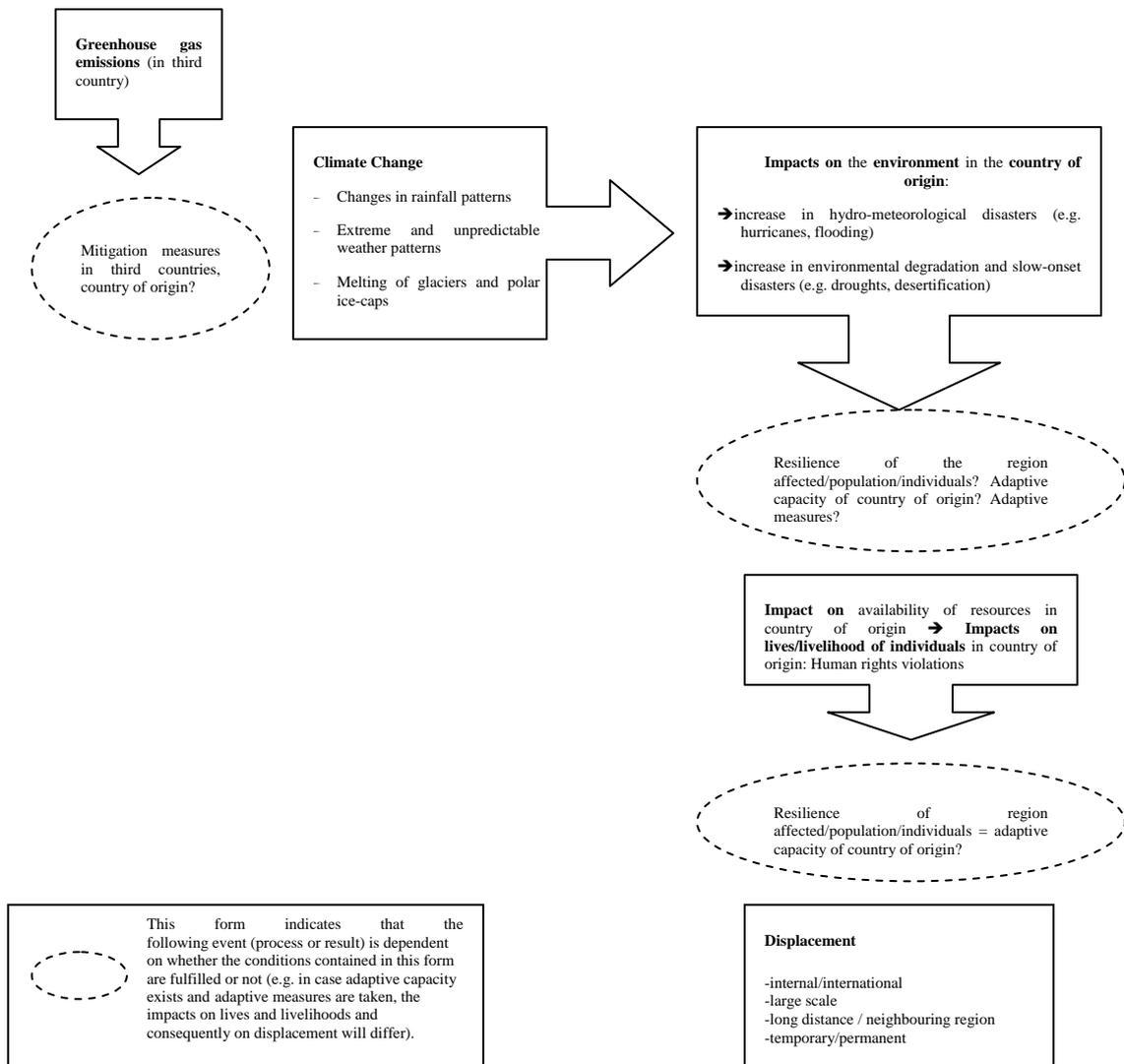
4.1.1.2	Failure of the State to provide effective protection (<i>'unable or, owing to such fear, is unwilling to avail himself of the protection of that country'</i>).....	46
4.1.2	Persecution ground/Nexus clause	48
4.1.2.1	Cases in which the nexus clause is fulfilled.....	49
4.1.2.2	Member to a particular social group, causal connection between group and fear of persecution.....	50
4.1.3	Refugee status determination (RSD) procedure	52
4.1.3.1	<i>Prima facie</i> refugees	53
4.1.4	Regional level.....	54
4.1.5	Conclusion.....	55
4.2	Complementary protection	56
4.2.1	Complementary protection and 'international climate displacees'?.....	58
4.2.1.1	ECHR	58
4.2.1.2	Qualification Directive: 'Subsidiary Protection'.....	61
4.3	Temporary protection.....	63
4.4	Excursion: Protection obligations arising from the 'Responsibility to Protect'?	64
5	Submerging territory: The status of displacees.....	66
5.1	Option: Country of origin still exists (Citizenship continues to exist).....	67
5.2	Option: Country of origin (and citizenship) cease(s) to exist	68
5.2.1	Application of the statelessness regime?	68
5.2.1.1	Excursion: A right to citizenship?	69
6	Solutions	71
	Bibliography	74

LIST OF ABBREVIATIONS

AP	additional protocol
AR4	Fourth Assessment Report
CESCR	Committee on Economic Social and Cultural Rights
CIREFCA	International Conference on Central American Refugees
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCR	economic social and cultural rights
ExCom	Executive Committee of the High Commissioner's Programme
GRC	Geneva Refugee Convention
HRC	Human Rights Council
HRComm	Human Rights Committee (ICCPR)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IEL	International Environmental Law
ILC	International Law Commission
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel on Climate Change
KP	Kyoto Protocol
OHCHR	Office of the High Commissioner of Human Rights
R2P	Responsibility to Protect
Res	Resolution
RSD	Refugee Status Determination
UDHR	Universal Declaration of Human Rights
UNFCCC	UN Framework Convention on Climate Change
UNGA	UN General Assembly

UNHCR UN High Commissioner for Refugees
UNSC UN Security Council
UNSG UN Secretary General

OVERVIEW: HOW IMPACTS OF CLIMATE CHANGE LEAD TO HUMAN DISPLACEMENT



1 INTRODUCTION: CLIMATE CHANGE AND DISPLACEMENT¹

*'Although there is a growing awareness of the perils of climate change, its likely impact on human displacement and mobility has received too little attention.'*²

António Guterres, UN High Commissioner for Refugees

According to the Fourth Assessment Report (2007) of the Intergovernmental Panel on Climate Change (IPCC)³ observations leave no doubt that the warming of the climate system is unequivocal; a delay in reducing emissions would significantly increase the risk of more severe climate change impacts. Even if the emissions were stabilised, the impacts of climate change would continue to be felt. The warming of the climate system is largely due to *man-made* greenhouse gas emissions,⁴ which are attributable to mainly developed countries.⁵

Today, nine out of every 10 natural disasters are climate related; over the last two decades, the number of recorded natural disasters has doubled (from ca. 200 to over 400 per year).⁶ For the end of the 21st century, different impacts of climate change are predicted: an increase in hydro-meteorological disasters (e.g. hurricanes, flooding), in environmental degradation and slow-onset disasters (e.g. droughts, desertification) and in sea-level rise.⁷

¹ Special thanks go to Lisa Stadlmayr, in particular for providing input from an international environmental law perspective.

² Guterres A., 'Millions Uprooted', *Foreign Affairs*, September/October 2008, cited in UNHCR (2008) 'Climate change, natural disasters and human displacement: a UNHCR perspective', 23.10.2008.

³ IPCC, 'Climate Change 2007: Synthesis Report, Summary for Policymakers' (AR4) 2; available at: <http://www.ipcc.ch> (30.03.2009). The IPCC is a scientific intergovernmental body set up by the World Meteorological Organization (WMO) and by the United Nations Environment Programme (UNEP) in order to provide decision-makers and others with an objective source of information about climate change. The Panel assesses the latest scientific, technical and socio-economic literature relevant to the understanding of the risk of human-induced climate change, its observed and projected impacts and options for adaptation and mitigation. The IPCC does not conduct any research or monitor climate related data. When governments accept the IPCC reports, they acknowledge the legitimacy of their scientific content. The findings of the first IPCC Assessment Report (1990) played a decisive role in leading to the UNFCCC; the second (1995) provided key input for the negotiations of the Kyoto Protocol in 1997. The IPCC continues to be a major source of information for the negotiations under the UNFCCC. See <http://www.ipcc.ch/about/index.htm> (30.03.2009).

⁴ The UNFCCC deals only with climate change attributable to human activity; see art. 1 (2) UNFCCC.

⁵ See also High Representative Javier Solana and the European Commission (2008) 'Climate Change and International Security', Paper to the European Council, 14.03.2008.

⁶ UNHCR (2008) 'Climate change, natural disasters and human displacement: a UNHCR perspective', 23.10.2008, 2, refers to Holmes J., Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordination, Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition 'DIHAD 2008 Conference', available at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7DHL88?OpenDocument> (30.04.2009).

⁷ IPCC, AR4. Examples of environmental degradation, which have already taken place and are regarded as impacts of climate change, see Jakobeit C., Methmann C. (2007) 'Klimaflüchtlinge', Universität Hamburg, Fakultät Wirtschafts- und Sozialwissenschaften, study on request of Greenpeace, 16-25.

1.1 REPERCUSSIONS OF CLIMATE CHANGE IMPACTS ON THE HUMAN BEING

These impacts of climate change affect the availability of resources of the country of origin and the basic elements of life, e.g. food, water, health, as well as culture. The impacts of climate change undermine livelihoods and security, exacerbate income differentials and deepen inequalities. Temperature rise and less productive land will accelerate urbanisation, which will generate additional competition for scarce resources in cities; cost of food and energy will increase; vector-borne diseases will be on the rise; increased social tension and political conflict within and between States is likely.⁸ Recently, the Global Humanitarian Forum has stated that climate change is currently responsible for 300,000 deaths per year and will in the future reach half a million by 2030.⁹

While it is accepted in the literature and among policy makers that the impacts of climate change will result in some migratory movements, it is less clear how many people will be affected (being dependent on the size and the population density of the area affected), how migration pattern will be influenced, what kind of migratory movement will result (internal or international; sudden or slow onset; forced or voluntary; mass movement or movement of individuals) and what will be the destination area.

It is argued that developing countries and within these countries the most marginalised groups of the population will be affected first and hardest.¹⁰ This is not only due to the geographical position and the density of the population of those countries but in particular due to a lack of adaptive capacity ('vulnerability'¹¹). In that regard, the Stern Report noted: *'[...] exact number who will actually be displaced or forced to migrate will depend on the level of investment, planning and resources [...]'*¹² Stable wealthy countries are better in a position to adapt to the consequences of climate change. Thus, one of the crucial factors determining the degree of displacement in the long run is the existence, scope and targeting of **preventive measures** (i.e. mitigation and adaptation):¹³ The extent of displacement will

⁸ UNHCR (2008) 'Climate change, natural disasters and human displacement: a UNHCR perspective', 23.10.2008, 2-3. UNHCR, 'Global Trends 2007: Refugees, Asylum-seekers, returnees, internally displaced and stateless persons', June 2008. Here it is argued that increased competition for rare resources will lead to extremely high prices; this will affect the poorest hardest and will cause instability.

⁹ Global Humanitarian Forum (2009) 'The Anatomy of a Silent Crisis, Human Impact Report Climate Change', available at: <http://assets.ghf-ge.org/downloads/humanimpactreport.pdf> (08.06.2009). This report also contains country case studies.

¹⁰ See preamble to resolution of UN Human Rights Council (HRC) regarding climate change and human rights, United Nations Human Rights Council, UN Doc. A/HRC/7/L.21/Rev.1 (26.03.2008), see also HRC Resolution 10/4. See also Mary Robinson, 'Climate Change and Justice', Barbara Ward Lecture, 11.12.2006: *'All human beings are born free and equal in dignity and rights. However[...] it is poor communities who are suffering most from the effects of climate change, and it is rich countries that are contributing most to the problem [...].'*

¹¹ Vulnerability in context of the UNFCCC is defined as 'the degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude, and rate of climate variation to which a system is exposed, its sensitivity, and its adaptive capacity'.

¹² Stern N. (2006) 'Stern Review: The Economics of Climate Change, Executive Summary', 30.10.2006, para. vii: *'The impacts of climate change are not evenly distributed - the poorest countries and people will suffer earliest and most. And if and when the damages appear it will be too late to reverse the process. Thus we are forced to look a long way ahead.'*

¹³ Mitigation aims at reducing the sources or enhancing the sinks of GHG; adaption aims at adjusting in natural or human systems in response to (actual or expected) climatic impacts moderating harm or exploits beneficial opportunities'. Mitigation in context of the UNFCCC is defined as 'a human intervention to reduce the sources or enhance the sinks of greenhouse gases. Examples include using fossil fuels more efficiently for industrial processes or electricity generation, switching to solar energy or wind

depend on the timing and the scope of measures addressing the root causes of climate change (reduction of greenhouse gas emissions, ‘mitigation’) as well as the scope of adaptive measures (e.g. warning systems, flooding insurances, and the erection of dams). Further, it will depend on whether the needs of the most marginalised groups are addressed.

However, it is agreed that even if the root causes were addressed today, i.e. greenhouse gas emissions were stopped or reduced dramatically, the implications of climate change and consequently displacement would still occur. Further, it is established that current coping strategies are insufficient to prevent significant population displacements.¹⁴ Still, preventive measures would in the long run have positive impacts on the enjoyment of human rights and would also constitute the economically best solution: The Stern Review comes to the conclusion that in considering the economic costs of the impacts of climate change and the costs and benefits of action to reduce greenhouse gas emissions ‘*the benefits of strong, early action considerably outweigh the costs*’. Tackling climate change could be done in a way not hindering the growth of rich or poor countries. The earlier effective action is taken, the less costly it would be; the less mitigation is done now, the greater the difficulty of continuing to adapt in the future.¹⁵

There exist predictions about the number of so-called ‘environmental refugees’. Well-known estimations come from Norman Myers. In 1993, Norman Myers predicted 150 million ‘environmental refugees’ until 2050 worldwide; in 1996, he estimated 200 million ‘environmental refugees’ solely due to sea-level rise.¹⁶ Stern also speaks of about 200 million persons permanently displaced until mid of this century only due to rising sea levels, heavier floods, and more intense droughts. As Stern notes, while this estimate has not been rigorously tested, it would remain in line with the evidence that climate change will lead to hundreds of millions more people without sufficient water or food to survive or threatened by dangerous floods and increased disease. Recently, also a number of one billion ‘environmental refugees’ was mentioned.¹⁷ However, given the lack of a precise definition of ‘environmental refugees’ or ‘climate

power, improving the insulation of buildings, and expanding forests and other ‘sinks’ to remove greater amounts of carbon dioxide from the atmosphere’. Adaptation in context of the UNFCCC is defined as ‘Adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities’. See http://unfccc.int/essential_background/glossary/items/3666.php (16.04.2009).

¹⁴ Declaration on climate migrations, adopted at conference on Climate migrations organised in the European Parliament, 11.06.2008 by the Greens/EFA group, preamble.

¹⁵ Stern N. (2006) ‘Stern Review: The Economics of Climate Change, Executive Summary’, ii; available at: http://www.hm-treasury.gov.uk/d/Executive_Summary.pdf (09.04.2009). The Stern Review on the Economics of Climate Change delivered a report to the UK Prime Minister and Chancellor assessing the nature of the economic challenges of climate change and how they can be met, both in the UK and globally. It is the most comprehensive review ever carried out on the economics of climate change. The actions over the coming few decades could create risks of major disruption to economic and social activity, later in this century and in the next, on a scale similar to those associated with the great wars and the economic depression of the first half of the 20th century; it would be difficult or impossible to reverse these changes.

¹⁶ Myers N., Kent J. (1995) *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute, Washington DC, 1, 14. See also The Independent, 29.04.2008: ‘Climate change could force 1 bio from their homes by 2050’.

¹⁷ This estimate was stated at the Climate Change and Forced Migration Conference on 29.04.2008 (organised by the Institute for Public Policy Research); participant was inter alia Norman Myers. See The Independent, ‘Climate change could force 1 bio from their homes by 2050’, 29.04.2008.

refugees', these numbers have to be treated with caution.¹⁸ For an overview over definitions, see chapter 2.

1.2 DISPLACEMENT SCENARIOS¹⁹

Dependent on the nature and extent of the climate change-induced environmental degradation, displacement can take place within the country of origin or across borders, can be of a sudden or gradual nature and affect only a few individuals or masses. Sudden onset disaster e.g. cyclones, floods, tsunamis are likely to lead to displacement in large numbers and in short periods. Longer-term consequences of climate change will trigger movement in large numbers but over longer periods of time and in more diverse directions.²⁰

While it is acknowledged that most displacement will take place within a country,²¹ or within the region, it is also accepted that on the one hand initial internal displacement can become in the long run international displacement (if not addressed adequately) and that - on the other hand - there are instances where **displacement to developed countries** will be inevitable. In that regard, the Stern Review remarked that *'climate change is likely to increase migratory pressures on developed countries significantly, although the potential scale and effect are still very uncertain and require considerably more research'*.²² On EU level, Javier Solana, High Representative for the Common Foreign and Security Policy, has noted that Europe would ultimately bear the consequences of climate change – *inter alia* in the form of mass migration. Some of the EU neighbouring regions would be very vulnerable to the impacts of climate change (e.g. North Africa, Middle East). Parts of those populations would be already now affected by difficult health conditions, unemployment and social exclusion, which would render them even more vulnerable to the impacts of climate change and trigger or reinforce internal and international movement.²³ Similarly, the Parliamentary Assembly of the Council of Europe (CoE) has

¹⁸ Castles S. (2002) 'Environmental change and forced migration: making sense of the debate', New Issues in Refugee Research Nr. 70.

¹⁹ The notion 'displacement' includes an involuntary element and consequently excludes voluntary movements.

²⁰ UNHCR (2008) 'Climate change, natural disasters and human displacement: a UNHCR perspective', 23.10.2008, 3. Declaration on climate migrations, adopted at conference on Climate migrations organised in the European Parliament, 11.06.2008 by the Greens/EFA group, preamble: *'Population movements can be diffuse and ongoing (e.g. desertification) or massive and specific in response to climate event.'*

²¹ UNHCR (2008) 'Climate change, natural disasters and human displacement: a UNHCR perspective', 23.10.2008, 2: 'It is likely that most of the displacement provoked by climate change manifested, for example, through natural disasters, could remain internal in nature.' UNHCR reports about 25 million natural disaster-IDPs in comparison to 26 million conflict generated IDPs. UNHCR, 'Global Trends 2007: Refugees, Asylum-seekers, returnees, internally displaced and stateless persons', June 2008.

²² Stern Review, part II: The Impacts of Climate Change on Growth and Development, Costs of Climate Change in developed Countries (Chapter 5), 17. The Review mentions as factors leading to long-distance and large-scale migration the income gap (since climate change would raise existing inequalities and income differentials between developed and developing countries) and environmental disasters.

²³ High Representative Javier Solana and the European Commission (2008) 'Climate Change and International Security', Paper to the European Council, 14.03.2008. Apart from 'migration' he also mentioned other 'threats' deriving from climate change: i.e. conflict over resources, economic damage and risk to coastal cities and critical infrastructure, loss of territory and border disputes, situations of fragility and radicalisation, tension over energy supply, pressure on international governance.

recently acknowledged that Europe would not be immune to the consequences of climate change including migration.²⁴

In the following an overview is given of how different impacts of climate change are ‘apt’ to ‘produce’ displacement and what kind of displacement is likely to follow:²⁵

1.2.1 ‘Hydro-meteorological disasters’ (e.g. hurricanes, cyclones, flooding, mudslides)

This type and the number of affected persons are difficult to predict; the number is dependent on the density of the population of the affected area. It has been argued that tropical hurricanes and heavy rainfalls have only limited potential to trigger long-term and long distance migration. Since mainly poor countries are affected, it is said that due to limited mobility, ‘victims’ would rather return to their home place. Thus, ‘new and larger situations of **internal displacement**’ will be the consequence. In certain instances, people might also cross an international border. According to the International Emergency Events Database²⁶ between 2000 and 2005 ca. 106 million persons were affected by flooding and ca. 38 million by hurricanes.²⁷

Kälin also mentioned that certain scenarios (e.g. increased risk of mudslides in mountain regions, coastal plains prone to flooding) will require governments to designate areas as **high-risk zones** from which people would need to be (**forcibly**) **evacuated** to safe areas and prohibited from returning to their lands.

1.2.2 ‘Environmental degradation and slow onset disaster’ (e.g. reduction of water availability, desertification, salinisation of coastal zones, recurrent flooding)

The size of the affected population and the migration flows are difficult to predict. Economic opportunities and life conditions will deteriorate, people will start moving to regions with better income opportunities and living conditions (described as voluntary movement) before it becomes impossible to

²⁴ See Parliamentary Assembly, 23.12.2008, Environmentally induced migration and displacement: A 21st century challenge, Doc. 11785, Committee on Migration, Refugees and Population, Rapporteur Tina Acketoft. Apart from that, an Additional Protocol to the ECHR regarding a right to a healthy and secure environment should be established; in the mean time, Member States should apply the *non-refoulement*-prohibition (arts. 2, 3 ECHR) in an ‘inclusive’ way and manner and grant complementary and temporary protection.

²⁵ In the following, parts of the typology of Kälin are used; Kälin W. (2008) ‘The Climate Change – Displacement Nexus’, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Panel on disaster risk reduction and preparedness: addressing the humanitarian consequences of natural disasters, ECOSOC Humanitarian Affairs Segment, 16.07.2008; see also Kälin W., ‘Climate Change, Migration Patterns and the Law’, Keynote Address by Dr. Walter Kälin, Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons, IARLJ 8th World Conference 28.01.2009: However, Kälin departs from five scenarios (in addition to the mentioned three scenarios, he mentions ‘zones designated by governments as being too high-risk and dangerous for human habitation’ and ‘armed conflict triggered by a decrease in essential resources owing to climate change’ as separate categories).

²⁶ Emergency Events Database (EM-DAT), available at: <http://www.emdat.be> (16.06.2009).

²⁷ e.g. hurricane Katrina 2005 led to the evacuation of hundreds of thousands inhabitants of New Orleans; ten thousands of others, in particular Afro-Americans were caught in the city due to insufficient transport possibilities.

stay.²⁸ However, if areas become uninhabitable because of complete desertification or sinking coastal zones, then permanent and forced displacement would be the consequence. It is argued that there would be the need for criteria to better determine where to draw the line between voluntary and forced movement; international displacement protection gap.²⁹ Migration would constitute rather a last step and be **regional and short-term**. According to the International Emergency Events Database³⁰ between 2000 und 2005 approx. 146 million persons were affected.³¹ The IPCC-report 2007 anticipates increasing water shortage in Africa and Asia; 74 to 250 million persons could be affected until 2020: *‘Freshwater availability in Central, South, East and Southeast Asia particularly in large river basins is projected to decrease due to climate change which, along with population growth and increasing demand arising from higher standards of living, could adversely affect more than a billion people by the 2050s.’* While the North of China will see less rain and drying out of rivers, the probability of floods and rainfalls in the South of China is on the increase. One quarter of China’s population (300 million people) could suffer from the wholesale reduction in glacial melting water.³²

1.2.3 Sea-level rise

Sea-level rise can be located – and predicted – rather easily. Coastal areas with low altitudes make up approx. 2.2 % of dry land, which is home for 10.5 % of the world population (602 million persons). 75 % of the endangered population lives in South and East Asia.³³ The rise is a long-term process with a **high potential for migration** since it is irreversible and takes place progressively over a longer period of time.³⁴ The phenomenon will prompt internal relocation and migration abroad until the territory is no longer able to sustain human life. The question of statelessness arises if territory disappears. In 2005, the first 980 ‘official climate refugees’ were evacuated from the Carteret islands (Papua New Guinea) due to rising sea levels.

1.2.4 Conclusion

Most of the displacement is likely to occur within the country or region of origin:

- Hydro-meteorological disasters are likely to lead to internal displacement; few persons will cross an international border. Kälén argues that in the latter case, the status of the persons

²⁸ The lack of drinking water and irrigation and the consequent progressive cyclical migration constitutes also a centuries old survival strategy (e.g. in South America, Syria, Iran, Central Asia, South Asia).

²⁹ Kälén W. (2008).

³⁰ Emergency Events Database (EM-DAT), available at: <http://www.emdat.be> (28.10.2008).

³¹ e.g. mass emigration in the Sahel zone 1973-1999; max. 1 million displaced during drought in Niger 1985.

³² The Stern Review also mentions the Irish Potato Famine (1845) as example for a dramatic loss in basic subsistence triggering large-scale population movement; a potato fungus destroyed the primary food source for the majority of the population and led to the death of 1 million people and the emigration of a further 1 million.

³³ Small island States in the South Pacific, e.g. Tuvalu, are affected by flooding resulting in loss of territory or salinisation of former fertile soil. According to the Stern Review, Bangladesh (with a high population density) faces the permanent loss of large areas of coastal land affecting 35 million people, i.e. about one quarter of its population, due to sea level rise, more frequent and heavier storms, floods but also drought.

³⁴ Piguet E. (2008) ‘Climate change and forced migration’, New Issues in Refugee Research Nr. 153.

affected would remain unclear (they would not qualify as refugee nor as economic migrant).³⁵ In the case of designation of high-risk zones and forced evacuation, displacement is likely to be internal and permanent - unless durable solutions are found. However, the potential scale would not yet be clear. Persons concerned would clearly qualify as IDPs. Kälin argues that stronger engagement of early recovery and development agencies as well as close cooperation between populations and authorities, and between development and humanitarian actors would be necessary.³⁶

- Environmental degradation and slow-onset disasters will rather lead to internal or regional movement, which will be voluntary in the beginning but become forced displacement if land becomes uninhabitable to sustain a living.
- Sea-level rise is a long-term process and likely to trigger permanent internal and international migration/displacement.

Regarding internally displaced persons (IDPs) the government of the country of origin is primarily responsible for protection. The IDP Guidelines³⁷ offer guidance - their application is only contested in relation to gradual environmental degradation since here also the distinction between voluntary and forced migration is difficult. Further, it is argued that an operational gap exists since the mandates of international actors do often not include persons displaced by environmental disasters or degradation.

Either in case of **internal displacement** or in case of **displacement in the region**, it will be most likely **developing countries** to be **affected** – thus, the assistance of third States and international organisations will be required.³⁸ Countries in the neighbourhood may be faced with a similar problem like the country of origin since both are often situated in the same climatic area.³⁹ Thus, those countries may be unable to assist and offer protection because hosting refugee camps could jeopardise its own environmental and financial situation.⁴⁰ The presence of large refugee populations has an economic,⁴¹ environmental,⁴² social and political impact,⁴³ as well as impact on national, regional and international peace and security^{44, 45}.

³⁵ Kälin W. (2008). In particular, they would risk ending up in a legal and operational limbo; for the moment, it would be desirable to allow them to stay temporarily for humanitarian reason until a safe return is possible (e.g. Hurricane Mitch USA).

³⁶ Kälin W. (2008).

³⁷ Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, 11.02.1998, Introduction, Scope and Purpose, para. 2: 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border'

³⁸ UNHCR (2008) 6: According to UNHCR, these actors 'have traditionally acted in accordance with the principle of international solidarity and burden-sharing, supporting and supplementing national response capacities.'

³⁹ Lafontaine E. (2007) *The need for a new instrument to deal with 'Environmental Refugees'*, 21.09.2007, 7, refers to McGregor J., *Refugees and the Environment*, in *Geography and Refugees: Patterns and Processes of Change*, 1993.

⁴⁰ Lafontaine E. (2007) 7, refers to UNHCR Refugee Magazine, Issue 127(2002); Myers N., Kent J. (1995). UNGA, A/AC.96/904, 07.09.1998, Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees, Executive Committee of the High Commissioner's Programme, 49th session, paras. 8-12. '*There is increasing recognition of the extent to which large refugee and returnee populations may impede or jeopardize the development efforts of developing countries. Some of the largest refugee and returnee concentrations are to be found in countries, which already suffer from weak economies and poor infrastructure, as well as widespread and chronic poverty. National and regional authorities in these countries are often compelled to divert considerable resources and manpower to deal with issues relating to these populations, detracting from the pressing demands of their own development.*'

However, it is equally clear that climate change will **increase migratory pressures on developed countries significantly** (see in detail above).

1.3 WHAT IS THE CURRENT (LEGAL) RESPONSE TO CLIMATE CHANGE, IN PARTICULAR TO CLIMATE CHANGE-INDUCED DISPLACEMENT?

1.3.1 International responses (universal level)

At the moment, climate change and its impacts are addressed in international environmental law instruments, which focus on the prevention of climate change including its adverse effects. Apart from that, climate change is described in international law as a threat to international peace and security. Finally, climate change is increasingly dealt with in the context of international human rights instruments.

1.3.1.1 International environmental law: Focus on prevention

The main instrument dealing with the issue of climate change, in particular with its mitigation and the adaptation to its impacts, is the **UN Framework Convention on Climate Change (UNFCCC)**.⁴⁶ Its objective is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.⁴⁷

The UNFCCC contains following principles:

- In implementing the Convention, **developed country parties**⁴⁸ should **take the lead** in the protection of the climate system for the benefit of present and future generations, on the basis of

⁴¹ Substantial demands on food, energy, transportation, employment and public services such as education, health and water facilities; increased public expenditure needed; structural adjustment programmes simultaneously being implemented in some developing countries.

⁴² Sudden influxes of large refugee populations often lead to serious, uncontrolled environmental imbalances which can affect entire eco-systems; refugees often create an unexpected and massive demand for scarce natural resources with long-term implications for their sustainable regeneration; effects of environmental damage often continue to be felt long after refugees leave the affected area.

⁴³ In particular, where refugees or returnees are from different cultural, ethnic, religious or linguistic groups from the local population, this may create or exacerbate social tensions.

⁴⁴ Internal security, particularly where the ratio of these populations to local people is high; implications for regional and international peace and security, Great Lakes region of Africa; problems of politicization and militarization of refugee camps and settlements are well known; demands on the police and armed forces to ensure the security and stability.

⁴⁵ UNGA, A/AC.96/904, 07.09.1998, Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees, Executive Committee of the High Commissioner's Programme, 49th session, paras. 8-12.

⁴⁶ UNFCCC (09.05.1992) 1771 UNTS 107, entry into force 21.03.1994.

⁴⁷ art. 2 UNFCCC.

⁴⁸ Annex I Parties are the industrialised countries committed to return their greenhouse gas emissions to 1990 levels by the year 2000 as per art. 4 (2) (a) and (b). They have also accepted emissions targets for the period 2008-12 as per art. 3 and Annex B of the Kyoto Protocol. They include the 24 original OECD members, the EU, and 14 countries with economies in transition. Annex II Parties are the countries having a special obligation to provide financial resources and facilitate technology transfer to developing countries. Annex II Parties include the 24 original OECD members and the EU.

equity⁴⁹ and, in accordance with **common but differentiated responsibilities and respective capabilities**,⁵⁰ Here the contribution of a State to the cause of the environmental degradation as well as the capacity of a State to prevent and control, have to be taken into consideration.

- The **specific needs of developing country Parties** - especially those particularly vulnerable to the adverse effects of climate change, and those that would have to bear a disproportionate burden under the UNFCCC - should be given full consideration.⁵¹
- According to the **‘precautionary principle’** ‘lack of full scientific certainty should not be used as a reason for postponing precautionary measures’ where there are threats of serious or irreversible damage.⁵²

The UNFCCC commits States to actions in relation to mitigation and adaptation. Developed Parties are expected to assist the developing country Parties that are particularly vulnerable to the adverse effects in meeting costs of adaptation.⁵³ The **Kyoto Protocol**⁵⁴ imposes corresponding legally binding reduction targets regarding greenhouse gas emissions. At the moment, a successor protocol is negotiated, which should contain more far-reaching reduction obligations with a higher number of States; developing countries should be involved in reduction efforts. The **Bali Action Plan**⁵⁵ launched a comprehensive process to enable the full implementation of the UNFCCC through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision in December 2009 in Copenhagen at the Conference of the Parties (COP) by addressing, *inter alia* enhanced action on adaptation, enhanced action on technology development and transfer to support action on mitigation and adaptation, enhanced action on the provision of financial resources and investment to support action on mitigation and adaptation and technology cooperation.

Apart from those norms, the **‘polluter pays principle’** following principle 16 Rio Declaration⁵⁶ is often cited in the context of climate change. Costs incurred due to preventive and control measures in relation

⁴⁹ Equity enables to correct a result achieved by application of legal norms if it seems unfair. See *Thirlway H.* (2006) in *Evans M.* (ed.), *International Law* (Oxford, 2nd edition), 136.

⁵⁰ art. 3 (1) UNFCCC. See also Principle 7 Rio Declaration.

⁵¹ art. 3 (2) UNFCCC.

⁵² art. 3 (3) UNFCCC. See also UNU-EHS (2008) Report on Human Security, Climate Change and Environmentally Induced Migration, 53; it is discussed about the scope and quality of this principle; see Sands P. (2003) *Principles of International Environmental Law* (Cambridge, 2nd edition), 266 ff. See also Principle 15 Rio Declaration. In contrast to the majority of norms of international environmental law, the precautionary ‘principle’ should also relate to the prevention of environmental degradation within a State and not request a border crossing element (ILC Memorandum of the Secretariat on the Protection of Persons in the Event of Disasters, UN doc A/CN.4/590, para. 24). In particular, it is argued (but contested) that the onus of proof is reversed in relation to the obligation to prevent cross-border harm (in the sense of a no harm rule).

⁵³ art. 4 (1) UNFCCC: Commitments include the implementation of measures to mitigate climate change and to facilitate adaptation to climate change; develop plans for coastal zone management, water resources and agriculture, protection and rehabilitation of areas affected by drought and desertification, floods - particularly in Africa; take climate change considerations into account in social, economic and environmental policies, e.g. impact assessments of measures to mitigate or adapt with a view to minimising adverse effects on the economy, on public health and on the quality of the environment.

⁵⁴ UN Doc FCCC/CP/1997/7/Add.1 (10.12.1997) 37 ILM 22 (1998), in force since 16.02.2005, as of 14.01.2009 183 State parties and the European Community, see http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (25.04.2009).

⁵⁵ FCCC/CP/2007/L.7/Rev.1, 14.12.2007, Decision -/CP.13.

⁵⁶ ‘National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.’ Different ways of interpreting this provision

to environmental degradation are to be borne by the polluter. Even though the legal quality of this principle is contested, it can become relevant in the context of burden-/responsibility sharing. Since the application of this principle to inter-State relations is negated, it could be relevant for establishing inner-State liability regimes for private actors.⁵⁷

1.3.1.2 International peace and security

Climate change and its implications are often described as a threat to international security or even a 'security threat multiplier'.⁵⁸ This was confirmed by the UN Security Council (UNSC), which held its first debate on the repercussions of climate change on international peace and security in April 2007.⁵⁹ Climate change would have effects on possible conflict factors (e.g. access to energy, water, food, and other scant resources) as well as population movements and border disputes. While some countries argued in favour of expanding the concept of 'security threats' to environmental threats,⁶⁰ developing countries preferred to see climate change to be dealt with rather by the UN General Assembly (UNGA) or by the UN Economic and Social Council (ECOSOC) since it was an issue of 'socio-economic' development. However, Papua New Guinea - on behalf of the Pacific Islands Forum - described the impacts of climate change on small island States as no less threatening than the dangers emanating from bombs or firearm: massive dislocation similar to population movements after conflicts would be the consequence.⁶¹ Also UN Secretary General Ban Ki-Moon stressed the serious implications for peace and security⁶² and argued for a long-term global answer to climate change – to be brought about with the support of UNSC, member States and other international actors.

1.3.1.3 International human rights framework: A response to the impacts on the individual and regarding the role of the individual

Repercussions of climate change on the individual person or the role of individuals and communities in the actions aiming at the prevention of the root causes or the impacts of climate change have been often neglected in international instruments. However, since the effects of climate change are being or will be felt hardest and most acutely by already vulnerable segments of the population (owing to e.g. geography,

exist. However, reduction targets of the Kyoto Protocol were not founded on this principle; they were the result of political negotiations.

⁵⁷ Sands P. (2003) *Principles of International Environmental Law* (Cambridge, 2nd edition), 285.

⁵⁸ High Representative Javier Solana and the European Commission (2008) 'Climate Change and International Security', Paper to the European Council, 14.03.2008.

⁵⁹ 5663rd Meeting, first open debate on impacts of climate change on peace, 17.04.2007.

⁶⁰ The representative of Belgium stressed the necessity 'to broaden the scope of common thinking about security threats.' The representative of Peru argued that environmental degradation and natural disasters would constitute threats to international peace and security. Special attention should be paid to prevention and not re-action; climate change would be a problem of a global dimension and could be addressed only through multilateral actions of the whole international community. See also suggestions regarding reform of the UN Environmental Governance architecture, <http://www.reformtheun.org/index.php/eupdate/2803> (21.05.2009), refers to Security Council meeting of 08.01.2007.

⁶¹ 5663rd Meeting, first open debate on impacts of climate change on peace, 17.04.2007.

⁶² He mentioned that restricted access to energy and shortage of food and water could increase the conflict risk; floods and droughts could trigger mass flight - in particular, in vulnerable regions, which are exposed to multiple stress factors (e.g. conflicts, poverty, unequal access to resources, weak institutions, food insecurity, diseases such as HIV/AIDS) at the same time.

poverty, gender, age, indigenous or minority status and disability), looking at climate change also from a human rights perspective appears necessary.

This lack was recognised and first steps towards studying the relationship between climate change and human rights were taken: the Office of the United Nations High Commissioner of Human Rights (OHCHR) prepared on request of the UN Human Rights Council (HRC)⁶³ a study on the relationship between climate change and human rights. The study⁶⁴ focused on the question how international human rights standards and procedures could guide mitigation and adaptation measures in order to deliver a note to the Climate Change Conference in Copenhagen in December 2009. As a result, the HRC recognised that climate change – as a global problem – would require a **global solution** and that effective **international cooperation** to enable the implementation of the UNFCCC was important to support national efforts for the realisation of human rights. Further, the Council described **human rights obligations and commitments** to have the potential to **inform and strengthen international and national policy-making** in the area of climate change, promote policy coherence, legitimacy and sustainable outcomes.⁶⁵

Thus, it is increasingly accepted that **mitigation and adaptation measures** need to be informed by a **human rights based approach**, i.e. that human rights obligations and commitment should inform and strengthen international and national climate change policy-making (e.g. access to information and participation in decision-making of persons affected; empowerment of the individual, focusing on needs of marginalised groups).

The Human Rights Council (HRC) held a panel discussion in June 2009 (11th session) on the relationship between climate change and human rights to contribute to the realisation of the goals set out in the Bali Action Plan and to invite all relevant stakeholders to inform the Conference of Parties of the UNFCCC. Steps have been taken also by the OHCHR and the secretariat of the UNFCCC to facilitate exchange of information in the area of human rights and climate change. Special procedures of the HRC are increasingly dealing with the potential impacts of climate change.⁶⁶

Still, so far it has been **hardly touched upon the question of how to deal with persons displaced**. While it is clear that the IDP Guidelines can be applied to a considerable part of the group of internally

⁶³ HRC, Resolution 7/23 on human rights and climate change, UN Doc. A/HRC/7/L.21/Rev.1 (28.03.2008).

⁶⁴ Report of the OHCHR on the relationship between climate change and human rights, A/HRC/10/61. The study was undertaken in consultation with States, international organisations and intergovernmental bodies, including the Intergovernmental Panel on Climate Change (IPCC), the secretariat of the UNFCCC and other stakeholders. A Consultation meeting on climate change and human rights took place on 22.10.2008.

⁶⁵ See preamble HRC resolution 10/4.

⁶⁶ After the Special Rapporteur on adequate housing had decided to draft a thematic report on the potential impact of climate change on the right to adequate housing, the HRC encouraged other relevant special procedure mandate-holders to give consideration to the issue of climate change within their respective mandates. Human Rights Council, A/HRC/10/L.11, 31.03.2009, 10th session, Draft report on its tenth session (text of resolutions and decisions adopted and the President's Statement agreed upon). HRC, Resolution 10/4 Human Rights and Climate Change, adopted at 41st meeting, 25.03.2009. Human Rights Council, A/HRC/10/L.10, 07.04.2009, 10th Session, Draft report on its tenth session, Report relating to the organization of the session and the items on the agenda, paras. 160-161.

displaced (even though an ‘operational protection gap’ may exist,⁶⁷ it remains dubious what solutions (in particular what legal status) can be offered to persons displaced across borders: it has been argued that persons displaced by the adverse effects of climate change are not covered by the Geneva Refugee Convention (GRC)^{68, 69}. Further, the question of burden-sharing has not been adequately addressed in this context.

1.3.2 European response (European Union, Council of Europe)

On the European level, persons, who had to leave their country due to the impacts of climate change, do not form a specific category in any binding international or supranational agreement, which would regulate their protection or immigration.

However, the **European Union (EU)** Commission has stressed the need for a policy in response to the increasing impact of climate change on migratory movement.⁷⁰ It has already funded a two-years-project ‘Environmental Change and Forced Migration Scenarios’ (EACH-FOR), which investigated the causes of environmentally forced migration and its connections to other social, political and economic phenomena in Europe and 26 main countries of origin.⁷¹ Similarly, the European Refugee Fund has very recently started the funding of projects investigating environmental degradation as possible trigger for forced migration to EU Member States.⁷² Apart from that, the EU Commission suggested the establishment of a ‘Global Climate Change Alliance’ between the EU and developing countries, in which the EU should finance adaptation and risk reduction measures; climate change should be included in poverty reduction strategies.

On the level of the **Council of Europe (CoE)**, the Parliamentary Assembly has recently acknowledged that Europe would not be immune to the consequences of climate change including migration and has called for the elaboration of a CoE ‘Framework Convention for the Recognition of Status and Rights of Environmental Migrants’.⁷³

⁶⁷ The application is only contested in relation to gradual environmental degradation (since here the distinction between voluntary and forced is difficult).

⁶⁸ Convention Relating to the Status of Refugees, 28.07.1951, UNTS no. 2545, vol. 189, p. 137; Protocol Relating to the Status of Refugees, 606 UNTS 267, entered into force 04.10.1967.

⁶⁹ Mary Robinson, Guest essay on climate change and human rights: ‘[...] *The 1951 Geneva Convention established the right to asylum for those in fear of persecution, not those whose homes had been destroyed by the forces of nature. If the impacts of climate change on the vulnerable are as severe as predicted, there is no system to deal with them, leaving their existence untenable, yet outside the realms of international law. [...].*’

⁷⁰ See Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies’, COM (2008) 611/3, 7-8.

⁷¹ See EACH-FOR (2008) Preliminary Findings from the EACH-FOR project on Environmentally Induced Migration, Environmental Change and Forced Migration Scenarios Project, available at: <http://www.each-for.eu> (30.04.2009).

⁷² Call 2008 of the European Refugee Fund (available at: http://ec.europa.eu/justice_home/funding/refugee/funding_refugee_en.htm# (01.06.2009)); Objective 4 action b: ‘pilot projects related to the study of new types of conflicts and threats, including environmental damage, which may have an impact on the flows of persons seeking protection in the EU.’

⁷³ See Parliamentary Assembly, 23.12.2008, Environmentally induced migration and displacement: A 21st century challenge, Doc. 11785, Committee on Migration, Refugees and Population, Rapporteur Tina Acketoft. Apart from that, an Additional Protocol to the ECHR regarding a right to a healthy and secure environment should be established; in the mean time, Member

1.3.3 National responses

The Swedish aliens' law⁷⁴ is one of the few migration laws of EU Member States, which contains a category of persons who cannot return to their countries of origin due to environmental disasters.

Elsewhere, more concrete steps have been taken on national level:

In Australia, the Migration Amendment Bill 2007 contained a definition of climate refugees and gave the Immigration Minister the power to make a 'climate change induced environmental disaster' declaration. He/She is to consider geographical scope of disaster, possibilities for adaptation and long-term sustainability of the area; the capacity of the country and neighbouring countries to absorb displaced persons; he/she could also set the number of visas issued to people displaced by declared disaster. The Australian Labor's Party argued that Australia should accept climate change refugees as part of its humanitarian immigration programme and should ensure appropriate recognition of climate change refugees in existing Conventions, or through the establishment of a new convention on climate change refugees.⁷⁵

It is often argued that New Zealand has already accepted 'climate refugees'. However, in reality New Zealand hereby only accepts an annual quota of migrants from certain island states (e.g. 75 from Tuvalu and Kiribati, 350 from Tonga) on the basis of an immigration agreement (Pacific Access Category (PAC)). The PAC does not employ the term environmental or climate refugee, nor does it mention the threat of climate change or state any responsibility for the displacement of these populations. The immigrants are selected each year by ballot and need to fulfil certain criteria.⁷⁶ That means, that the vulnerable groups such as the elderly, sick or poor (which are affected hardest by climate change) are not covered.

1.4 STRUCTURE OF THIS STUDY

This study focuses on *third* State obligations – in particular international protection obligations – towards persons affected by the impacts of climate change (often referred to as 'climate refugees'). However, since international protection obligations are linked to human rights violations inflicted in the country of origin, also the human rights situation in the country of origin will need to be looked at.

After having provided a brief background regarding climate change, its impacts on the environment and on human beings as well as regarding the displacement resulting thereof (**chapter 1**), the **second chapter** develops a working definition for so called 'climate refugees', on which the rest of the study is to be based. This seems to be necessary since a variety of definitions exist.

States should apply the *non-refoulement*-prohibition (arts. 2, 3 ECHR) in an 'inclusive' way and manner and grant complementary and temporary protection.

⁷⁴ In force since 31.03.2006.

⁷⁵ "Our drowning neighbours", Australian Labor's Policy Discussions paper on climate change in the pacific, 05.01.2006, 10.

⁷⁶ Age 18-45; they need to be offered a full-time employment; minimum level of English, minimum income requirement if dependant; health and character criteria.

The **third chapter** aims at looking at the human rights situation in the country of origin: in particular, the role of the country of origin and of third countries – which have contributed to climate change – in protecting human rights of individuals affected by the impacts of climate change is investigated; further, it is asked to what extent those countries can be made responsible for human rights violations.

Chapter four focuses on international protection obligations, i.e. to what extent international refugee law,⁷⁷ complementary forms of protection (‘subsidiary protection’ in the EU) or ‘temporary protection’, including corresponding EU norms (Qualification Directive,⁷⁸ Temporary Protection Directive⁷⁹) are applicable or could become applicable if interpreted in a specific way. Also the question, whether the protection offered under these norms is adequate, should be addressed.

The **fifth chapter** looks at the special situation of populations whose States are likely to be submerged within the next decades. Their status is currently not regulated under public international law.

Finally, the **sixth chapter** is dedicated to the development of solutions in order to address the protection gaps detected in the previous chapters.

⁷⁷ Geneva Refugee Convention including its protocol 1967.

⁷⁸ Council Directive 2004/83/EG, 29.04.2004.

⁷⁹ Council Directive 2001/55/EG, 20.07.2001.

2 ‘CLIMATE REFUGEES’

At the moment, a variety of terms and definitions developed by researchers from different fields exist. They were all established not to be used in a legal framework, but in an e.g. sociological, empirical context. Thus, in the following - based on the analysis of existing definitions and the criticism - a preliminary working definition is established.

2.1 OVERVIEW OVER EXISTING DEFINITIONS: ‘ENVIRONMENTAL REFUGEES’, ‘CLIMATE REFUGEES’

The term ‘environmental refugees’ first emerged in the late 1970s (Lester Brown, World Watch Institute) and was subsequently used mainly in context of environmental research starting in the mid 1980s (El-Hinnawi, UN Environmental Programme (UNEP); in the 1990s Norman Myers). The notion also became part of the international political agenda and was used *inter alia* by former US president Bill Clinton and former UN Secretary General Boutros Boutros-Ghali.⁸⁰ Variations of the term have appeared over the years, differentiating between ‘environmental refugees’, ‘environmentally displaced persons’ and ‘climate refugees’. The last expression emerged with increasing scientific evidence on the advancement and negative impacts of climate change; in that way it should be stressed that it is in particular climate change, which is responsible for the major part of environmental degradation.

2.1.1 ‘Environmental refugees’

Commonly used definitions of ‘environmental refugees’ were developed by Essam El-Hinnawi (1985) Jodi L. Jacobson (1988), Norman Myers (1993, 1995, 2005) and Diane Bates (2002)⁸¹. All of them are combining elements of involuntariness, a threat to life or livelihood, posed by or in the aftermath of an environmental disruption:

El-Hinnawi (1985): *‘Those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life. By “environmental disruption” [...] is meant any physical, chemical and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.’*⁸²

Jodi L. Jacobson (1988): *‘Environmental refugees have become the single largest class of displaced persons in the world. They fall into 3 broad categories: 1) those displaced temporarily because of a local*

⁸⁰ Kolmannskog V.O. (2008) ‘Future Floods of Refugees’, Norwegian Refugee Council, 8.

⁸¹ Bates D.C. (2002) ‘Environmental Refugees? Classifying human migrations caused by Environmental Change’, in: Population and Environment, vol. 23, no. 5, 468.

⁸² El-Hinnawi E. (1985) ‘Environmental Refugees’, United Nations Environment Program (UNEP), New York, 4.

*disruption such as an earthquake or avalanche, 2) those who migrate because of environmental degradation that undermines their livelihood or threatens their health, or 3) those who resettle because land degradation has resulted in desertification or because of other permanent and untenable changes in their habitat.*⁸³

Norman Myers (1993, 1995, 2005):⁸⁴ *'[...] people who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty. In their desperation, these people feel they have no alternative but to seek sanctuary elsewhere, however hazardous the attempt. Not all of them have fled their countries; many being internally displaced. But all have abandoned their homelands on a semi-permanent if not permanent basis, having little hope of foreseeable return.'*

However, the concept of 'environmental refugees' has been criticised for its ambiguity in many ways: no sufficient distinction would be made between the root causes (i.e. different forms of environmental degradation triggering forced migration), between forced and voluntary migration,⁸⁵ between internal and international migration, and between environmental change as direct or indirect cause for migration.⁸⁶ Apart from that, involuntary migration would be triggered by the interaction of environmental degradation with many factors, in particular poverty and conflicts;⁸⁷ environmental change as such would not inevitably lead to involuntary migration but rather reinforced by economic, social, ethnical and political factors:⁸⁸ *'[...] the term environmental refugee is simplistic, one-sided and misleading. It implies a mono-causality which very rarely exists in practice [...] (Environmental and natural factors) are part of a complex pattern of multiple causality, in which (they) are closely linked to economic, social and political ones.'*⁸⁹

In that regard, recently, António Guterres, the UN High Commissioner for Refugees, stated that he had *'serious reservations with respect to the terminology and notion of environmental refugees or climate refugees. These terms have no basis in international refugee law'*; the majority of those would have not crossed an international border.⁹⁰ He also stressed the link between extreme poverty, a deteriorating environment (due to climate change) and violence, forcing more and more persons to leave their homes.⁹¹

⁸³ Jacobson, J.L. (1988) 'Environmental Refugees. A Yardstick of Habitability'. Worldwatch Paper 86, Washington: Worldwatch Institute, 37ff.

⁸⁴ Myers N. (2005) 'Environmental Refugees: An emergent Security Issue', 13th Economic Forum, 22.05.2005; see also Myers N. (1993) 'Environmental refugees in a globally warmed world', in: Bioscience, vol. 43, 752; Myers N., Kent J. (1995) *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute, Washington DC, 1, 14.

⁸⁵ Bates D. (2002) 467 et seq.

⁸⁶ Jakobeit C., Methmann C. (2007) *Klimaflüchtlinge*, 9.

⁸⁷ Castles S. (2002) 'Environmental change and forced migration: making sense of the debate', *New Issues in Refugee Research* Nr. 70.

⁸⁸ Piguet E. (2008) 'Climate change and forced migration', *New Issues in Refugee Research* Nr. 153.

⁸⁹ Castles S. (2002).

⁹⁰ UNHCR (2008) 'Climate change, natural disasters and human displacement: a UNHCR perspective', 23.10.2008, 7.

⁹¹ NZZ Online, 'Auch Hunger- und Umweltflüchtlinge brauchen Schutz', Interview with UN High Commissioner for Refugees António Guterres (18.06.2008) available at: http://www.nzz.ch/nachrichten/international/auch_hunger-_und_umweltfluechtlinge_brauchen_schutz_1.762289.html (25.07.2008).

In his view, climate change would be one of the main reasons to increase the probability of conflicts and lead indirectly to forced migration.⁹² The use of the term ‘refugee’ would possibly undermine the protection of ‘classical’ refugees under the Geneva Refugee Convention (GRC) and furthermore restrict the phenomenon to *international migration*.⁹³

2.1.2 ‘Environmental displacees’

The International Organisation for Migration (IOM) and the EU-funded EACH-FOR Project used the expressions ‘environmental migrants’ for voluntary migration and ‘environmental displacees’ for involuntary migration.⁹⁴ Environmental displacees are defined as ‘[...] *forced to leave usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as result of adverse environmental processes and events (natural and/or triggered by people) [...] displaced by both slow onset and rapid onset environmental process (natural disasters, land degradation and sea-level rise) [...].*’

2.1.3 ‘Climate refugees’

Cord Jakobeit and Chris Methmann use the concept of ‘climate refugees’ as a sub-category of environmental refugees, which was adapted to the peculiarities of climate change.⁹⁵

The Declaration on climate migrations defines people displaced by the impacts of climate change as ‘*people forced to leave their homes, temporarily or permanently, due to impacts of climate change that put their existence at risk or seriously affect their living conditions.*’⁹⁶

2.2 PRELIMINARY WORKING DEFINITION

In order to avoid the highly contested notion ‘climate refugees’, in the following, the notion ‘**international/internal climate displacees**’ is used.

⁹² Climate change is today one of the main drivers of forced displacement, both directly through impact on environment - not allowing people to live any more in the areas where they were traditionally living - and as a trigger of extreme poverty and conflict.’ See The Guardian, Conflicts fuelled by climate change causing new refugee crisis, warns UN (17.06.2008) available at: <http://www.guardian.co.uk/environment/2008/jun/17/climatechange.food/print> (15.09.2008). See also criticism raised by Richard Black: Black R. (2001) ‘Environmental refugees: myth or reality?’, New Issues in Refugee Research Nr. 34; see also International Peace Academy (2007), *Climate Change and Conflict: The Migration Link*. Castles S. (2002); see also UNU-EHS (2008) 62.

⁹³ See also King T. (2006) ‘Environmental Displacement: Coordinating Efforts to Find Solutions’, Georgetown International Environmental Law Review, vol. 18, 543. See also UNHCR (2008) 7.

⁹⁴ EACH-FOR project on Environmentally Induced Migration, see Preliminary Findings, 01.10.2008, <http://www.each-for.eu> (21.05.2009)

⁹⁵ Jakobeit C., Methmann C. (2007) *Klimaflüchtlinge – Die verleugnete Katastrophe*, Universität Hamburg, Fakultät Wirtschafts- und Sozialwissenschaften, study on behalf of Greenpeace, 8 et seq.

⁹⁶ Adopted at conference on Climate migrations organised in the European Parliament, 11.06.2008 by the Greens/EFA group.

2.2.1 Personal scope

Primarily, citizens of the country of origin and persons residing in the country of origin not having a stronger link to a third State to which they could turn (e.g. stateless persons with habitual residence) should be covered by the definition.

2.2.2 Material scope: The cause of displacement

Forced migration (displacement) vs. voluntary migration

In migration theory the decision to emigrate is described as a continuum: ranging from persons with absolute no control over their relocation (forced migration) to persons with total control (voluntary migration).⁹⁷ This study, however, deals with persons who saw themselves confronted with a **'serious threat to life or livelihood'** or who have suffered **'serious harm of life or livelihood'** posed by the climate change-induced environmental degradation or disaster. In order to determine the seriousness of the threat or harm, it needs to be looked at to what extent the core content of human rights (civil and political rights as well as economic social and cultural rights (ESCR)) is affected. In many cases, both civil and political rights as well as ESCR will be affected at the same time. Of course, in determining whether life or livelihood of a certain person is threatened, his/her specific vulnerability needs to be taken into account.

'Climate change related' displacement

While it will not be easily possible to distinguish between disasters, which are due to climate change and others, which are not, it is confirmed that nine out of ten natural disasters are climate change-induced disasters. However, clearly **out of the scope** of this study and **the definition** are cases of environmental degradation resulting from **development projects** or from **industrial accidents**. In the former case, persons affected are in general in a position to plan their 'resettlement' to another place (be it internal or internationally). Further, in both cases, the actors responsible for those acts (resulting in environmental degradation) are clearly identifiable; persons affected will in most cases know against who they will have to direct their complaints for compensation.

The impacts of climate change as one of various reasons vs. the main reason for displacement / The impacts of climate change as direct vs. indirect cause for displacement

The impacts of climate change need to be the **main reason** but also the **direct** cause for displacement. Thus, displacement triggered by conflicts (which might be caused *inter alia* by climate change-induced environmental degradation or disaster) will not be covered. Apart from the complex and difficult relationship of different factors leading to armed conflicts, persons fleeing violent conflicts are already

⁹⁷ Bates D.C. (2002) 'Environmental Refugees? Classifying Human Migrations caused by Environmental Change, Population and Environment', vol. 23, no. 5, 467ff. Similar also Jakobeit C., Methmann C. (2007) 11.

sufficiently protected under international law (i.e. international refugee law, complementary forms of protection, temporary protection, 1998 Guiding Principles on Internal Displacement).⁹⁸

Gradual vs. sudden deterioration of the environment

It has occasionally been argued that gradual degradation would allow the population to take precautionary measures and to prepare; thus migration under those circumstances would have to be considered voluntary. However, since this study covers only persons who leave their country because of a **serious threat posed to their life or livelihood** or **serious harm of life or livelihood** inflicted, this distinction does not seem useful. However, whether the impacts of climate change lead to a gradual or sudden deterioration of the environment can have a repercussion on the **extent of the flow**. Sudden degradation (e.g. flooding, hurricane) may affect many persons at the same time triggering a mass flow while gradual degradation might lead to many persons forced to leave – but during a longer period of time and in diverse directions.

2.2.3 Consequences (Displacement)

Temporary vs. permanent displacement

Depending on whether persons affected can return to their home/country of origin, i.e. whether the environment can be restored, the consequence can be **temporary** or **permanent** displacement. This will need to be taken into account in the form and content of protection accorded to the persons affected. In particular, if return to the country of origin is permanently impossible, lasting solutions will need to be considered. In that regard, a special case are the populations of ‘submerging’ island States, where traditional forms of international protection, assuming some kind of ‘integration’ of affected persons in the society of the host State, could prove inadequate.

Internal vs. international displacement

The focus of this study will be reception obligations of third countries towards persons who were forced to leave their country of origin (**‘international displacement’**). However, internal displacement will be taken into account in the final chapter on solutions, in particular under the aspect of burden sharing. This acknowledges the fact the major part of the persons displaced will stay within their country of origin and that the country of origin is the primarily responsible for protection.

2.2.4 Summary

‘International climate displacees’

‘Citizens or persons with habitual residence in the country of origin who are faced with a serious threat to their lives or livelihoods or who have suffered serious harm to their lives or livelihoods caused by

⁹⁸ UNHCR (2008) 5.

environmental degradation/disasters – the main cause for the latter being impacts of climate change. The consequence is permanent or temporary displacement to a third State.’

‘Internal climate displacees’

‘Citizens or persons with habitual residence in the country of origin who are faced with a serious threat to their lives or livelihoods or who have suffered serious harm to their lives or livelihoods caused by environmental degradation/disasters – the main cause for the latter being impacts of climate change. The consequence is permanent or temporary displacement within the country of origin.’

Thus, this study focuses on the legal status of persons displaced across the border and uses the term **‘international climate displacees’**. This term covers **citizens** of the country of origin and persons residing in the country of origin, who do not have a stronger link to a third State (e.g. stateless persons with **habitual residence**, persons whose country of origin has ‘submerged’ because of sea level rise). The impacts of climate change need to be a **main reason** for displacement and a **direct cause for displacement to a third country** (thus, displacement triggered by conflicts is not covered since those persons are already sufficiently protected under international law). They saw themselves confronted with a **‘serious threat to life or livelihood’** or have suffered from **‘serious harm to life or livelihood’** posed by the impacts of climate change (no matter whether this is caused by sudden or gradual environmental disasters/degradation). Thus, voluntary migration is excluded from the scope of this study; however, it is acknowledged that in the case of long-term environmental degradation (which is regarded as voluntary migration if it does not reach the level of seriousness as described), solutions for the future need to be sought already today; such solutions should focus on reducing the specific vulnerabilities of regions and persons affected; measures might include undertaking research on and strengthen resilience.

3 HUMAN RIGHTS LAW AND 'INTERNATIONAL CLIMATE DISPLACEES'

3.1 INTRODUCTION: THE IMPACTS OF CLIMATE CHANGE ON HUMAN RIGHTS IN THE COUNTRY OF ORIGIN

The UN Human Rights Council (HRC) recently reaffirmed that impacts of climate change would have direct and indirect implications for the effective enjoyment of human rights, e.g. the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation.⁹⁹ It noted that climate change was contributing to destitution causing a negative impact on the realisation of the right to food in particular in developing countries.¹⁰⁰

3.1.1 Excursion: Rights of indigenous peoples

Indigenous peoples are affected disproportionately high by environmental degradation since both their livelihood as well as cultural identity depend on a healthy environment; degradation can threaten the survival of their communities: *„[...] most advanced scientific research has concluded that changes in climate will gravely harm health of indigenous peoples, traditional lands and waters and that many of plants and animals upon which they depend for survival will be threatened by immediate impacts of climate change.*¹⁰¹ Environmental degradation can force indigenous peoples to leave their territory or even their country of origin¹⁰² leading to a disruption of their lifestyle and livelihood.

Because of this particular relationship to the nature and their particular vulnerability, indigenous peoples possess – complementary to individual rights of their members – collective rights which are indispensable for their existence as people, e.g. right to self-identification, right to self-determination, right to self administration of their territories and natural resources, right to preserve their culture (history, language,

⁹⁹ HRC Resolution 10/4, preamble.

¹⁰⁰ HRC Resolution 10/12. See also 'Climate Change, Migration and Human Rights', Address by Ms. Kyung-wha Kang Deputy High Commissioner for Human Rights, Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities, 19.02.2008, Geneva.

¹⁰¹ Regarding impacts of climate change see also UN Permanent Forum on Indigenous Issues, Climate Change: An Overview (November 2007), 4. UN Doc E/C.19/2008/CR2, 1. See also OHCHR (2007) The human rights impact of climate change: 'Emerging evidence suggests that the livelihoods and cultural identities of indigenous peoples across all regions, such as the Inuit from North America, the Sami people from the Nordic countries and the Russian Peninsula of Kola, the Massai Tribe from Africa, and indigenous populations in Latin America, Central Asia and the Pacific Rim, are threatened by the detrimental impacts of Climate change partly because their means of subsistence are highly dependent on nature.'

¹⁰² Hampson F. (2005) 'Expanded working paper on the human rights situation of indigenous peoples in States and other territories threatened with extinction for environmental reasons', Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2005/28, 16.06.2005, paras. 6-8. If indigenous peoples settle down in a third country, it is questionable whether they can still be regarded as 'indigenous' in regard to the country of reception.

identity) and participation rights.¹⁰³ The ICESCR acknowledges the particular vulnerability of indigenous peoples¹⁰⁴ and contains apart from the collective right to self-determination individual rights for the members (e.g. right to health requires protection of plants and animals or minerals),¹⁰⁵ which can also have a collective dimension: *'[...] in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. [...] development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.'*¹⁰⁶

Apart from that, the Human Rights Committee (HRC) used art. 27 ICCPR (minority protection) for the protection of indigenous peoples from environmental degradation and requires positive actions in particular participation of the peoples in decision-making: *'[...] culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.'*^{107,108}

The *UN Declaration on the Rights of Indigenous Peoples* is a universal (but not legally binding) framework adopted in form of a UNGA resolution.¹⁰⁹ It also contains individual and collective rights regarding protection of the environment.¹¹⁰ Collective rights comprise e.g. the right to self-determination.¹¹¹ Despite the non-binding character, the *UN Permanent Forum on Indigenous Issues*¹¹²

¹⁰³ ILO Convention concerning indigenous and tribal peoples in independent countries, 27.06.1989; ratified by 20 States (as of 21.01.2009) status of ratification see <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (21.01.2009). This instrument contains minimum guarantees regarding protection of their territories and the environment, participation rights in decisions regarding their natural resources.

¹⁰⁴ General Comment No. 12, para. 13: *'[...] A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.'*

¹⁰⁵ General Comment No. 14 (2000): The right to the highest attainable standard of health, 11.08.2000, E/C.12/2000/4, para. 27: *'The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. [...]*

¹⁰⁶ General Comment No. 14 (2000): The right to the highest attainable standard of health, 11.08.2000, E/C.12/2000/4, para. 27.

¹⁰⁷ See General Comment No. 23: The rights of minorities (art. 27), 08.04.1994, CCPR/C/21/Rev.1/Add.5, para. 7.

¹⁰⁸ The HRC found a violation of art. 27 ICCPR in a case arguing that historic inequalities between indigenous people and rest of population together with exploitation of oil and gas of their territories endangers their way of life and culture. *Bernard Ominayak and the Lubicon Band v. Canada*, Communication No. 167/1984, Decisions of the Human Rights Committee, U.N. Doc. CCPR/C/38/D/167/1984 (1990). Overview over decisions of the Human Rights Committee, see *Shelton D.*, Human Rights and the Environment: Jurisprudence of Human Rights Bodies, Background Paper No. 2, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002.

¹⁰⁹ UNGA, A/RES/61/295, 13.09.2007. To a certain extent, the Declaration reflects customary international law.

¹¹⁰ See art. 1: *'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the UN Charter, UDHR, and international human rights law.'* States have to develop mechanisms in order to realise the right to protection of the environment and of productive capacity of their territories and resources (art. 29). States are obliged to take effective measures in order to ensure that no dangerous materials are deposited or projects are implemented in territories of indigenous peoples without their free informed consent. They have the right to determine priorities for the usage of their territories and resources; States have to take effective measures to envisage compensation to mitigate adverse effects on the environment (art. 32).

¹¹¹ arts. 3-4.

¹¹² The Forum was developed by the ECOSOC in 2002 in order to advise the Council in regard to the protection of the rights of indigenous peoples. See 7. Session 2008 'Indigenous Peoples and Climate Change'; see also *International Expert Group Meeting on Indigenous Peoples and Climate Change* (2008).

recommended to adopt the Declaration as binding framework in the formulation of development plans and in particular in context of the implementation of climate change policies.¹¹³

3.2 THE COUNTRY OF ORIGIN AS THE PRIMARILY RESPONSIBLE ACTOR FOR HUMAN RIGHTS PROTECTION

Human rights law is currently primarily suited to establish obligations of the country of origin (*to respect* human rights, *to protect* from actions of third parties, *to fulfil*)¹¹⁴ in relation to subjects present within its territory or jurisdiction. The country of origin is obliged to protect an individual against harm affecting the enjoyment of human rights. In that regard, the connection between the enjoyment of human rights (in particular the right to life and to health) and the quality of the human environment was made in several ways:

- *In context of a human right to a healthy environment*

This connection has been made in several legally non-binding documents such as the 1972 Stockholm Declaration on the human environment;¹¹⁵ 1987 in the context of the World Commission on Environment and Development¹¹⁶ or 1994 in the so-called Ksentini-report *Human Rights and the Environment*.¹¹⁷

However, while it has been argued, that such a human right to a healthy environment would be ‘on its way’,¹¹⁸ at the moment, no such right exists in a universally recognised source of international law.¹¹⁹ A

¹¹³ The Forum ordered a Special Rapporteur to conduct a study regarding the consideration of the UN Declaration-standard in context of climate change policies. Further, together with indigenous peoples, a *Draft Declaration of Action on Climate Change and Indigenous Peoples* should be drafted (including a Road map for indigenous peoples on the way to the 2009 Copenhagen Conference UNFCCC). Another proposal relates to the drafting of mechanisms of the UNFCCC for the participation of indigenous peoples.

¹¹⁴ See Nowak M (2003) *Introduction to the International Human Rights Regime*, 48f; see e.g. General Comments of the Committee on Economic Social and Cultural Rights, e.g. General Comment no. 19: The Right to Social Security.

¹¹⁵ Stockholm Declaration on the Human Environment, 11 I.L.M. 1416 (1972). Principle 1 contains explicitly a right to life in a healthy environment and an obligation of the human being to protect and improve the environment for future generations: *Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations.* This principle of this non-binding declaration does not yet constitute international customary law or a general principle of law; but see argumentation in Bilderbeek S., Wijgerde A., van Schaik N. (1992) *Biodiversity and International Law: The Effectiveness of International Environmental Law*, 90f.

¹¹⁶ World Commission on Environment and Development, ‘Our Common Future’, UN Doc. A/42/427 (20.03.1987), principle 1: *‘All human beings have the fundamental right to an environment adequate for their health and well-being.’*

¹¹⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities Human Rights and the Environment: Final Report prepared by Mrs Fatima Zohra Ksentini, Special Rapporteur, e/cw.4/Sub.2/1994/9; the report contains principles on human rights and the environment (e.g. all human beings have a right to secure healthy and ecologically intact environment).

¹¹⁸ Asia Pacific Forum, Human Rights and the Environment, Reference Paper for the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions in Sydney, 24-27.09.2007, 33f, refers to Meeting of Experts on Human Rights and the Environment, organised by OHCHR and UNEP, Conclusions: Final Text (2002), available at: <http://www.unhchr.ch/environment/conclusions.html>; the experts recommended *‘to support the growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed entitlement/right or as a guiding principle of national and international law’*.

¹¹⁹ art. 38 (1) Statute of the International Court of Justice. It has been argued that the regional customary international rules (Africa, Central America) together with national rules containing a right to environment can contribute to the formation of a universal material customary right to a healthy environment. The assumption of procedural environmental rights in Europe and the developments on European and national level would strengthen the belief in a term of an emerging material human right to environment on international. See Pedersen O. (2008) 3f.

right to an environment of a certain quality is only to be found on the regional level in Africa and Latin America. On European level, the jurisprudence of the ECtHR suggests the existence of an implicit (at least procedural) right to environment.¹²⁰ The ECtHR recognises increasingly positive State obligations, in particular procedural rights (e.g. right to access to information,¹²¹ right to conduct an impact assessment study, participation, access to review procedures and compensation). art. 37 EU Fundamental Rights Charter does not grant individuals a right and is to be understood as a policy goal: '*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*'¹²²

– *Procedural rights*

Procedural rights in relation to environmental change such as the rights contained in the Aarhus Convention¹²³ or as interpreted by the European Court of Human Rights (e.g. right to access to information, participation rights, access to an effective remedy) have been affirmed.

– *Human rights as a means to promote the protection of the environment*

Human rights such as the freedom to assembly and freedom of expression constitute a means to promote the protection of the environment.¹²⁴

– *A healthy environment as a precondition for other rights*¹²⁵

In the ICJ case *Gabčíkovo-Nagymaros Project*, judge Weeramantry noted: '*Protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself.*'¹²⁶

¹²⁰ The Parliamentary Assembly of the Council of Europe suggested already years ago to recognise a '*right to a healthy, viable, decent environment*' and to ensure individual procedural rights through an additional protocol to the ECHR. The Council of Minister referred to the jurisprudence of the ECtHR, which would contribute indirectly to environmental protection. See Parliamentary Assembly, *Environment and Human Rights*, 24th Sess., Rec. 1614 (2003), 27.06.2003; Reply from the Committee of Ministers, 21.01.2004, Doc. 10041, para. 4. Guidelines, which summarise all rights and their interpretation by the ECtHR, were drafted. See Manual on human rights and the environment - Principles emerging from the case-law of the European Court of Human Rights (2006).

¹²¹ What is to be understood by this information, see also Directive on the Freedom of Access to Information on the Environment, Council of European Communities 1990.

¹²² Chapter IV (Solidarity); see *Pedersen* (2008) 41. As soon as the Charter constitutes binding primary law, it is within the ECJ's jurisdiction, which could lead to an expansion of the scope of application.

¹²³ UN Economic Commission for Europe, Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters. The Convention goes back to principle 10 of the Rio Declaration ('access to environmental information and public participation'). Art. 1: first multinational environmental agreement which combines human rights with protection of the environment: '*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice.*' The international conference in Aarhus in November 2008 was dedicated to the topic 'The Role of Information in an Age of Climate Change: An International Conference to Mark the 10th Anniversary of the Aarhus Convention'; it dealt with inter alia public participation in decision making regarding climate change policy. See also EC norms (e.g. Directive on the Freedom of Access to Information on the Environment, Council of European Communities 1990).

¹²⁴ See African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre v. Nigeria*.

¹²⁵ UNGA Resolution 2398(XXII), 03.12.1968, UN Conference on the Human Environment. The UNGA noted the '*continuing and accelerating impairment of the quality of the human environment*' and its '*consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries.*' The resolution also recognised that '*the relationship between man and his environment is undergoing profound changes in the wake of modern scientific and technological developments*'. See for further information *Pedersen O. W.* (2008) 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?', *Georgetown International Environmental Law Review*, vol. 21 no. 1, 2.

3.2.1 A healthy environment as a precondition for the enjoyment of human rights

Complaints before the Human Rights Committee (HRC) claimed that environmental degradation constituted a violation of the right to life¹²⁷ or the right to private and family life.¹²⁸ So far, the ECtHR has found situations of environmental damage to be in violation of art. 8 ECHR (right to private and family life), art. 2 ECHR (right to life) and art. 1 AP1 ECHR (right to protection of property).¹²⁹

Limitations exist in relation to rights, which are not accorded absolutely leaving the State a margin of appreciation (e.g. allowing the State to weigh for example economic interests against environmental protection); further, the ECHR sometimes requests that environmental harm was predictable for the State. Finally, while the impacts of climate change are often predictions regarding future effects, human rights violations are normally determined by competent bodies only *after* the damage has already occurred.^{130 131} Thus, it might be the case that individuals turning to competent authorities of the country of origin, will not succeed with their complaints.

Gradual as well as sudden climate induced environmental degradation and disasters endanger also the enjoyment of economic social and cultural rights (ESCR). ESCR oblige the country of origin to take steps in order to realise them as fast and effective as possible. Thus, the country of origin remains responsible for taking steps towards full realisation - to the maximum extent of resources available. ESCR are affected by the impacts of climate change to a considerable extent. It has become clear, that the impacts of climate change will place a heavy burden on the available resources in already poor countries of origin. In particular, it might become difficult for such countries to fulfil their core obligations. Thus, international cooperation would be of high importance (see below extraterritorial obligations 3.3.1).

ESCR – as any other human rights – oblige the country of origin to respect, protect and fulfil human rights. For example, the right to water demands measures of environmental protection in order to prevent the violation of ESCR such as the development of comprehensive strategies in order to secure sufficient

¹²⁶ *Gabčíkovo-Nagymaros Project* (Hungary vs Slovakia), 25.09.1997 ICJ. 7, 88, para. 91, opinion of the vice president of the ICJ, Christopher Weeramantry.

¹²⁷ The Committee interpreted art. 6 ICCPR to require the State to take positive measures such as measures to protect from malnutrition and epidemics. CCPR General Comment No. 6: The right to life, 30.04.1982, paras. 5ff., See also General Comment No. 3: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26.05.2004, CCPR/C/21/Rev.1/Add.13.

¹²⁸ Communication No. 645/1995, *Bordes and Temeharo v. France*, CCPR/C/57/D/645/1995, 30.07.1996. The complaint contained violation of the right to life and the right to private and family life, since French nuclear tests in the South Pacific could endanger health and environment; however, the complaint laid the burden of proof on the State (France could not prove that tests were not dangerous); the Committee rejected the complaint since no victim.

¹²⁹ Until today, the ECtHR has not admitted a case under art. 3 ECHR. See Pedersen O. (2008) 24.

¹³⁰ In order to qualify as a victim of a human rights violation, '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 such a right, or that such an effect is imminent [...] *Aalbersberg v. Netherlands* (Nr. 1440/2005).

¹³¹ Human Rights Council, Annual Report of the High Commissioner for Human Rights and Reports of the OHCHR and the UNSG, Report of the OHCHR on the relationship between climate change and human rights, A/HRC/10/61, 15.01.2009, para. 70.

and ‘secure’ water also for future generations.¹³² The right to adequate food demands ensuring physical and economic access at all times to adequate food of a certain quality or means for its procurement.¹³³

As a rule, ESCR are to be fulfilled progressively.¹³⁴ However, core contents of ESCR (‘core obligations’), i.e. a certain minimum of ESCR has to be guaranteed at any time¹³⁵ – even in times of natural disasters.¹³⁶¹³⁷

Also here, it might become difficult for a potential victim to succeed in his or her complaints against the country of origin regarding the infringements of ESCR: on one hand due to the factual difficulties involved (see above), on the other hand, in many national systems, ESCR are regarded as ‘non-justiciable’.¹³⁸ International bodies constitute only a secondary means for individuals to enforce human rights violations; however, here the Optional Protocol to the ICESCR which was adopted in December 2008 could lead to an improvement in the future.

3.2.2 Disasters and emergency clauses

While international treaties regulating civil and political rights envisage emergency clauses allowing the derogation from certain obligations, treaties regulating ESCR oblige the country of origin to pay special attention to victims of disasters and treat them prioritised:

International treaties regulating civil and political rights include a clause according to which a State can derogate – in times of public emergency – from provisions to the extent strictly required (art. 4 ICCPR, art. 15 ECHR). The term ‘public emergency’ includes serious natural and environmental disasters (e.g. earthquakes, floods, cyclones, reactor accidents), if they affect the whole population and threaten the organised life of the community.¹³⁹ This derogation clause does not apply to e.g. prohibition of torture and slavery or the right to life under certain circumstances.¹⁴⁰

International treaties regulating ESCR do not contain such emergency clauses. Rather, they oblige the State to guarantee in situations of natural disasters at least a minimum of rights. They present victims of natural disasters and persons living in disaster prone areas as particularly vulnerable groups and oblige the

¹³² General Comment No. 15 (2002): The right to water (arts. 11 and 12 ICESCR); E/C.12/2002/11; 20.01.2003, para. 28 (a)-(i). States are asked to install responding mechanisms for emergency situation; conduct impact assessments of activities regarding water availability and natural eco systems – e.g. climate change, desertification, salting of soil, loss in biodiversity; monitor the contamination of water resources.

¹³³ General Comment No. 12 (art. 11), 12.05.1999, E/C.12/1999/5, para. 6.

¹³⁴ art. 2(1) ICESCR: ‘Each State Party to the present Covenant undertakes to take steps, [...] with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’ However, the duty of non-discrimination is to be fulfilled immediately. Further, steps towards progressive realisation have to be taken immediately.

¹³⁵ General Comment No. 3 (1990) of the Committee on Economic Social and Cultural Rights regarding the nature of States parties obligations (art. 2(1)), 14.12.1990, para. 9.

¹³⁶ art. 11 (2) ICESCR: the ‘fundamental right of everyone to be free from hunger’ obliges States to take ‘individually and through international co-operation, the measures, including specific programmes, which are needed’ (e.g. improving methods of production and distribution of food; ensuring an equitable distribution of world food supplies in relation to need).

¹³⁷ General Comment No. 12 (art. 11), 12.05.1999, E/C.12/1999/5, para. 6: States have a core obligation to take the necessary action to mitigate and alleviate hunger even in times of natural or other disasters.

¹³⁸ However, compare the jurisprudence of the South African Constitutional Court, e.g. Grooteboom case.

¹³⁹ Nowak M. (1989) UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll: CCPR Commentary, 86 para. 16.

¹⁴⁰ See Grabenwarter C. (2008) *Europäische Menschenrechtskonvention*, 11ff para. 9ff.

country of origin to pay special attention to such groups and to take special measures to assist them.¹⁴¹ In case victims of natural disasters are not in a position (for reasons out of their control) to guarantee their right to adequate food out of their own means, the country of origin is obliged to directly provided this right (*'duty to fulfil-provide'*).¹⁴² Similar obligations exist in relation to the right to adequate housing¹⁴³ or the right to health.¹⁴⁴ In case of a lack of resources, the country of origin is obliged to ask the international State community for support;¹⁴⁵ under certain circumstances an extraterritorial obligation of third States could be assumed (see below 3.3.1).

The continued applicability in times of disasters is also reflected in the IDP Guiding Principles, which are a synthesis of international human rights standards, refugee law and humanitarian standards. Of particular importance in that regard, however, are the *Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights and Natural Disasters*, which were drafted by the Special Representative of the Secretary-General on the Human Rights of IDPs.¹⁴⁶ These *per se* non-binding guidelines show how human rights are applicable before, during and after natural disasters. In particular, they highlight that persons affected by natural disasters enjoy the same human rights as other persons and that *'human rights underpin all humanitarian action'*.¹⁴⁷

3.2.3 Conclusion

It is the country of origin, which is primarily responsible for the protection of human rights of its population - even in the event of disasters.

Since countries of origin are often developing countries (being the most vulnerable and affected by climate change and the least responsible for climate change), this seems unfair. Countries of origin would have to bear the main burden imposed by climate change caused by mainly developed countries.

¹⁴¹ General Comment No. 12, para. 13: *'Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals [...]. Victims of natural disasters, people living in disaster-prone areas [...] may need special attention and sometimes priority consideration with respect to accessibility of food. [...].'*

¹⁴² General Comment, No. 12, para. 15: *'[...] Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.'*

¹⁴³ General Comment No. 4: The right to adequate housing (Art11 (1)), 13.12.1991, para. 8 (e): *'[...] Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as [...] victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.'*

¹⁴⁴ i.e. the right to achieve the highest attainable standard of corporal and mental health (art. 12(1) ICESCR). The right to health demands to take measures in order to secure the healthy development of the child or prevent diseases. See also General Comment No. 14 (2000): The right to the highest attainable standard of health, 11.08.2000, E/C.12/2000/4. See also art. 24 (2) (c) Convention on the Rights of the Child (CRC), which obliges States to take into account the risks of environmental degradation when implementing the rights of the child to the highest attainable health standard.

¹⁴⁵ art. 2 (1) ICESCR: *'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights [...].'* See also art. 11 (2) ICESCR.

¹⁴⁶ *Inter-Agency Standing Committee (IASC) (2006) Operational Guidelines on Human Rights and Natural Disasters*, Washington, D.C.: Brookings-Bern Project on Internal Displacement. See further Field Manual on Human Rights Protection in Situations of Natural Disaster (2008).

¹⁴⁷ See Principles 1 and 3.

From the perspective of an individual affected by the impacts of climate change, enforcement of those human rights obligations of the country of origin is a different issue: human rights are to be enforced primarily at national level. However, often access to an effective remedy is not readily available in countries of origin. The subsidiary enforcement by international bodies, again, is – at least at universal level – not always effective: on the one hand, such bodies cannot issue binding decisions and award compensation; on the other hand in particular in relation to ESCR there exists no individual complaints procedure. It remains to be seen how the entry into force of the Optional Protocol to the ICESCR will bring about improvement in that regard.

3.3 HUMAN RIGHTS OBLIGATIONS OF THIRD COUNTRIES?

While it has been argued that the failure of the highest emitting nations to take action would constitute a breach of human rights law,¹⁴⁸ it is difficult to hold third countries accountable for their emissions under international human rights law. Apart from the fact that a multiplicity of emitters - private actors - exists (making it difficult to assign emissions to a specific third State), the emissions were effectuated on their territory, but had a negative impact – much later – on the human rights of people living in the country of origin.¹⁴⁹

On the basis of treaties regulating civil and political rights, third countries can generally not be made responsible for human rights violations since emissions cannot be regarded as exercising ‘effective control’: International treaties regulating civil and political rights oblige States to ensure human rights regarding persons within their jurisdiction.¹⁵⁰ While an extraterritorial human rights obligation is assumed when a State exercises ‘*effective control*’ over the territory/a person of another State, this is highly contested in other situations.¹⁵¹ A State should in general only be responsible for ensuring human rights

¹⁴⁸ Mary Robinson, ‘Guest essay on climate change and human rights’, available at: <http://www.britishcouncil.org/ar/ireland-governance-climate-change.htm> (24.04.2009): ‘*Climate change is a subtle form of human rights violation*’ committed by industrialised nations through their greenhouse gas emissions, which have ‘*jeopardised the ability of certain societies to maintain their traditional practices, diminishing their cultural identity and their connection with their natural environment.*’

¹⁴⁹ Human Rights Council, Annual Report of the High Commissioner for Human Rights and Reports of the OHCHR and the UNSG, Report of the OHCHR on the relationship between climate change and human rights, A/HRC/10/61, 15.01.2009, para. 70.

¹⁵⁰ The treaties dispose of different clauses which are interpreted differently by the competent organs: the ECHR (art. 1) and the ACHR (art. 1) oblige to ensure human rights of persons who are within the jurisdiction of the State Party; the ICCPR regarding persons who are within territory and jurisdiction (art. 2(1)); see General Comment No. 3, The nature of States parties obligations, para. 10: ‘*[...] State party must respect and ensure the rights [...] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...].*’ See ECtHR, *Bankovic ao. vs Belgium a.o.*, No. 52207/99, ECtHR 12.12.2001, para. 61. Criticism comes from *Scheinin*, since the Court would have investigated the case only from the aspect of extraterritorial act but not under aspect of extraterritorial effect. See Scheinin M. (2004) ‘Extraterritorial Effect of the ICCPR’, in Coomans/Kamminga, 73ff. *Bankovic*, para. 80: the ECHR is a multilateral treaty in an essential regional context; FRY is no Member State; ECHR was not established in order to be applied in the whole world – even if in contest of acts of Member States. But compare ECtHR, *Öcalan vs Türkiye*, 12.03.2003; *Issa vs Türkiye*, 16.11.2004: exercise of sovereignty on territory of non Member State (Iraq, Kenya). The Inter-American Commission has developed its system of extraterritorial applicability based on ACHR and on American Declaration (not containing any jurisdiction clause) (USA is not member state of ACHR); in a similar case as *Bankovic* the IACoMHR departed from a ‘cause and effect’ jurisdictional theory. The Human Rights Committee has interpreted the jurisdiction clause very expansively; see General Comment No. 31. Regner A., ‘Extraterritorial Application of Human Rights Treaties’, 2006, 14.

¹⁵¹ McAdam J., Saul B. (2008) An Insecure Climate for Human Security?, 11, available at: <http://www.law.usyd.edu.au/scil/workingpapers.html> (26.01.2009).

outside its jurisdiction if it also has factual and meaningful possibilities to prevent human rights violations.¹⁵²¹⁵³ Thus, on the basis of treaties regulating civil and political rights (ECHR, ICCPR) third countries can in general not be made responsible for human rights violations – except third countries exercise ‘effective control’. However, greenhouse gas emissions cannot be regarded as exercising ‘effective control’. Still, in 2005 a petition on behalf of Canadian Inuits before the Inter-American Commission on Human Rights was directed against the US because of their high emissions of greenhouse gases and resulting violation of the UNFCCC and international customary law (‘no harm rule’).¹⁵⁴

3.3.1 Extraterritorial obligations regarding economic social and cultural rights¹⁵⁵¹⁵⁶

ESCR are regarded as to comprise ‘extraterritorial’ obligations of third States ‘*to respect*’ and ‘*to protect*’ human rights - complementary to obligations of the country of origin. The extent of the obligation ‘*to fulfil*’, in particular ‘*to fulfil-provide*’ implying an obligation to provide financial or technical assistance (in order to support the country of origin in fulfilling ESCR) – in particular its extent – is contested. In detail:

3.3.1.1 Existence of extraterritorial obligations

The ICESCR does not contain any jurisdictional clause, which would restrict human rights obligations explicitly only regarding individuals within a given State’s jurisdiction. Further, the ICESCR explicitly refers to international support and cooperation in order to realise ESCR (art. 2(1), art. 11 (1); art. 23 ICESCR). The role of international cooperation and assistance has been reaffirmed recently by the Committee on Economic Social and Cultural Rights (CESCR) in its General Comment no. 19 on the right to social security: ‘*Art. 2 (1) and arts. 11 (1) and 23 ICESCR require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the rights inscribed in the Covenant, including the right to social security.*’¹⁵⁷

¹⁵² Scheinin M. (2004) 75.

¹⁵³ Currently no clear international responsibility exists regarding private actors assigned to this State which become active outside its territory – and thus outside its area of control. *De Schutter* argues that this classical view could be altered in particular regarding ESC rights soon (see below). See de Schutter O., Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, Background Paper to a seminar organised in collaboration with OHCHR in Brussels on 2-4.11.2006 within mandate of Special Representative on the issue of human rights and transnational corporation and other enterprises, 19. Regarding ICCPR see McGoldrick (2004) ‘The extraterritorial application of the ICCPR’, in Coomans, F., Kamminga M.T. (eds.) *Extraterritorial application of Human Rights Treaties*, 42

¹⁵⁴ See Osofsky H. (2007) ‘The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights’, *American Indian Law Review*, vol 31, 675ff.

¹⁵⁵ In the literature the terms ‘transnational obligations’ or ‘third country obligations’ are also applied.

¹⁵⁶ Sepúlveda M., The obligations of ‘international assistance and cooperation’ under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to Millennium Development Goal 8, *The International Journal of Human Rights*, vol. 13, no. 1 (2009). Vandenhole W. (2005) ‘A Partnership for Development: International Human Rights Law as an Assessment Instrument’ (See Commission on Human Rights, Working Group on the Right to Development, High-level task force on implementation of the right to development, E/CN.4/2005/WG.18/TF/CR3, 09.11.2005); available at: <http://www2.ohchr.org/english/issues/development/docs/vandenhole.doc> (10.06.2009).

¹⁵⁷ General Comment No. 19 (2008): The right to social security, E/C.12/GC/19, 04.02.2008, para. 52.

- art. 2 (1) ICESCR obliges States Parties ‘to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights [...]’ ‘Available resources’ comprises also those resources, which are made available by the international community in context of international cooperation and assistance. By referring to arts. 55f UN Charta and to principles of international law, the CESCR stated that international cooperation for development, i.e. for the realisation of ESCR, would constitute an obligation of all States – in particular of those States, which would be in a position to assist others in that regard.¹⁵⁸
- Similarly, art. 11 (1) ICESCR obliges States to take appropriate steps to ensure the realisation of this right to an adequate standard of living, ‘recognising to this effect the essential importance of international co-operation based on free consent’. The CESCR held in its General Comment on the right to water that art. 11 (as art. 2(1) ICESCR) would require that States recognise the important role of international cooperation and aid and to take along and jointly measures to ensure the right to water.¹⁵⁹
- According to art. 23 ICESCR the Contracting Parties agree that international measures for achieving the convention rights comprise *inter alia* the conclusion of treaties, adoption of recommendations or furnishing technical assistance, holding of regional and consultation meetings in conjunction with the government concerned.

Explicit links to international cooperation are to be found also in subsequently negotiated human rights instruments such as the Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD).

The CESCR interpreted already several rights as to comprise an extraterritorial obligation ‘to respect’ und ‘to protect’:

- obligation ‘to respect’

The obligation ‘to respect’ prohibits States to execute activities in the county of origin, which could negatively impact on ESCR, e.g. development aid should be carried out in a way not infringing ESCR. In that regard, the CESCR remarked that ‘States should take steps to respect the enjoyment of the right to food in other countries.’¹⁶⁰ Further, in the context of the right to social security, it stressed that in order to comply with their international obligations ‘States parties have to respect the enjoyment of the right by refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries.’¹⁶¹ Similar interpretations exist with regard to the right to water or health.

- obligation ‘to protect’:

¹⁵⁸ General Comment No. 3 (1990): The nature of States parties obligations, paras. 13f.

¹⁵⁹ General Comment No. 15 (2003): The right to water, E/C.12/2002/11; 20.01.2003, para. 30.

¹⁶⁰ General Comment No. 12 on the Right to Adequate Food, para. 36.

¹⁶¹ General Comment No. 19 (2008): The right to social security, E/C.12/GC/19, 04.02.2008, para. 53.

The obligation ‘*to protect*’ encompasses the obligation to deter private actors from taking measures which could infringe ESCR. In that regard, the CESCR interpreted in context of the right to water that States have to prevent citizens and enterprises from violating e.g. the right to water in other countries.¹⁶² In context of the right to social security, it stated that ‘*States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the UN Charter and applicable international law.*’¹⁶³

To sum up, the obligations ‘*to respect*’ and ‘*to protect*’ would oblige third countries not to conduct development projects in the country of origin which could have a negative impact on ESCR – and finally lead to displacement of persons since their livelihood cannot be assured anymore. Further, it would oblige third countries to deter their private actors from taking measures which could infringe ESCR in the country of origin: e.g. development projects carried out by private actors; environmental degradation through activities of business corporations in the country of origin.

3.3.1.2 Scope of extraterritorial obligations

While extraterritorial obligations ‘*to respect*’ and ‘*to protect*’ are not doubted by the international community and are regarded as complementary (but not secondary) to obligations of the country of origin¹⁶⁴ the scope of the obligation ‘*to fulfil*’ is contested.

The obligation ‘*to fulfil*’ is composed of the obligations to ‘*fulfil-facilitate*’ (obliging third States to facilitate to guarantee the right again on its own), to ‘*fulfil-promote*’ and to ‘*fulfil-provide*’. In particular, the duty to ‘*fulfil-provide*’ is highly disputed: it is considered as to oblige third States to provide 0,7 % of the gross domestic product (GDP) as development assistance until 2015 (MDG). *Vandenhole* departs from the assumption that the latter duty can only be assumed if four conditions are fulfilled:

- Subsidiarity to the obligation of the country of origin, i.e. only if the country of origin is itself not capable – for reasons outside its control – to guarantee this right;¹⁶⁵
- the State has already asked for international support;
- the extraterritorial obligation only has to be fulfilled progressively (the obligation is dependent on the resources available; whether means are available should be dependent on how much of the national budget is dedicated for development assistance);

¹⁶² General Comment No. 15 (2003): The right to water, E/C.12/2002/11; 20.01.2003, para. 31.

¹⁶³ General Comment No. 19 (2008): The right to social security, E/C.12/GC/19, 04.02.2008, para. 54.

¹⁶⁴ Vandenhole W. (2007), 97, refers to Nowak M., A Human Rights Approach to Poverty, in Scheinin M., Suksi M. (eds), *Human Rights in Development Yearbook 202: Empowerment, Participation, Accountability & Non-Discrimination: Operationalising a Human Rights-Based Approach to Development* (2005) 34.

¹⁶⁵ See Vandenhole W., ‘EU and Development: Extraterritorial obligations under the ICESCR’, in Salomon M., Tostensen A., Vandenhole W (eds) (2007) *Castig the Net Wider: Human Rights, Development and New Duty-Bearers*, 87.

- the obligation refers only to core obligations, i.e. obligations regarding a minimum level of a right.¹⁶⁶

It is also contested *which States* should be obliged. *Vandehole* regards all OECD Member States as eligible; in particular States which can be made responsible for the non-realisation of ESC rights.¹⁶⁷ If this is not possible, then a collective obligation to be fulfilled by international organisation exists.

A recent comment of the CESCR regarding the right to social security stated that States parties should facilitate the realization of the right to social security in other countries - depending on the availability of resources, e.g. through provision of economic and technical assistance - in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. **Economically developed States parties** would have a **special responsibility** for and interest in **assisting the developing countries** in this regard.¹⁶⁸ Similarly, regarding the right to water, the CESCR stated that it would be *'particularly incumbent on States parties, and other actors in a position to assist'* to provide international assistance and cooperation, *'especially economic and technical which enables developing countries to fulfil their core obligations [...]'*.¹⁶⁹

In the context of climate change and the principle of common but differentiated responsibilities of the UNFCCC, it could be argued that in particular developed Parties to the UNFCCC (annex I) should be targeted by this obligation. Apart from that, the Millenium Development Goal no. 8 ('Develop a global partnership for development') affirms the need for international cooperation and support.

3.3.1.3 Summary

Third countries are obliged to protect human rights in the country of origin – to a certain extent. In particular, economically developed States are said to have a special responsibility for and interest in assisting the developing countries in the fulfilment of human rights. However, again, the enforcement of such obligations turns out to be difficult. No effective remedies are foreseen in that regard.

3.3.2 Excursion: An obligation of third States to deliver humanitarian aid in the event of disasters?

As can be deduced from above (3.2.2), in the case of disasters, human rights obligations - in particular obligations regarding ESCR - of the country of origin normally persist. Thus, it is the country of origin, which is primarily responsible to guarantee ESCR (at least at a minimum level) and has the primary obligation to deliver humanitarian aid. Other actors of the international community can play an important role – as far as public international law authorises such measures. In general, consensus of the country of

¹⁶⁶ Vandehole W. (2007) 95.

¹⁶⁷ Vandehole W. (2005) A Partnership for Development, International Human Rights Law as an Assessment Instrument, 9, refers to the concept of 'enhanced obligation, which was used by the CESCR in its General Comment No. 13 (The right to education (Art13)).

¹⁶⁸ General Comment No. 19 (2008): The right to social security, E/C.12/GC/19, 04.02.2008, para. 55.

¹⁶⁹ General Comment No. 15 (2003): The right to water, E/C.12/2002/11; 20.01.2003, para. 38.

origin¹⁷⁰ or the authorisation of the Security Council in accordance with Chapter VII UN Charter is necessary. It is agreed that international actors have the **right to offer aid**.¹⁷¹ The decision does not lie within the discretion of the country of origin if survival of population is at risk and if humanitarian organisation fulfils requirements of impartiality and non-discrimination. Denial of consent would be tantamount to a violation of the prohibition to use hunger as a weapon. *Kälin* deduces this principle also from the two Covenants.¹⁷² Regarding a 'right' to humanitarian aid in natural disasters see below.¹⁷³

In the literature and in several non-binding texts (e.g. Mohonk criteria,¹⁷⁴ Principles and Rules for Red Cross and Red Crescent Disaster Relief,¹⁷⁵ Guiding Principles on the Right to Humanitarian Assistance¹⁷⁶) it is argued, that a 'right to humanitarian aid' to be applied during disasters exists.¹⁷⁷ In contrast to situations of armed conflicts,¹⁷⁸ positive law does not contain explicit provisions in that regard. Some authors are of the opinion that a human right to humanitarian aid exists under customary international law.¹⁷⁹ The resolution on humanitarian assistance of the Institute of International Law concretises the obligations in that regard that third States should offer humanitarian assistance to the

¹⁷⁰ See IDP Guidelines arts. 24-27.

¹⁷¹ Principle 25 *IDP Guidelines*.

¹⁷² Kälin W., Annotations, 64f. Reference to art. 2(1) ICESCR, General Comment No. 3(5), Z14; art. 11(2) ICESCR (Recht, frei von Hunger zu sein – Staaten sind verpflichtet, individuell und durch internationale Kooperation Maßnahmen setzen); Recht auf Leben (e.g. art. 6 ICCPR) verpflichtet Staaten positive Maßnahmen zu setzen (General Comment No. 6 (1982), Z5. See also Resolution des Institute of International Law (02.09.2003) Sec. II, Z1-2: '*leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights. The victims of disaster are entitled to request and receive humanitarian assistance*'.

¹⁷³ International Law Commission (2008) Protection of persons in the event of disasters, Memorandum by the Secretariat, A/CN.4/590 (in the following: ILC Disasters (2008)), 153, paras. 257f.

¹⁷⁴ These criteria call on UN Member States, *to recognize the right to humanitarian assistance and the responsibility to provide it*; Mohonk Criteria for Humanitarian Assistance in Complex Emergencies, 1995, in J. M. Ebersole (1995) 'The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies', *Human Rights Quarterly*, vol. 17, No. 1, 195, para. 1. See further 196: '*everyone has the right to request and receive humanitarian aid necessary to sustain life and dignity from competent authorities or local, national or international governmental and non-governmental organizations.*'

¹⁷⁵ Principle 2.1: 'The Red Cross and Red Crescent in its endeavour to prevent and alleviate human suffering, considers it a fundamental right of all people to both offer and receive humanitarian assistance', *International Review of the Red Cross*, No. 310 (29.02.1996), annex IV.

¹⁷⁶ Adopted by the Council of the International Institute of Humanitarian Law in April 1993, (*International Review of the Red Cross*, vol. 33, No. 297 (1993)), Principle 1: '*Every human being has the right to humanitarian assistance in order to ensure respect for the human rights to life, health, protection against cruel and degrading treatment and other human rights which are essential to survival, well-being and protection in public emergencies.*'

¹⁷⁷ See 'Guiding Principles on the Right to Humanitarian Assistance', *International Review of the Red Cross*, No. 297 (November-December 1993), 519-525; Kalshoven F. (ed.) (1988) 'Assisting the Victims of Armed Conflict and Other Disasters: Papers delivered at the International Conference on Humanitarian Assistance in Armed Conflict', the Hague, 22-24.06.1988; Hardcastle R.J., Chua A.T.L., 'Humanitarian assistance: towards a right of access to victims of natural disasters', *International Review of the Red Cross*, No. 325 (1998) 589-609.

¹⁷⁸ Fourth Geneva Convention regarding the protection of civilians in times of war (1949); Additional Protocol to the Geneva Conventions regarding the protection of victims of international armed conflicts (protocol I) 1977; Additional Protocol regarding the protection of victims in internal armed conflicts (Protocol II), 1977.

¹⁷⁹ ILC Disasters (2008) International Law Commission (2008) Protection of persons in the event of disasters, Memorandum by the Secretariat, A/CN.4/590 (in the following: ILC Disasters (2008)), 153, paras. 257f: '*We can already affirm that the right to humanitarian aid is for the most part, in the light of current ideas and current needs, a peremptory norm of international law, recognized as such by the international community of States as a whole, according to the formulation of article 53 of the 1969 Vienna Convention on the Law of Treaties. The right to humanitarian aid would thus constitute today a case of jus cogens, rendering null any treaty or any international juridical act that conflicts with this right or the measures required by its application.*' Opposed to that idea *Hardcastle/Chua* (1998) 35.

maximum extent possible, except such help would threaten their own economic social and political situation.¹⁸⁰

¹⁸⁰ Resolution on humanitarian assistance of the Institute of International Law (02.09.2003); Sect. V, para. 1.

4 PROTECTION OBLIGATIONS

4.1 REFUGEE LAW

In general, it is highly disputed whether ‘international climate displacees’ fulfil the ‘refugee’ criteria of the Geneva Refugee Convention (GRC) (as amended by the 1967 Protocol) laid down in art. 1A (2).¹⁸¹ In particular, it is contested whether they fulfil the core elements of the definition, which are on the one hand ‘a well-founded fear of persecution’ and on the other hand the nexus of the well-founded fear of persecution with one of the enumerated reasons (*‘well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion’*). The definition does not explicitly mention environmental degradation either as a form of persecution or as a persecution ground.¹⁸² In general, lengthy discussions have been held as to whether the GRC - developed in a specific historical and political context - fits the new challenges, which have come up since the end of the Cold War or whether the Convention, in particular the refugee definition, needs amendment.¹⁸³

In the following, those two core elements will be investigated in order to come to a conclusion as to whether ‘international climate displacees’ qualify as ‘refugees’.

4.1.1 ‘Well-founded fear of persecution’

The element of ‘persecution’ consists mainly of two components: ‘serious harm’ and the failure of State protection; these two elements are also reflected in the Qualification Directive.

The element ‘well-founded fear’ relates to past persecution or to future persecution if returned. According to the UNHCR Handbook, the applicant's fear should be considered well-founded if he/she can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him/her for the reasons stated in the definition, or would for the same reasons be intolerable if returned there.¹⁸⁴

¹⁸¹ ‘[...] the term “refugee”, shall apply to any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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. [...]’.

¹⁸² UNHCR Handbook (1992) para. 39. According to the UNHCR Handbook the expression “owing to well-founded fear of being persecuted” for the reasons stated rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. However, other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

¹⁸³ In particular, mass displacement by war and generalised violence; asylum-migration-nexus, e.g. UNHCR Global Consultation 2001.

¹⁸⁴ UNHCR Handbook, para. 42.

4.1.1.1 Infliction of serious harm (act/omission)

In general, climate displacement situations may bring about the infringement of the enjoyment of both civil and political as well as ESC rights and consequently the violations of respective State obligations. This is reflected in authoritative interpretations of treaty bodies, which often connect violations of civil and political rights with ESCR and *vice versa*: e.g. the Human Rights Committee (HRC), the ICCPR treaty body, stated that the right to life would oblige States to take all possible steps to reduce infant mortality and increase life expectancy by adopting e.g. measures to eliminate malnutrition and epidemics¹⁸⁵ - thus requiring measures in relation to the right to adequate food and health. Similarly, the ECtHR regards serious environmental damage and accompanying health problems as a violation of art. 8 ECHR¹⁸⁶ or the return to a country, in which adequate health care cannot be assured, as a violation of art. 3 ECHR¹⁸⁷.

There is no generally accepted definition of the term ‘persecution’.¹⁸⁸ It is accepted that not only a threat to life or freedom (see art. 33 GRC) but also other serious violations of international human rights norms – including ESCR - can amount to persecution.¹⁸⁹ According to Hathaway the authors of the GRC did not intend to apply an absolute standard and persecution should always comprise *inter alia* ‘serious social and economic consequences’.¹⁹⁰ Thus, it is increasingly recognised in the literature and slowly also in the jurisprudence that ‘persecution’ may also exist in case of violation of ESCR such as the complete denial of the right to work.

In practice, decision-makers are increasingly using ESCRs as contained in e.g. the ICESCR. However, as criticised by Foster, they often refer to a ‘normative hierarchical approach’ (Carlier) or a ‘hierarchy of obligation approach’ (Hathaway) resulting in an exclusion of claims based on the violation of ESCR:

- According to the ‘normative hierarchical approach’ the more fundamental a right in question is, the less (quantitatively and qualitatively) severe treatment needs to be; conversely, the lower priority is attributed to the violated freedom, the more severe the treatment must be; in this context civil and political rights are found to be more fundamental requiring less severe treatment than ESCRs in order to amount to persecution.
- The ‘hierarchy of obligation approach’ of Hathaway defines persecution as ‘sustained or systemic failure of State protection in relation to one of core entitlements’ and applies a four level

¹⁸⁵ HRC, GC 6, para. 5; HRC GC no. 28, para. 10.

¹⁸⁶ ECtHR, *López Ostra v. Spain*, 09.12.1994, Series A no. 303-C.

¹⁸⁷ ECtHR, *D vs UK*, 02.05.1997, Nr. 30240/96, paras. 49ff.

¹⁸⁸ The drafters deliberately left the meaning of ‘persecution’ undefined; Kozoll argues that ‘environmental harm is as capable of being a means of persecution as any other form of harm.’ Lopez A. (2007) 377-381, refers to Kozoll C. (2004) ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’, 15 *Colombia Journal of International Environmental Law & Policy* 271, 272.

¹⁸⁹ This interpretation is based on general rules of treaty interpretation, art. 31 (3) (c) Vienna Convention on the Law of Treaties (VCLT) 1969. UNHCR Handbook (1992) para. 51: ‘From art. 33 it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution’.

¹⁹⁰ Hathaway J. (1991) *The Law of Refugee Status*, 103.

hierarchical model regarding these ‘core entitlements’. In this model, ESC rights in the ICESCR range only thirdly after non-derogable ICCPR rights (where the ‘serious possibility of a violation will *always* constitute a risk of persecution’) and derogable ICCPR rights (where the failure to ensure any of the rights will ‘*generally* constitute violation of a State’s basic duty of protection’). Hathaway argues that the ICESCR rights would ‘*not impose absolute and immediately binding standards of attainment*’ and rather require taking steps to the maximum of available resources to progressively realise rights in non-discriminatory way. According to Hathaway, the State would be in breach of its basic obligation where it either ‘*ignores these interests notwithstanding fiscal liability to respond, or where it excludes minority of population from enjoyment*’; deprivation of certain ESCR ‘will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution.’¹⁹¹

At European level, the Qualification Directive, which uses the human rights framework - in particular the ECHR - as a yardstick, also follows such approaches to a certain extent: Acts of persecution must be

- ‘sufficiently serious by their nature or repetition as to constitute a **severe violation of basic human rights** [...]’ - ‘in particular the rights from which derogation cannot be made under art. 15 (2) ECHR’¹⁹² or
- ‘an accumulation of various measures, including violations of human rights, which is **sufficiently severe as to affect an individual in a similar manner** [...]’.¹⁹³

Such acts of persecution ‘can, *inter alia*, take the form of acts of physical or mental violence, including acts of sexual violence; legal, **administrative**, police, and/or judicial **measures** which are in themselves discriminatory or which are **implemented in a discriminatory manner**; prosecution or punishment, which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; [...]; acts of a gender-specific or child-specific nature.’¹⁹⁴ While Burson has argued that the denial of food, shelter and medicine by state administrative bodies is capable of falling within the scope of this provision,¹⁹⁵ national practice shows that ESCR are hardly invoked.

However, those approaches, i.e. a distinction between duties of immediate and progressive nature and a reliance on the notion of derogability, are not consistent with the development of the human rights systems, in particular the indivisibility, interdependence and interrelatedness of all human rights as emphasised in the Vienna Declaration and Programme of Action (VDPA).¹⁹⁶ Foster argues that refugee

¹⁹¹ Fourthly, Hathaway mentions two rights in the UDHR not codified into ICCPR or ICESCR (right to own, and be free from arbitrary deprivation of property, right to be protected against unemployment) which would ‘not ordinarily suffice in and of themselves as foundation for a claim of failure of State protection because are not subject to binding legal obligation.’

¹⁹² art. 9 (1) (a) Qualification Directive.

¹⁹³ art. 9 (1) (b) Qualification Directive.

¹⁹⁴ Art. 9 (2) Qualification Directive.

¹⁹⁵ Burson B. (2008) Environmentally induced Displacement and the 1951 Refugee Convention: Pathways to Recognition, EFMSV Conference Bonn October 2008, 7.

¹⁹⁶ Foster M. (2007) 170, 181 et seq.

law must reflect the normative development of ESCR¹⁹⁷ and that tools available in this context such as General Comments delivered by treaty bodies, in particular the CESCR, should be used by decision-makers.¹⁹⁸ The three levels of obligations on States Parties (obligation to respect, protect and to fulfil) apply also to ESCR.

In that regard, some national asylum authorities have regarded the complete denial of right to work as amounting to persecution¹⁹⁹ - since as has been stated the South African Supreme Court of Appeal - ‘the freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity [...]’. Those national developments have to be seen in context with the CESCR’s view that the right to work in art. 6 ICESCR ‘is essential for realising other human rights and forms an inseparable and inherent part of human dignity;’²⁰⁰ the core obligation of the right to work encompasses the obligation to ensure non-discrimination and equal protection of employment and includes ‘the right of access to employment, especially for disadvantaged and marginalised individuals and groups, permitting them to live a life of dignity.’ Thus, a government violates its obligations when it denies access to work to particular individuals or groups, whether such discrimination is based on legislation or practice.’²⁰¹

4.1.1.1.1 A test of ‘seriousness’

Foster suggests as a key method of distinguishing human rights violations which amount to ‘persecution’ from those which are not, a **test of ‘seriousness’** by referring to the **concept of ‘core and periphery’** (introduced in 1990 by General Comment no. 3 of the CESCR): the focus should be on the **core violations** of all types of rights (and not on the nature of the right).²⁰² The CESCR has identified the core contents of specific rights (e.g. right to education, health, food, water, work) in relation to which ‘a State party cannot, under any circumstances whatsoever, justify its non-compliance.’ The core of a right may be different according to vulnerabilities of the applicant.²⁰³

Non-core violation may nonetheless - in combination with other violations - amount to persecution.²⁰⁴ In that regard, there exist decisions, which have recognised claims based on the violation of a range of rights amounting to denial of ‘basic living standards’ or would result in ‘a life of destitution’.²⁰⁵ Severe pollution and environmental degradation caused by State or non-State actors (which State fails to control)

¹⁹⁷ Foster M. (2007) 190.

¹⁹⁸ Foster M. (2007) 153.

¹⁹⁹ E.g. the Refugee Appeal Board of South Africa has recognised this in relation to Zimbabwean professionals prevented by the Zimbabwean authorities for political reasons from carrying out their work - due to his political affiliations with the opposition, the asylum applicant “would not easily, if at all, secure gainful employment as a chartered accountant.” Appeal number 53/2005, 30.11.2004, cited in Foster M. (2007) 102.

²⁰⁰ CESCR, General Comment no. 18: The Right to Work, UN Doc. E/C.12/GC/18, para. 1.

²⁰¹ CESCR, General Comment No. 18, para 32.

²⁰² Foster M. (2007) 193, refers to International Association of Refugee Law Judges (1999) *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*.

²⁰³ Foster M. (2007) 205.

²⁰⁴ Foster M (2007) 212.

²⁰⁵ Foster M. (2007) 214.

may seriously affect the right to health and give rise to refugee claim where harm can be linked to a Convention ground.²⁰⁶ In the case of a real risk of starvation, the right to life in conjunction with the right to adequate food will amount to persecution.²⁰⁷ In that regard, in New Zealand, the competent authority recognised that where food and other essential survival items are withheld on a discriminatory basis so that an individual faces real risk of starvation, the right to adequate food coupled with the right to life can bring a situation within the scope of the GRC.²⁰⁸ It is argued that '*jurisprudence relating to "being persecuted" is broader than is assumed in much of the literature to date.*' The concept of persecution would be sufficiently flexible to include discriminatory denial of otherwise available basic social goods where this would result in serious harm of an acute kind. However, difficult evidential issues may arise.

Also omissions of the State can amount to persecution if they are targeted at specific individuals for specific reasons (e.g. lack of prevention of soil erosion, lack of regulation of nuclear plant because the State hopes that plant explodes and kills people living within two-mile radius).

Even if single acts or threats, which for on its own would not constitute 'persecution', accumulated or in context with other measures (e.g. general atmosphere of insecurity in country of origin) they could amount to persecution, e.g. instances of discrimination or exclusion.²⁰⁹ However, in such events it could turn out to be difficult to establish a claim – in particular if the question of whether the harm is sufficiently serious is intertwined with the question of sufficiency of State protection (especially in the case of inability of the State to provide protection against persecution).²¹⁰ In that regard, claims founded on severe discrimination in education, health care and other ESCR relating to an adequate standard of living were occasionally held to fall within the GRC.

4.1.1.2 Failure of the State to provide effective protection (*'unable or, owing to such fear, is unwilling to avail himself of the protection of that country'*)

According to the UNHCR Handbook persecution (which may take the form of environmental damage) can be also inflicted through the **lack of effective State protection**: A person may either be unable²¹¹ or

²⁰⁶ Foster M. (2007) 233 refers to ECtHR jurisprudence.

²⁰⁷ Foster M. (2007) 234.

²⁰⁸ Burson B. (2008) 7, refers to Refugee Appeal No 74665.

²⁰⁹ UNHCR Handbook (1992) para. 53. This depends on the circumstances of the individual case; also here the subjective side has to be taken into account (views and feelings of person affected, different psychological state of persons and different circumstances). According to the Handbook, it wouldn't be possible to determine in a generally binding way how 'cumulative grounds' can lead to a right to recognition of refugee status.

²¹⁰ Foster M. (2007) 108. While courts sometimes only require a 'due diligence' effort, Foster argues that a State can be considered to offer sufficient protection only if it removes a well-founded fear of being persecuted. See in particular Foster M. (2007) International Refugee Law and Socio-Economic Rights, 91-93. See also Lafontaine E. (2007) 14. See also Future floods of Refugees, 25ff.

²¹¹ UNHCR Handbook (1992) paras. 98-99: '*There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution. [...]*'.

unwilling²¹² to avail him-/herself of State protection. Thus, if effective protection of the country of origin is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection.

Persecution – as human rights violations generally - can also occur by virtue of an **omission** by the State,²¹³ e.g. the failure of a State to take any steps whatsoever to fulfil a duty can be regarded as persecution if the failure has a disproportionate impact on a particularly marginalised group²¹⁴ - even in times of resource constraints.²¹⁵

However, disputes exist over the question whether also intent on part of the State is a necessary element in order to amount to persecution. In that regard, some authors argue that the **lack of State protection** is only persecutory if **intent on the part of the government** can be established.²¹⁶ Other authors, though, are of the opinion that there is no need to establish intent on side of the government in the case of non-sufficient State protection: the only thing, which would matter is the inability or unwillingness of the applicant to avail him/herself of the protection of the country of origin; thus, only the **availability of sufficient State protection** could remove a person's well founded-fear of being persecuted. That also means that it is not enough that a State is endeavouring to fulfil obligations pursuant to international human rights law – rather, the State must succeed in removing the applicant's well-founded fear. Still, this approach is not followed in the Qualification Directive since the State is presumed to provide protection if it demonstrates that 'reasonable steps' were taken in order to prevent persecution and the applicant has access to protection; however, it does not request that available protection has to be sufficient in order to remove the well-founded fear (see art. 7 (2) Qualification Directive).

4.1.1.2.1 Acts by private actors

²¹² UNHCR Handbook (1992) para. 100: *'The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase "owing to such fear". Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution". Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.'*

²¹³ General Comment of the CESCR, paras. 42-43.

²¹⁴ Foster M. (2007) 201-204.

²¹⁵ General Comment no. 3 (1990): The nature of States parties obligations, para. 12; General Comment 14, para. 49: *'even in times of severe resource constraints [...] vulnerable members of society can and indeed must be protected by the adoption of low-cost targeted programmes'*.

²¹⁶ E.g. Lopez A. (2007) 377-381. at 380: *'[...] The nature of the intent required is more than volition or awareness of consequences. Thus, the governmental entity must have been negligent or inactive "because of," and not merely "in spite of" its adverse effects upon an identifiable group. As a consequence, Jessica Cooper's argument of state persecution in cases of environmental degradation, as illustrated by examples of governmental negligence or inaction in the African Sahel and Chernobyl, is unconvincing.'* At 381: *'The 1951 Refugee Convention considers the lack of state protection as persecutory [...] only if, the persecutory intent on the part of the governmental entity may be established. [...] Persecution may be inflicted directly by the governmental entity or indirectly by the lack of protection from these governmental entities. In any case, the harm must be inflicted on cognizable groups with the particular intent to harm these groups because of a valuation of the lives and cultures of the people harmed.'*

The GRC-definition of ‘persecution’ is normally related to actions by the authorities of a country.²¹⁷ However, acts by private actors can be considered as persecution if they are knowingly tolerated by the authorities, or if authorities refuse, or prove unable, to offer effective protection.²¹⁸

According to art. 7 Qualification Directive, the State is presumed to provide protection if it demonstrates that ‘reasonable steps were taken in order to prevent persecution *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection’.

4.1.2 Persecution ground/Nexus clause

The GRC requires that the well-founded fear of persecution (serious harm) is causally linked to one of the five protected grounds (*[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [...]*). This means the claimant must have been targeted individually for a specific reason. Similarly, according to art. 9 (3) Qualification Directive, there must be a connection between the reasons (art. 10) and the persecutory acts/omissions (art. 9 (1)).

In general, different views as to whether intent and by whom intent needs to be established: some link GRC grounds to the persecutor’s intent, to the intention of the State failing to protect the applicant, or to the applicant’s well-founded fear of being persecuted.²¹⁹ Since it is the ‘fear’ of the applicant, which is the focus of the refugee definition (*[...] owing to well-founded fear of being persecuted for reasons of [...]*; i.e. formulation in passive voice) and since the GRC criteria do not explicitly mention the intention of the persecutor, the latter approach (focus on the reason for the applicant’s fear) should be favoured. This interpretation is also supported by the humanitarian objective of the treaty as a whole.²²⁰

In that regard, it is often reasoned that the GRC does not apply to generalised suffering (e.g. by civil war, generally poor economic conditions or natural disasters, e.g. earthquakes, famines and floods). In particular, in the context of climate change-induced environmental degradation/disasters it would be difficult to establish that serious violations of human rights are inflicted for one of the five reasons since climate change and its impacts affect persons usually indiscriminately. In particular, in situations where the State – without discrimination – is **unable** to respond to environmental degradation/disasters – even if resulting in serious harm – the claim would not be fulfilled.²²¹ In the majority of situations, it would be **impossible to demonstrate a link** between a **specific action causing migration** and a **specific characteristic of persons migrating**.

In the following it will be looked at cases, in which this nexus clause might still be fulfilled.

²¹⁷ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, 1979, reedited 1992, para. 65.

²¹⁸ UNHCR Handbook (1992) para. 65.

²¹⁹ Foster M. (2007) 268.

²²⁰ Foster M. (2007) 263 et seq., in particular 273.

²²¹ Burson B. (2008) 8.

4.1.2.1 Cases in which the nexus clause is fulfilled

Quite clear is the case with man-made environmental degradation **not caused by climate change** but by e.g. private foreign actors exploiting natural resources, if the destruction of the environment was taken into account since the population affected was considered as racially inferior.²²² Thus, an applicant who can show **deliberately inflicted, severe environmental harm in absence of State protection** will have strong claim to refugee status. It does not matter whether the persecutor is the State or a third party, if the harm is inflicted upon a victim for reasons of race, religion, nationality, membership of particular social group or political opinion and if environmental harm engenders a well-founded fear in the applicant so that he/she is unable to avail him/herself of protection of the country of origin.²²³

Further, the nexus clause is likely to be fulfilled, if (climate change-induced) **environmental degradation** is **'applied as a weapon'** against a particular group (e.g. 'environmental cleansing', i.e. 'deliberate manipulation and misuse of the environment so as to subordinate groups based on characteristics e.g. race, ethnicity, nationality, religion and so forth').²²⁴ An example often mentioned is the drainage of marshes in southern Iraq, inhabited by tribes of Shi'a Muslims ('Marsh Arabs')²²⁵ who had based their livelihoods on marshes through fishing, hunting, buffalo breeding, and agriculture. Scholars argued that the Iraqi government had committed genocide of Marsh Arabs by *'deliberately inflicting on the group conditions of life calculated to bring about physical destruction in whole or in part'*.²²⁶ The loss of livelihood and forced deportations resulted in death of thousands of Marsh Arabs. In this case, the intent to destroy them could be even established by e.g. plan of action for the marshes approved by Saddam Hussein.²²⁷²²⁸

²²² E.g. gold mining by foreigners in Papua New Guinea: waste generated by the mine was pumped into a river, which used to be the base of livelihood; as a result, fish died, members drinking the river water died; despair, increased violence and social disharmony resulted. Marcs C. (2008) *Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm with the Meaning of the Refugee Convention, International Human Rights Law and the Protection of the Environment*, Academy on Human Rights and Humanitarian Law (American University International Law Review) (2008), 31-71. Regarding the case in Papua New Guinea, see also Lafontaine E. (2007) 19-20. Marcs states that an 'evolutionary approach to the interpretation of GRC-definition was envisaged by drafters', this would be also in line with accepted principles of treaty interpretation.

²²³ Marcs C. (2008) 31-71.

²²⁴ Lopez A. (2007) 381-386, refers to Drumbl M.A. (2005) 'The International Responses to the Environmental Impacts of War', 17 *Georgetown International Environmental Law Review* 565, 627.

²²⁵ Weinstein argues that the Iraqi government targeted the Marsh Arabs not only as Shi'a but also as a specific ethnic group connected with Iran. They were singled out in the media among the Shi'a for their alleged poverty, backwardness and immorality; they were described as 'monkey-faced' people who are not 'real Iraqis', but rather the descendants of black slaves. See Weinstein T., 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?', *Georgetown International Environmental Law Review* 17 no. 4, 719. Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs,' A Human Rights Watch Briefing Paper, January 2003. See also Nadeem Kazmi S., Leiderman S., 'Twilight People: Iraq's Marsh Inhabitants,' Human Rights Dialogue 2, no. u (Spring 2004). Schwabach A., 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts,' *Colorado Journal of International Environmental Law & Policy* 15, no. 1 (2004), 1-28.

²²⁶ art. 2c Genocide Convention.

²²⁷ Lopez A. (2007) 381-386, refers regarding the proof of intent to van der Stoep M. (1993) Report on the situation of human rights in Iraq, 94-98.

²²⁸ UNHCR (2008) 5, 7: Some movements likely to be prompted by climate change could fall within the traditional refugee law framework, e.g. *'where the victims of natural disasters flee from their homeland because their government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five grounds set out in the refugee definition.'*

The nexus clause is also likely to be fulfilled if a government does not install any mitigative or adaptive mechanisms in a certain area where a distinct ethnic group is living – despite the knowledge that the likelihood is very high that this specific area will be affected by climate change-induced environmental degradation/disaster or it has been already affected and it is likely that it will happen again. Similar is the situation where a climate change-induced environmental disaster happens and the government does not deliver (withholds or obstructs the delivery of) humanitarian aid on purpose to a specific e.g. ethnic group.²²⁹ In that regard, the UNHCR Handbook states: ‘*Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group.*’²³⁰ Kozoll argues that an analogy with combined political-economic factors can be made with environmental-political ones – i.e. where direct and specific environmental harm destroys the cultural existence of certain peoples, this may amount to persecution.

For all other cases it will be difficult to fulfil the nexus clause. In the literature it is argued that ‘membership of a particular social group’ is the most likely reason to be invoked by ‘international climate displacees’. It is described as the most flexible persecution ground.²³¹

4.1.2.2 Member to a particular social group, causal connection between group and fear of persecution

A ‘social group’ usually comprises persons with similar background, habits or social position,²³² disposing of fundamental or inherent protected and immutable characteristics (e.g. compare art. 10 (1) (d) Qualification Directive²³³).²³⁴ The group must exist independently of the persecution.²³⁵ However, there does not need to be a ‘voluntary associational relationship’ between members of a particular social group; further, a particular social group does not have to be of a particular size; neither is it necessary that all members of such a group are at risk of being persecuted. Sometimes also the external social perception of the group is mentioned as criteria.²³⁶

In the literature, opinions are divided:

²²⁹ See also UNHCR (2008) 7; McAdam J., Saul B. (2008) 8.

²³⁰ UNHCR Handbook (1992) paras. 63-64.

²³¹ Lopez A. (2007) 381-386, refers to Aleinikoff T.A. (1990) ‘The meaning of “persecution” in US Asylum Law’, in *Refugee policy: Canada and the United States*, 298.

²³² UNHCR Handbook (1992) para. 77.

²³³ It looks at innate characteristics or an immutable background, or for the identity of the persons concerned indispensable characteristics or conviction and a identity which is clearly delimited in the country (since it is regarded as different from the rest of the society).

²³⁴ UNHCR Handbook (1992) para. 78: Membership of a social group can be the reason for persecution, if there is no confidence in the loyalty of the group towards the government or if the political direction, the previous behaviour or the economic activity of the members of that group or simply the existence of the group are regarded as an obstacle to the politics of the government.

²³⁵ Foster M. (2007) 293.

²³⁶ Committee of Ministers Recommendation Rec (2004)9; Goodwin-Gill G., McAdam J., 85. Departing from the principles of treaty interpretation (VCLT), the protected characteristics approach is to be preferred as a matter of international law. See Hathaway J., Foster M., ‘Membership of a Particular Social Group’, 484-9. Endorsed by experts under auspices of UNHCR’s Global Consultations Project: PSG ‘is a group of persons who share a common characteristic other than their risk of being persecuted, and which sets them apart. The characteristic will ordinarily be one which is innate, unchangeable or which is otherwise fundamental to human dignity.’

Cooper argues that ‘environmental refugees’ would constitute ‘a social group’ of ‘politically powerless individuals to protect their own environment’.²³⁷ This powerlessness would induce the State to carry on policies resulting in environmental degradation and finally in persecution. However, it is questionable whether ‘political power’ as protected characteristic is innate and immutable since political power varies according to the government in place, international pressure, rights or political policies at stake; further, the group must have existed before the occurrence of the claimed persecution (e.g. an event affecting more strongly a certain part of the society does not in itself create a social group – even if people affected lack political power to demand help from the government).²³⁸ This approach has also been criticised since not all persons affected by environmental degradation are politically powerless.²³⁹ Thus, many authors argue that persons affected by the impacts of climate change would hardly build a social group since the impacts of climate change would affect people indiscriminately²⁴⁰ and would not be targeted at a specific group of people with a common immutable characteristic, which is different from the threat of persecution (the membership has to exist already before persecution).²⁴¹

4.1.2.2.1 Vulnerable groups as social groups?

Thus, it seems convincing that persons who are affected by the impacts of climate change indiscriminately are not linked through an immutable characteristic, which is different from the threat of persecution. At the same time, it is repeatedly claimed that marginalised groups such as e.g. women, children, the elderly, indigenous people, or ‘the poor’ will be affected hardest by the impacts of climate change. In that regard, Foster has argued that economic class, in particular ‘the poor’, may constitute a ‘particular social group’ if being poor makes one vulnerable to persecutory types of harm.²⁴² She is of the opinion that poverty can be immutable if the State deliberately operates to prevent the poor from rising above their poverty: The ability to change must be a present option and not be possible only on a theoretical level. The decision whether poverty is immutable would need to be grounded in a realistic assessment of reasons for and difficulties in alleviating poverty. In that regard, the CESCR has noted that in all States women and girls bear a disproportionate burden of poverty, and children growing up in poverty are often *permanently* disadvantaged.²⁴³ Poverty is a structural problem in developing countries²⁴⁴ and alleviation requires national action and international action and cooperation. In that regard, it could be said that those marginalised groups within ‘the poor’ form a social group (e.g. ‘women affected by the

²³⁷ Cooper J. (1998) ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition,’ 6 *N.Y.U. Environmental Law Journal* 1997-1998, 483.

²³⁸ Lafontaine E. (2007) 21.

²³⁹ Zartner Falstrom D. (2001) 5, 6, refers to people living in Florida.

²⁴⁰ Zartner Falstrom D. (2001) 5, 6.

²⁴¹ McAdam J., Saul B., 8.

²⁴² Foster M. (2007) 310, refers to UNHCR (2006) ‘Guidelines on International Protection: The application of art. IA(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked’, HCR/GIP/06/07, 07.04.2006: ‘scenarios in which trafficking can flourish frequently coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of characteristics contained in the 1951 refugee definition [...]’.

²⁴³ Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the ICESCR, ESC Res E/C.12/2001/10, UN ESCOR, 25th session, Agenda Item 5, para. 4.

²⁴⁴ Foster M. (2007) 304ff.

impacts of climate change’, ‘children affected by the impacts of climate change’, ‘the disabled affected by climate change’).

In order to fulfil the nexus clause, it must be established that the well-founded fear of being persecuted exists because the applicant belongs to a specific group; the membership to this groups makes the applicant particularly vulnerable of potential persecution (disproportionate risk of harm). Here, an assessment of the wider context of a person’s fear of being persecuted (e.g. wider context of societal discrimination against a particular group) should be taken into account. Decision makers have recognised that being poor, particularly in combination with other attributes (e.g. gender or age) can put an applicant in an extremely vulnerable position and thus constitute necessary causal link to GRC ground.²⁴⁵

4.1.3 Refugee status determination (RSD) procedure

The Geneva Refugee Convention assumes that as soon as persons meet the GRC definition, they are refugees; i.e. recognition by reception States does not form a constitutive element. Thus, domestic RSD procedures are **declaratory** in nature.²⁴⁶ It is left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.²⁴⁷ However, the Executive Committee of the High Commissioner's Programme (ExCom) recommended certain basic procedural requirements reflecting the special situation of the applicant.²⁴⁸ In practice, procedures adopted vary considerably - from formal procedures specifically established for this purpose to consideration within general procedures for the admission of aliens to determination under informal arrangements, or *ad hoc* for specific purposes. Some potential receiving States of ‘international climate displacees’, in particular countries in the region, have under-developed RSD-systems.²⁴⁹

In general, the RSD procedure is an **individualised procedure**,²⁵⁰ i.e. an assessment on a case-by-case basis. In general, the burden of proving a ‘well-founded fear’ lies with the applicant, but is shared with the authority of the host country.²⁵¹ In context of ‘international climate displacees’, this would require the claimant to demonstrate how a particular environmental situation (whether a disasters or gradual deterioration) affects him/her *individually* and forced his/her migration (similar to claim based on refugee

²⁴⁵ Foster M. (2007) 283-85.

²⁴⁶ UNHCR Handbook (1992) para. 9.

²⁴⁷ While the determination of refugee status is mentioned in art. 9 GRC, the GRC does not indicate what type of procedures is to be adopted. See UNHCR Handbook (1992) para. 189.

²⁴⁸ UNHCR Handbook (1992) paras. 191f. Among basic requirements are the following: There should be a clearly identified authority-wherever possible a single central authority-with responsibility for examining requests for refugee status and taking a decision in the first instance. The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR. If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status. If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system. The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending

²⁴⁹ Burson B. (2008) 9.

²⁵⁰ See UNHCR Handbook (1992) paras. 195ff.

²⁵¹ UNHCR Handbook (1992) para. 196.

model).²⁵² An individual would need to demonstrate severe environmental harm that either threatens life or freedom or amounts to other serious human rights violations, or is of such nature or extent that it would reasonably induce fear; further it would need to be demonstrated that environmental harm affects the individual in his/her capacity as a member of a protected category to a higher degree than other persons.²⁵³ In conformity with the approach taken above, an applicant would not need to demonstrate persecutory intent on part of the government²⁵⁴ but that the well-founded fear of persecution can be linked to one of the five GRC-reasons. The standard of proof and the evidence needed in order to satisfy this standard (evidence pertaining to elements needed to fulfil threshold) should not be too high. If the claimant is deemed credible, the concept of the ‘benefit of the doubt’ might apply.

Thus, the RSD procedure – usually an assessment by the host country on a case-by-case basis – could be inappropriate for ‘international climate displacees’ arriving in masses. However, group determination of refugee status on a *prima facie* basis could offer a solution.

4.1.3.1 *Prima facie* refugees

A response to large-scale influxes is a group determination of status on a *prima facie* basis, i.e. the recognition by the State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to exodus.²⁵⁵ Its purpose is to ensure admission to safety, protection from *refoulement* and basic humanitarian treatment to those patently in need of it. The principal triggering factors should be the **objective circumstances**, which led to mass displacement and the **scale of displacement**. It is presumed that *prima facie* refugees are refugees within the meaning of the relevant instruments - unless it is dislodged by evidence that wrongly recognised as a refugee or was liable to exclusion under the provisions of refugee law. Thus, they are entitled to enjoy all the rights of refugees under the GRC and any other instrument applicable to them.

Examples for *prima facie* recognition are Hungarian refugees fleeing the failed revolution in 1956; in Africa before and after the adoption of the 1969 OAU Refugee Convention; in Asia refugees fleeing

²⁵² The applicant’s statement constitutes the starting point of an assessment. Regarding the subjective component of the assessment in the element of fear, a testimony of the claimant would be sufficient if it is credible (personality of applicant needs to be taken into account). Regarding the objective element (risk that applicant will be persecuted if returned), the burden is seen rather on the authorities since they are deemed to have access to relevant information (e.g. reports of governments, NGOs, experts, info on environmental impact of private actors based on national legislation, impact assessments). However, it is likely that the decision-maker would benefit from expertise in environment and scientific data analysis. See Lafontaine E. (2007).

²⁵³ Kozoll C. 284.

²⁵⁴ Government must have been negligent or inact 'because of' and not 'in spite of' its adverse effects upon identifiable group. Lopez A. refers to Purrington R., Wynne M. (1998) ‘Environmental Racism: Is a Nascent Social Science Concept a Sound Basis for Legal Relief?’, 35 *Hous. Law.* 34, 35, Mar-Apr1998.

²⁵⁵ UNHCR Handbook (1992) para. 44: ‘While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to provide assistance is extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to the so-called “group determination” of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.’

Vietnam after the fall of Saigon until the adoption of the Comprehensive Plan of Action which required an individualised RSD procedure to be followed.²⁵⁶

In context of ‘international climate displaces’ a neutral international body could make an assessment of the situation of environmental disruption leading to international protection.²⁵⁷

4.1.4 Regional level

Regional instruments in Africa (Convention of the Organisation for African Unity (OAU) governing the specific aspects of refugee problems in Africa)²⁵⁸ and Central America (Cartagena Declaration on Refugees)²⁵⁹ recognise in their expanded refugee definitions (in addition to persons fulfilling the GRC definition) persons who were forced to leave their place of habitual residence ‘owing to [...] events seriously disturbing public order in either part or the whole of their country’²⁶⁰ or persons ‘who have fled their country because their lives, safety or freedom have been threatened by generalised violence, massive violation of human rights or other circumstances which have seriously disturbed public order.’^{261,262}

However, it is argued that there is no *opinio iuris* regarding subsuming environmental degradation/disasters under these provisions:

- In context of the definition contained in the instrument of the Organisation of the African Union (OAU), it has been argued that to accept persons temporarily after natural catastrophes would not be regarded as obligation under the OAU Convention but rather as contribution to the development of a right to temporary protection for humanitarian reasons under international customary law (the reason for the broad OAU-definition being the support of the flight of

²⁵⁶ Rutinwa B. (2002) ‘Prima facie status and refugee protection’, New Issues in Refugee Research, Working Paper No. 69.

²⁵⁷ Lafontaine E. (2007).

²⁵⁸ Convention of the Organisation for African Unity (OAU) governing the specific aspects of refugee problems in Africa, adopted on 10.09.1969, in force since 20.06.1974, UNTS, No. 14691, ratified by 45 States (as of 26.05.2007).

²⁵⁹ Cartagena Declaration on Refugees, OAS/Ser.L/V/II.66, doc. 10, rev. 1, 190-3; part III (Conclusions). The Declaration is per se non-binding but constitutes regional customary international law for Central America. However, Lopez argues that the Declaration is still not legally binding; Lopez A. (2007) 391.

²⁶⁰ art. I (2) OAU Convention expands the GRC refugee definition to include those persons who are not only fleeing from individualised persecution, but also those who are fleeing from ‘external aggression, occupation, foreign domination or events seriously disturbing public order in a part or a whole of their country’.

²⁶¹ Cartagena Declaration on Refugees, para. 3: ‘[...] in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee [...]. Hence the definition or concept of a refugee [...] one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, including among refugees persons who have fled their country because [...]’ See Franco L., de Noriega J.S., ‘Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America’, in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), 92–119. See also Corcuera S. (2004) ‘Reflections on the Application of the Broader Refugee Definition of the Cartagena Declaration in Individual Refugee Status Determination Procedures’, in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), 197–203.

²⁶² The definition in the Bangkok Principles is similar; however, the principles are legally not binding. Asian-African Legal Consultative Organisation, 1966 Bangkok Principles on Status and Treatment of Refugees’, adopted on 24.06.2001, New Delhi. art. I (2): ‘The term ‘refugee’ shall also apply to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’

displaced in the wars of independence).²⁶³ The practice of accepting persons temporarily after natural catastrophes could rather be seen as contribution to the development of a **right to temporary protection for humanitarian reasons** under international customary law.²⁶⁴ On the other hand, it has been argued that the OAU Convention 'unequivocally includes victims of environmental crises since such events seriously disturb the public order'.²⁶⁵

- While it is claimed that under the OAS Cartagena Declaration victims of environmental crisis are included (since such events were '*seriously disturbing the public order*'),²⁶⁶ the International Conference on Central American Refugees (CIREFCA) takes a rather restrictive approach: '*circumstances seriously disturbing public order must result from human acts and not from natural disasters.*'²⁶⁷ In relation to '*[...] massive human rights violations*' it is argued that '*the denial of civil, political, economic, social and cultural rights in a serious and systematic manner may be considered massive violations of human rights.*'²⁶⁸ Apart from that, it is criticised that the protection accorded to refugees under the expanded definition of the Cartagena Declaration is not sufficient to protect 'environmental refugees' adequately. Refugees would receive even less protection than envisaged in the OAU Convention.²⁶⁹

Refugees fulfilling only the requirements of the expanded definitions of the OAU Convention receive only temporary protection; they are not allowed to settle down in the host State (African refugees which were displaced by the wars of independence needed only temporary protection).²⁷⁰ Thus, provisional protection would in any case not provide adequate remedy where the environment is no longer sustaining a living.²⁷¹

4.1.5 Conclusion

The GRC as a human rights instrument could offer protection not only in cases where governments systematically impose foreseeable risks regarding impacts of climate change on members of particular race, religion, nationality, social group or political opinion or target a specific group in refusing to cope with environmental disasters. If interpreted liberally (which would be also in accordance with a

²⁶³ Hathaway J.C. (2002) 'Regional Organisations, Armed Conflict and Human Rights Abuses: New Definition of the Refugee', in Musalo K., Moore J., Boswell R.A. (2002) *Refugee Law and Policy a comparative and international approach*, Carolina Academic Press, 2nd edition, USA, 458f: '*The OAU definition, does not, for example, suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community, as a shift away from concern about the adequacy of state protection if favour of a more generalised humanitarian commitment might have dictated.*'

²⁶⁴ Edwards A. (2006) 'Refugee Status Determination in Africa', *African Journal of International and Comparative Law*, vol. 14 nr. 2, 227.

²⁶⁵ Lopez A. (2007) 389-390, refers to McCue G.S., 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration', 6 *Georgetown International Environmental Law Review* (1993) 153-154.

²⁶⁶ Lopez A. (2007) 390, reference to Cooper J., 499; Keane, 216.

²⁶⁷ CIREFCA Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, CIREFCA/89/9 (1989) para. 33. See also Corcuera S. (2004) 'Reflections on the Application of the Broader Refugee Definition of the Cartagena Declaration in Individual Refugee Status Determination Procedures', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004) 200. See also Lopez A. (2007) 390.

²⁶⁸ CIREFCA Principles and Criteria, para. 34.

²⁶⁹ Cooper J., 499.

²⁷⁰ See Cooper J., 497.

²⁷¹ Lopez A. (2007) 390.

teleological interpretation),²⁷² the Convention *could* (without being amended) protect marginalised groups among the poor (e.g. women, children, indigenous peoples), which are disproportionately affected by the impacts of climate change and whose lives and livelihoods are seriously threatened. However, at the moment, the **majority of States** and **UNHCR do not want** to see the refugee definition **liberally interpreted**.²⁷³ UNHCR is against an amendment since a modification could risk a renegotiation of the Convention, which in the current environment may result in a lowering of protection standards and undermine international refugee protection regime altogether.²⁷⁴ This restrictive interpretation of the GRC is reflected in the EU Qualification Directive.

It also has to be borne in mind that **in many cases** neighbouring countries of the country of origin, i.e. **countries in the region**, which are developing country, will be the **host States**.²⁷⁵ Thus, assuming that the GRC is applicable to ‘international climate displacees’, the granting of protection could place ‘unduly heavy burdens’ on certain already impoverished States; thus – as also suggested in the preamble of the GRC - a satisfactory solution of a problem of international scope and nature cannot be achieved without **international cooperation**.²⁷⁶ In particular in case of large scale influx, receiving countries would bear a disproportionately heavy burden in fulfilling their obligations under international refugee law.²⁷⁷ Thus, **international solidarity, responsibility- and burden-sharing** are regarded as a key to protection.²⁷⁸

Apart from that, the RSD procedure, generally an individualised procedure, could prove not adequate for displacees arriving in masses. Apart from that, few States, which might turn out to be important reception countries India (as a neighbouring country to Bangladesh) are not signatories to the GRC and its Protocol.²⁷⁹

4.2 COMPLEMENTARY PROTECTION

The term ‘complementary protection’ (as a technical legal term) denotes ‘protection granted to individuals on the basis of a legal obligation other than the principle refugee treaty’.²⁸⁰ Complementary forms of protection provide an alternative basis for eligibility for protection and extend the eligibility for protection (in contrast to the GRC there is no need to establish that the harm feared is related to a specific

²⁷² Lafontaine E. (2007) 12-29. Arguments why the Geneva Refugee Convention constitutes a human rights instrument are to be found in Lafontaine E. (2007) 23-24.

²⁷³ Lafontaine E. (2007) 8.

²⁷⁴ UNHCR (2008) 7.

²⁷⁵ Already now, the majority of GRC refugees are hosted in developing countries that are struggling to provide them with adequate protection due to poverty or political instability. At the end of 2003, over six million refugees worldwide were involved in ‘protracted refugee situations’, *Protracted Refugee Situations*, Standing Committee 30th meeting, UNHCR, EC/54/SC/CR14, 10.06.2004.

²⁷⁶ Preamble to the GRC, para. 4. At regional level: recognition of need for international solidarity and burden-sharing in art. II (4) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; EU Council Resolution on Burden-Sharing with regard to the Admission and Residence of Displaced Persons, Council of Ministers of Justice and Home Affairs, 25.09.1995.

²⁷⁷ Executive Committee, General Conclusion of International Protection No. 22 (XXXII) (1981) ‘Protection of Asylum Seekers in Situations of Large-Scale Influx’, Chapter IV, para. 1.

²⁷⁸ Executive Committee, General Conclusion of International Protection No. 77 (XLVI) (1995).

²⁷⁹ Burson B. (2008) 9.

²⁸⁰ McAdam J. (2007) *Complementary Protection in International Refugee Law*, Oxford University Press, 2-3.

ground). Complementary protection is the response by States to *individual* asylum seekers who cannot be removed by virtue of an extended principle of *non-refoulement* under international law.²⁸¹ The principle of *non-refoulement* – sometimes also referred to as the ‘cornerstone of international protection’ – prohibits to return persons (already present in the jurisdiction or at least at the border) by force to a State, in which they would be persecuted or exposed to torture, inhuman treatment or other serious human rights violation.²⁸² In treaty law, the *non-refoulement*-principle is implicit in art. 3 ECHR and art. 7 ICCPR²⁸³ and explicit in art. 33 (1) GRC and art. 3 (1) CAT.^{284, 285} While also other provisions (e.g. freedom of religion) could potentially be the basis for a *non-refoulement* obligation, the ECtHR and UN HRCComm are approaching other provisions than art. 3 ECHR and art. 7 ICCPR in a rather restrictive way.²⁸⁶ Many of those ‘other rights’ are ‘qualified’, i.e. States may interfere with qualified rights where they can demonstrate a legitimate aim (e.g. immigration control²⁸⁷).²⁸⁸ *McAdam* and *Saul* argue that 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’.²⁸⁹

In practice, complementary forms are subject to national legislation specifying eligibility criteria, rights and entitlements of complementary protection beneficiaries. Currently, ‘complementary protection’ is confined to comprise legal obligation of non-removal (threshold eligibility) and recognition that ‘some sort of legal status’ should attach. The ExCom has issued Conclusions regarding ‘complementary forms of protection’ but has not addressed the question of the status of beneficiaries.²⁹⁰ The principle of *non-refoulement* is more seen as a ‘curb on States’ ability to remove individuals’ and less seen as a positive entitlement to access international protection.²⁹¹ Codified forms exist within the European Union (‘subsidiary protection’), the US (‘Temporary Protected Status’) or Canada (‘persons in need of protection’).

In practice, lower levels of protection than in the GRC are envisaged – be it at national level or in those codified forms.²⁹² However, according to *McAdam*, there would be no legal justification for

²⁸¹ In contrast, ‘temporary protection’ is the response of time-bound, emergency protection to a sudden mass influx of asylum seekers.

²⁸² See Kälin W. (1990) *Grundriss des Asylverfahrens*, 210.

²⁸³ International Covenant on Civil and Political Rights (16.12.1966, entry into force 23.03.1976) 999 UNTS 171.

²⁸⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10.12.1984, entry into force 26.06.1987) 1465 UNTS 85.

²⁸⁵ art. 33 GRC requires a nexus between threats on life or freedom and one of recognised grounds. Further, it would be also contained in general humanitarian principles (e.g. providing assistance to persons fleeing from generalised violence) and in international criminal law. See *McAdam J.* (2007) 9.

²⁸⁶ i.e. ill-treatment under any right other than art. 3 ECHR and art. 7 ICCPR must effectively reach the level of inhuman or degrading treatment or punishment to constitute unjustifiable breach.

²⁸⁷ Even though immigration control is not a legitimate aim *per se*, it is recognised as medium through which other legitimate aims are promoted (e.g. national security, public safety, public health or morals, rights and freedoms of others, economic well-being, prevent disorder or crime).

²⁸⁸ *McAdam J.* (2007) 16, 144.

²⁸⁹ *McAdam J.*, *Saul B.* (2008) 12.

²⁹⁰ E.g. ExCom Conclusion on complementary protection, October 2005.

²⁹¹ *McAdam J.* (2007) 10.

²⁹² Lopez A., 393 refers to ECRE (2003) ‘European Asylum Systems: Legal and Social Conditions for Asylum Seekers and Refugee in Western Europe’; *McAdam J.* (2005) ‘The European Qualification Directive: The Creation of a Subsidiary Protection Regime’, 17 *International Journal of Refugee Law*, 461. *McAdam J.* (2007) 55.

differentiating between the status of GRC refugees and the status of beneficiaries of complementary protection. Looking at the historical development of international protection, a legal status equivalent to the GRC should apply to **all persons protected by the extended principle of *non-refoulement***. The GRC would function as a form of *lex specialis* for all persons in need of international protection – providing a legal status irrespective of the source of State’s protection obligation (refugee protection as sub-set of human rights law).²⁹³ The Final Act of the Conference of Plenipotentiaries envisaged the future application of the GRC to additional categories of refugees since it should be regarded as a living instrument. *McAdam* argues that the development of human rights-based *non-refoulement* would have extended the eligibility for protection (consequently, no formal expansion by amendment would be necessary).²⁹⁴

4.2.1 Complementary protection and ‘international climate displacees’?

It is not completely clear to what extent complementary protection can be made work for ‘international climate displacees’.²⁹⁵ In the following, it is focused on obligations of potential receiving States in Europe, thus the ECHR and the Qualification Directive will be the main legal points of reference.

In relation to climate change-induced displacement, only inhuman treatment, degrading treatment or other serious human rights violations are of relevance.²⁹⁶ The principle of *non-refoulement* precludes removal of persons already present on the territory of a third State; only in limited instances a right to entry is included.²⁹⁷ Thus, climate displacees in the region or within their country of origin seeking for complementary protection in Europe would not be covered.

4.2.1.1 ECHR

Under certain circumstance the return of ‘international climate displacees’ to the country of origin could be regarded as inhuman or degrading treatment.²⁹⁸ Still, the ECHR would provide the ‘best option’ among possible **protection proceedings** against *refoulement* before the Torture Committee, HRCComm or ECtHR

²⁹³ McAdam J. (2007) *Complementary Protection in International Refugee Law*, Oxford University Press, 1, 3. Human rights law alone does not provide sufficient status for beneficiaries of complementary protection: McAdam J. (2007) 12 refers to Hathaway J.C. (2005) *The Rights of Refugees under International Law*, CUP, Cambridge, 154: ‘general human rights norms do not address many refugee-specific concerns; general economic rights are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries; not all civil rights are guaranteed to non-citizens, and most of those which do apply to them can be withheld on grounds of their lack of nationality during national emergencies; and the duty of non-discrimination under international law has not always been interpreted in a way that guarantees refugees the substantive benefit of relevant protections.’

²⁹⁴ McAdam J. (2007) 11.

²⁹⁵ McAdam J., Saul B. (2008) 11f.

²⁹⁶ Torture is the infliction of severe pain or suffering by a public official for an enumerated purpose e.g. punishment or obtaining a confession.

²⁹⁷ No right to entry on basis of art. 33 GRC, art. 3 CAT; however right may arise under ECHR or CRC. McAdam J. (2007) 10 refers to Noll G. (2005) ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’, 17 *International Journal of Refugee Law* 542, 573; e.g. asylum seekers reaches State’s diplomatic premises in another country.

²⁹⁸ Grabenwarter C. (2008), 147, para. 26. The handing over of an individual to the authority of the foreign State, in which a violation of e.g. art. 3 ECHR is likely, can be seen as an act assigned directly to the *refouling* State.

in Europe due to its enforcement mechanism.²⁹⁹ The protection against *refoulement* in the ECHR obliges to take account of art. 3 ECHR when exercising the right to control entry, residence and expulsion of aliens on their territory.³⁰⁰

‘International climate displacees’ are faced with a serious threat to their lives or livelihood or who have suffered serious harm to their life or livelihoods. Both civil and political rights as well as ESCR are in those cases affected at the same time.³⁰¹ However, since there is no specific protection mechanism under international law for people fleeing violations of ESCR who feel that their survival in minimally acceptable conditions is at risk or impossible,³⁰² claims based on a lack of access to resources in the country of origin relied in the past primarily on **art. 3 ECHR**, in particular the phrase ‘inhuman or degrading treatment’. **Degrading treatment** may *inter alia* encompass the **denial of insufficient provision of basic services** necessary for a dignified existence, including access to health, shelter, social security, and the education and protection of children, provided that a **minimum level of severity** is met.³⁰³ In that regard, on national level, the UK Immigration Appeal Tribunal (IAT) noted 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*’ (e.g. absence of water, food or basic shelter) would cross the threshold of art. 3 harm.³⁰⁴

Theoretically, violations also of other ECHR-rights such as art. 8 ECHR³⁰⁵ could trigger a *non-refoulement*-obligation; however, in most cases rights are not absolutely guaranteed, so that it would be difficult to prove that the public interest in the deportation weighs less than the violation of human rights by deportation.³⁰⁶

²⁹⁹ McAdam J. (2007) 139, refers to Lambert H. (1999) ‘Protection against Refoulement from Europe: Human Rights Law comes to the Rescue’, 48 *International and Comparative Law Quarterly*, 543, 517-18.

³⁰⁰ ECtHR, *Hilal vs UK*, 06.03.2001.

³⁰¹ Further, it is argued that the right to a level of environment adequate to permit a ‘life of dignity and well-being’ (Stockholm and Rio Declaration) – which is said to be in development on international level – could provide a basis for creating an obligation to offer protection to victims of grave environmental disruption. Still, the lack of a clear definition of content and scope of such rights is problematic. See Lafontaine E. (2007) 8.

³⁰² McAdam J. (2007) 164: She argues that ICESCR rights are ‘not readily enforceable either domestically or at the international level, in part due to their progressive realisation’. However, the Optional Protocol to the ICESCR, adopted in December 2008, envisages an individual complaints mechanism. This could bring about improvements in the future.

³⁰³ McAdam J. (2007) 142 referring to Blake N, Husain R (2003) *Immigration, Asylum and Human Rights*, OUP, Oxford, 2.97; Schachter O. (1983) ‘Human Dignity as a Normative Concept’, 77 *American Journal of International Law*, 848, 851.

³⁰⁴ *Mandali v. Secretary of State for the Home Department* (2002) UK Immigration Appeal Tribunal 0741, para. 10. UK Immigration and Nationality Directorate, Discretionary Leave: ‘*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 UK’s art. 3 obligations.*’ It also noted that while it could amount to inhuman or degrading treatment to remove someone from the UK owing to the suffering caused by medical condition, the threshold for inhuman and degrading treatment is extremely high and will only be reached in truly exceptional cases involving extreme circumstances.

³⁰⁵ A life in dignity also forms part of right to respect for private life (aspect of bodily and physical integrity) under art. 8 (1) ECHR (but degrading treatment here can be justified – balancing individual’s right with legitimate interest of wider community, including social and economic considerations).

³⁰⁶ *R v. Special Adjudicator ex parte Ullah*, UKHL 26, 2004, para. 50: ‘*It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged.*’, para. 67: ‘*[...] a fair reading of the Strasbourg cases requires a national court to accept that these articles (annotation: art. 2, 4, 5, 7, 8) could possibly be engaged and that the exception to the territoriality principle is not confined to art. 3. There does not appear to be any conceptual reason why article 9 should not be capable in principle of engagement, although I find it difficult to envisage a case, bearing in mind the flagrancy principle [...] in which there could be a sufficient*

It has been argued that the likelihood of resource-related art. 3 claims developing into a meaningful alternative protection basis is considered to be remote:³⁰⁷

- There is relatively little support for a right to remain in a third State due to ‘severe paucity of resources in the country of origin’³⁰⁸ so that the term ‘inhuman or degrading treatment’ cannot be used as a remedy for general poverty, unemployment, lack of resources or medical care. Only in most exceptional circumstances such as cases of general threats for body, life or health such as inadequate medical treatment in the country of origin exposing a person to a real risk to die under ‘*most distressing circumstances*’ upon return^{309, 310}.
- In its recent jurisprudence (*N. vs UK*) the ECHR stated that even though many of ECHR rights would have social and economic implications, the Convention would aim at the protection of civil and political rights and consequently art. 3 ECHR would not oblige a contracting party to alleviate inequalities between different countries by e.g. granting of health care/protection to foreigners without residence permit.³¹¹ That means, States may return a person to countries that do not provide equivalent level of rights to ECHR unless it means a **complete denial** or nullification of right on return.

Even the **general threat** of a **whole ethnic group** or an **overall unstable situation** would **not be sufficient** for a violation of art. 3 ECHR.³¹² The mere existence of **generalised violence** is not of itself sufficient for art. 3 ECHR.³¹³ To trigger art. 3, applicant must show that there are substantial grounds for believing that **he/she** would face a real (‘foreseeable’) risk of being subjected to inhuman or degrading treatment if removed; mere possibility of harm insufficient; not necessary to show that ill-treatment will occur, ill-treatment must qualitatively attain **minimum level of severity** – assessment of which is relative

interference with art. 9 rights which does not also come within art. 3 exception [...]’ In this case, the UK House of Lords dealt with the question whether every article of the ECHR (apart from art. 3) could be applied – in the case of return of a person to her/his country of origin where a treatment would amount to a violation of a ECHR right (in this case art. 9 ECHR was at stake).

³⁰⁷ McAdam J. (2007) 164.

³⁰⁸ McAdam, J. (2007) 163.

³⁰⁹ *D. vs UK*, 02.05.1997, Nr. 30240/96, paras.. 49 et seq. Poor conditions and other factors, including impact of conditions on individual, created circumstances that would have resulted in treatment breaching art. 3 had applicant been returned. A deportation of the applicant who suffered from Aids would constitute a violation of art. 3 ECHR in regard to the situation awaiting him in his country of origin. The fact that he could still live under humane conditions would be due to the medical treatment in the UK. A deportation to St. Kitts would inevitably lead to the death under distressful conditions and would thus amount to *inhuman treatment* according to art. 3 ECHR. Criticism has been raised in the literature, e.g. *Hailbronner*, DÖV 1999, 619ff. The ECtHR does not distinguish in its jurisprudence whether the threat is emanating directly from the State and whether the threat was imposed on purpose (however, the Court applies higher requirements for the applicant to prove regarding unwillingness/inability of the State affected to guarantee effective protection. Grabenwarter (2008) 147, para. 26. See also Goodwin-Gill G./McAdam J. (2007) *The Refugee in International Law*, 314f.

³¹⁰ McAdam J., Saul B. (2008) 12. Goodwin-Gill/McAdam are also rather sceptical.

³¹¹ *N. vs UK* (Great Chamber) 27.05.2008, 26.565/05; Refoulement of a HIV-positive woman from Uganda was not regarded as inhuman or degrading treatment – despite it was confirmed that she would die soon after return without the treatment, which was not everywhere available and expensive.

³¹² *Venkadajalasorma vs NL*, Nr. 58510/00, para. 67: ‘Court has to assess whether at the present time and in the present situation there exists a real risk of the applicant being subjected to treatment proscribed by Article 3 if he was returned to his country of origin. Whilst stability and certainty are factors to be taken into account in the Court’s assessment of the situation in the receiving country, the fact that peace negotiations have not yet been successfully concluded does not preclude the Court from examining the individual circumstances of the applicant in the light of the current general situation [...]’

³¹³ *HLR vs France* (1997) 26 Essex Human Rights Review 29.

and depends on all circumstances of case, e.g. nature and context of treatment, manner and method of its execution, duration, effects, sex, age, state of health of victim; thus, **even small risk can be significant and ‘real’ where foreseeable consequences are very serious**. The more ill-treatment is caused by underlying social and political disorder, e.g. civil war, the higher the minimum level of severity will be assessed.³¹⁴

States and courts have resisted a conceptualisation of forced migration, which would acknowledge the **role** of the **global economy**, and in particular the role of western economic interest, **in destroying local livelihoods** and thus triggering movement in search of work or better opportunities.³¹⁵ However, as has been brought forward in the literature, displacement in the global South due to the decline of local livelihoods cannot be divorced from policies and market forces in more developed States expanding global economics. McAdam wonders whether benefiting States could be legally obliged to international protection for those moving in search of work or better opportunities or to provide greater in-country assistance aiming at the prevention of displacement or to open lawful channels for economic migration. McAdam suggests that socio-economic or development-induced displacement ought to be considered through wider lens than that presently used by ECtHR, in particular the role of western States in contributing to displacement should be taken into account.³¹⁶

4.2.1.2 Qualification Directive: ‘Subsidiary Protection’

The EC Qualification Directive³¹⁷ is the first supranational codification of a specialist complementary protection regime.³¹⁸ It regulates eligibility and status thereby setting an end to *ad hoc* and discretionary national practices. However, it does not create new obligations, but only codifies already existing State practices of MS, which were interpreted in a restrictive way.³¹⁹ In particular, the directive reflects the differentiation in rights between GRC and other refugees (notion ‘subsidiary’) and thereby *‘unjustifiably entrenches a protection hierarchy, and creates further protection gaps by omitting to provide for known categories of extra-Convention refugees’*. However, there is no international legal foundation on which to base distinctions between rights granted to GRC refugees and to beneficiaries of subsidiary protection.³²⁰

The **eligibility** criteria of the Qualification Directive follows – in contrast to its original concept, which was liberally conceived - a very **narrow approach** making it impossible to subsume ‘international

³¹⁴ McAdam, J. (2007) 143, refers inter alia to Einarsen T. (1990) ‘The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum’ 2 *International Journal of Refugee Law*, 361, 372.

³¹⁵ McAdam mentions the example of access of HIV affected people to generic affordable anti retroviral drugs.

³¹⁶ McAdam J. (2007) 169.

³¹⁷ Council Directive 2004/83/EC (29.04.2004) 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, OJ L304/12.

³¹⁸ McAdam J. (2007) 13.

³¹⁹ McAdam J. (2007) 56, see also Lopez A. (2007) 399. The directive is not result of a comprehensive and systematic analysis of all protection possibilities within international law.

³²⁰ Regarding the content of protection as guaranteed by Qualification Directive, McAdam J. (2007) 90ff.

climate displacees' under the directive:³²¹ a 'person eligible for subsidiary protection' is defined as a third country national or a stateless person who does not qualify as a refugee but in respect of whom **substantial grounds have been shown for believing** that the person concerned, if returned to his or her country of origin (or of former habitual residence) would face a **real risk of suffering serious harm**, and to whom the exclusion clause does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.³²² In general, UNHCR criticised that the types of threat in art. 15 would indicate a strong presumption for GRC status.³²³

From the **serious harm** described in art. 15, only the scenario of **inhuman or degrading treatment** in the country of origin could be applicable.³²⁴ McAdam argues that it would be difficult to argue that environmental crises fit within one of enumerated category of serious harm; the wording would not leave room for additional type of 'serious harm'.³²⁵ Since the directive was elaborated at a time when the international community was aware of the problems of environmental degradation and the vulnerability of large groups of persons in search of international protection, this gap seems to be on purpose.³²⁶ This assumption is confirmed by a note of the Council regarding art. 15 ('serious harm'): *'By using the wording "acts or treatment" it is ensured that only man-made situations, and not for instance situations arising natural disasters or situations of famine, will lead to the granting of subsidiary protection.'*³²⁷ What is more, the original draft of the directive was liberally conceived; consideration was also given as to whether certain environmental triggers might justify subsidiary protection.³²⁸ However, the European Parliament recognised that the growing number of people who are forced to leave their homes due to poverty and environmental degradation would equally need protection; appropriate instruments and

³²¹ Goodwin-Gill G./McAdam J., 40f criticise that the definition does not comprise all persons who could be protected under the ECHR against removal.

³²² art. 2 (e) Qualification Directive.

³²³ UNHCR Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, 14109/01 ASILE, 16.11.2001, 42.

³²⁴ art. 15 Qualification Directive. The other cases mentioned are death penalty or execution; torture or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

³²⁵ Any argument to the contrary would challenge both letter and spirit of directive as expressed during drafting process, in which the content of art. 15 was extensively discussed; a human rights paragraph applying to acts outside scope of a-c was drafted (serious harm could consist of 'violation of a human rights, sufficiently severe to engage MS's international obligation). However, this provision was deleted.

³²⁶ McAdam J. (2007) 55, refers to Note from Presidency to Asylum Working Party, 'Discussion Paper on Subsidiary Protection', 13167/99 ASILE 41 (19.11.1999) 3.

³²⁷ Council of the European Union, Presidency Note: Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 12148/02, 20.09.2002, 7. See also recital 26 directive: 'Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.' Thus, it is argued that the policy makers, in this case the Member States, wanted a narrow protection regime not granting people fleeing from natural disasters protection under this directive.

³²⁸ McAdam J. (2007) 83: '[...] as art. 15 stands now, there is little room for interpretation and it may be that "inhuman or degrading treatment or punishment" becomes focal point for seeking to broaden directive's scope, functioning in a similar fashion to Convention's "membership of a particular social group category. While "inhuman and degrading treatment" may encompass "flagrant violations" of other ECHR rights, there is value in testing the limits of those rights per se rather than via article 3 ECHR. Furthermore, art. 15 (b) is limited to inhuman or degrading treatment in the country of origin.' Original para. b provided that serious harm could consist of 'violation of human rights, sufficiently severe to engage the Member State's international obligations'. The deletion has dramatically reduced the scope of the Directive. The original wording of para. c (indiscriminate violence) contained reference to 'systematic or generalised violations of their human rights'; this phrase is to be found now in Temporary Protection Directive 2001 (art. 2 (e)).

policies of prevention would need to be devised ‘as a possible step 2 of a Common European Asylum Policy’.³²⁹

4.3 TEMPORARY PROTECTION³³⁰

The concept of ‘temporary protection’ is described as the ‘(typically European) response of according **time-bound**, emergency protection to a **sudden mass influx** of a large number of displaced persons who come from a specific country or geographical area (depending on resources of receiving State). The size of this influx would overwhelm standard RSD procedures. The arrival can be spontaneous or aided (e.g. evacuation). Temporary protection should only last for as long as it remains impossible to process asylum seekers through normal channels and accord protection on individual basis (distinct from persons recognised as prima facie refugees).³³¹

An ExCom Conclusion mentions following characteristics of mass influx: **considerable numbers of people** arriving over an international border, **rapid** rate of arrival, **inadequate absorption** or response capacity in host States, individual procedures (where they exist) are unable to deal with the assessment of such large numbers.³³² An instance of temporary protection – however outside the scope of the directive – was the UNHCR coordinated international Humanitarian Evacuation Programme for refugees fleeing Kosovo in 1999, which led to temporary hosting of 92.000 refugees by 29 States. This has been described as a shift in UNHCR’s traditional practice of keeping refugees within the region of displacement. UNHCR saw it as an **example of solidarity and burden-sharing**, showing ‘an exemplary political will to avert a risk of destabilisation created by the presence of large numbers of refugees in precarious circumstances.’³³³

³²⁹ ‘Equally, while current definitions of asylum seekers deal only with those suffering persecution, or the fear of it, at the hands of human agents, we are ignoring the growing number of people who are forced to leave their homes due to poverty and environmental degradation. These people equally need protection and there is an urgent need to devise the appropriate instruments and policies of prevention. Maybe that should provide step 2 of a Common European Asylum Policy.’ See European Parliament, Report on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM(2001) 510. C5-0573/2001. 2001/0207(CNS)) Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs Rapporteur: Jean Lambert, A5-0333/2002, 08.10.2002, 55 (explanatory statement).

³³⁰ Goodwin-Gill G.S., McAdam J. (2007) 335ff distinguish between a European model, on which the current international law notion of temporary protection is built and the South East Asian practice of temporary refuge (the latter was paid for by mostly western countries, on terms keeping majority of asylum seekers away from frontiers while leaving them able to pick and choose among candidates for permanent settlement.). In the following, reference is made exclusively to the first model.

³³¹ McAdam J. (2007) 3. UNHCR (2000) ‘UNHCR Commentary on the Draft European Union Directive on Temporary Protection in the Event of a Mass Influx’, 3: mass influx cannot be defined in absolute numerical terms since it depends on resources of receiving State.

³³² ExCom Conclusion No. 100 (LV) (2004) para. (a).

³³³ Goodwin-Gill G.S., McAdam J. (2007) 337 refers to UNHCR, ‘Annual Theme: Strengthening Partnership to Ensure Protection, Also in relation to Security’, UN doc. A/AC.96/923 (14.09.1999) para. 18.

EC Council Directive 2001/55³³⁴ establishes minimum standards for granting temporary protection³³⁵ in the event of a mass influx and defines ‘displaced persons’ in a broader way than beneficiaries of subsidiary protection in the Qualification Directive: they are third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated and are **unable to return in safe and durable conditions**, who may fall within the scope of art. 1 A Geneva Refugee Convention or other international or national instruments giving international protection, *in particular* persons at **serious risk** of, or who have been the **victims of, systematic or generalised violations** of their human rights.³³⁶ However, this system only applies if it is **triggered** by a decision of the Council of the European Community, i.e. representatives of EU Member States, on proposal of the Commission. So far, this mechanism has not been activated.

Under the directive, beneficiaries receive a **status** which is a ‘middle ground’ between that of asylum seekers and Convention refugees.³³⁷ These rather generous entitlements can be explained by the possibility to control the access to the rights (i.e. the trigger mechanism).

Thus, ‘international climate displacees’ fleeing in masses could qualify for ‘temporary protection’ since this definition is broader than the definition regarding ‘subsidiary protection’ in the Qualification Directive. However, looking at the current restrictive practice of EU Member States already in relation to political refugees, it is unlikely that this mechanism will be triggered in the case of ‘international climate displacees’. Apart from that, this kind of protection is only of limited assistance to persons affected by severe and durable environmental degradation.³³⁸

4.4 EXCURSION: PROTECTION OBLIGATIONS ARISING FROM THE ‘RESPONSIBILITY TO PROTECT’?

The concept of the **Responsibility to Protect** (R2P) is a relatively new concept of international politics and is not yet legally binding under public international law. This concept primarily focuses on the responsibility of every single State towards protection of its own population from certain threats – in particular by addressing root causes as well as immediate causes. The international community should

³³⁴ EC Council Directive 2001/55/EC of 20.07.2001 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.

³³⁵ art. 2 (d) Temporary Protection Directive defines ‘temporary protection’ as a procedure of exceptional character to provide, in the event of a mass influx, immediate and temporary protection, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation (art. 2 (a)). This temporary protection should not offer any protection as alternative to refugee status, but offer an instrument to respond to urgent protection needs until individual asylum applications are dealt with. The directive defines ‘mass influx’ as the ‘arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme’.

³³⁶ Definition in art. 2 (c). art. 2 (c) (i) would not apply to ‘international climate displacees’ (‘persons who have fled areas of armed conflict or endemic violence’).

³³⁷ Goodwin-Gill G.S., McAdam J. (2007) 342: entitlement to housing, social welfare, some medical care and access to education; access to the labour market is conditional on MS’ right to give priority to EU citizens and EEA citizens and legally resident TCNs receiving unemployment benefit; definition of ‘family’ is broader than under Qualification Directive.

³³⁸ Lopez A. (2007) ‘The protection of environmentally displaced persons in International law’, Lewis & Clark Law School’s Environmental Law Online, vol 37, 365ff.

bear the responsibility towards these internal threats only in cases, in which the State cannot come up to its responsibility to protect its population. As soon as threat scenarios realise, adequate measures (adaptation measures and other measures for the immediate protection of the population) need to be taken.³³⁹ Possible measures comprise the protection of IDPs as well as granting asylum to potential victims.³⁴⁰ R2P should be interpreted as imposing a positive obligation on States to take steps to prevent victimization, reduce statelessness, and redress the dire circumstances for those who have no human rights protection or even no national rights.³⁴¹ Military intervention should be only a measure of last resort to protect the population.

In its origins, the concept – as developed by International Commission on Intervention and State Sovereignty (ICISS) - was envisaged to apply in order to prevent ‚avoidable catastrophes’ such as genocide, mass rape or ethnic cleansing, starvation catastrophes and – also mentioned explicitly – natural disasters of big magnitude.³⁴² However, on the World Summit 2005, the UNGA confirmed the concept of R2P to apply only in cases of protection of the population from genocide, ethnic cleansing, war crimes and crimes against humanity.³⁴³ The UNSC confirmed this narrow understanding in its Resolution 1674.³⁴⁴ UNSG Ban Ki-moon reaffirmed that the concept’s scope was narrow focusing only on crimes and violations as agreed by world leaders in 2005: ‘[...] *Extending the principle to cover other calamities, such as HIV/AIDS, climate change or response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.*’³⁴⁵ In context of the cyclone in Myanmar some have argued for application of the R2P concept.³⁴⁶

Thus, the only way to bring climate change-induced environmental disasters/degradation under this concept would be to argue that the effective coping with environmental degradation is necessary for the prevention of genocide, ethnic cleansing, war crimes and crimes against humanity.

³³⁹ ICISS Report mentions ‘life supporting protection and assistance’ to populations at risk.

³⁴⁰ Barbour, B., Gorlick, B., Embracing the ‚Responsibility to Protect’: A Repertoire of Measures including Asylum for Potential Victims, Int’l J. Refugee Law; here only in context of a threat through genocide, ethnic cleansing, or crimes against humanity.

³⁴¹ Barbour B., Gorlick B. (2008) ‘Embracing the “Responsibility to Protect”’: A Repertoire of Measures including Asylum for Potential Victims’, *International Journal of Refugee Law*, vol. 20 nr. 4, 564f.

³⁴² International Commission on Intervention and State Sovereignty (ICISS) The Responsibility to Protect (2001), 33, available at: <http://www.iciss.ca/pdf/Commission-Report.pdf> (29.04.2009).

³⁴³ UN Summit Outcome Document 2005, UN Doc. A/RES/60/1, paras. 138 et seq. It is explained that this crimes would constitute violations of *ius cogens* and that no State could legitimately invoke its sovereignty to prevent external intervention.

³⁴⁴ SC Resolution 1674 (2006) S/RES/1674 (2006) 28.04.2006, para. 4.

³⁴⁵ Address of UN Secretary-General Ban Ki-moon at an event on ‘Responsible Sovereignty: International Cooperation for a Changed World’, delivered in Berlin on 15.07.2008, available as UN doc. SG/SM/11701, UN Department of Public Information, New York.

³⁴⁶ See Thakur R., Crisis and Response, Yale Global, 19.05.2008; Barbour B., Gorlick B. (2008) ‘Embracing the “Responsibility to Protect”’: A Repertoire of Measures including Asylum for Potential Victims’, *International Journal of Refugee Law*, vol. 20 nr. 4, 533ff.

5 SUBMERGING TERRITORY: THE STATUS OF DISPLACEES³⁴⁷

As also recently remarked by UNHCR, ‘a particular challenge will be posed by the case of sinking small island States caused by rising sea levels’.³⁴⁸ The majority of States which are affected by potential ‘submerging’ are island States in the South Pacific, Indian Ocean or in the Caribbean. Island States, which are affected most are Tuvalu, Nauru, Kiribati, Vanuatu, Maldives or the Bahamas. Their total population amounts to less than half a million persons; e.g. Tuvalu is inhabited by ca. 10,000 persons; lies only few centimetres above the sea level; it is expected that the island is uninhabitable by 2050. Bangladesh is a State, which will not ‘submerge’ completely; however, it is threatened to lose a significant part of its surface due to environmental reasons.³⁴⁹

Recently, at the UNSC’s first discussion on the impacts of climate change on international security, Papua New Guinea stated (on behalf of the Pacific Islands Forum) that the impacts of climate change on small island States would be no less threatening than the dangers emanating from bombs or firearm - massive dislocation similar to population movements after conflicts would be the consequence. The UN Security Council should not be involved in the UNFCCC-negotiations; however, it should further monitor and ensure that all countries – according to their available resources – contribute to the solution of the problem; it should also investigate the consequences of loss of land, resources and people on the sovereignty and on international rights.³⁵⁰

Thus, deterioration of life conditions will result in internal relocation (where possible) and international migration - until the territory is no longer able to sustain human life.³⁵¹ Cultural heritage will be lost in case of relocation/migration. The status of the population³⁵² of States, which are in the process of ‘submerging’ (e.g. Tuvalu) and which are likely to be completely submerged within the next decades, is not clear from a public international law perspective. Their status will depend on whether their States can still be considered existent under international law.³⁵³

The latter would obviously only make sense if a territory of a third State was ceded to the country of origin or if the country of origin was granted at least a right to ‘use’ the territory of a third State and exercise some forms of sovereignty.

³⁴⁷ Regarding the human rights aspects of the problem of States disappearing for environmental reasons, see also United Nations Sub-Commission on the Promotion and Protection of Human Rights, Prevention of discrimination and protection of indigenous peoples, Expanded working paper by Françoise Hampson on the human rights situation of indigenous peoples in States and other territories threatened with extinction for environmental reasons, E/CN.4/Sub.2/2005/28 (16.06.2005) para. 8.

³⁴⁸ UNHCR (2008) 4.

³⁴⁹ Hampson F. (2005) paras. 25-26.

³⁵⁰ 5663rd Meeting, first open debate on impacts of climate change on peace, 17.04.2007.

³⁵¹ Hampson F. (2005) paras. 25-26.

³⁵² Citizens and non-citizens not having a closer link to another State.

³⁵³ Hampson F. (2005) para. 13. UNHCR (2008) 4: ‘[W]ith the disappearance of territory, one of the key constituting elements of statehood, it is not clear that these states would continue to exist as such. [...]’.

Clearly, there is a need to regulate under public international law whether and under what conditions a State can be considered to cease to exist: possible options would be to regard a State ‘ceased’ already at the point when the population (or at least a considerable part of the population) can survive only through leaving since their livelihoods are threatened (even if parts of the territory are still above sea level) or – at a later stage - only if the whole territory has ‘submerged’. Further, it would need to be regulated whether this ‘non-existence’ of the State needs to be recognised by a certain authority under international law (in this case it would need to be clarified who would be the competent body for recognition).

In the following two options are elaborated on: firstly, the scenario in which the continued existence of the State (and citizenship) is presumed; secondly, the scenario in which it is assumed that at a certain point the State (and citizenship) ceases to exist.

5.1 OPTION: COUNTRY OF ORIGIN STILL EXISTS (CITIZENSHIP CONTINUES TO EXIST)

Maintaining citizenship would make only sense if the government would have at least the right to exercise some forms of sovereignty (parallel) from the territory of a third State, if the country of origin was ceded territory from a third State or the international community or if new land could be ‘created’ (‘land reclamation’). In absence of any options available at the moment, Tuvalu is considering to buy land from a third State such as New Zealand.

Regarding the exercise of sovereignty on the territory of a third State, solution models would need to be elaborated (e.g. full sovereignty, but common access to resources of the territory; autonomy with parallel judicial systems or currency systems).³⁵⁴ However, as noted by UNHCR, even where governments attempted to function from the territory of other states, it is unclear that they would be able to ensure the rights which flow from citizenship: *‘If they were unable to ensure such basic rights as the right to return to one’s own country or to obtain a passport, statelessness considerations would also arise.’*³⁵⁵ In general under current international law, exile governments can be recognised only as long as a serious possibility of return exists.³⁵⁶

In case of cession of territory of a third country it would be necessary to regulate whether this claim is to be directed against a certain State (e.g. on account of per capita emissions) or against the international community with internal burden sharing (for States with relatively little *per capita* emissions).³⁵⁷ It is argued that such claims needed to be posed against the whole international community since States, which are likely to ‘submerge’, tend to be geographically close to States, which are not on their own responsible for climate change.

³⁵⁴ Kelman I. (2008) Island Evacuation, *Forced Migration Review* 31, 21.

³⁵⁵ UNHCR (2008) 4f.

³⁵⁶ See Verdross A. (1984) *Universelles Völkerrecht: Theorie und Praxis*.

³⁵⁷ Suggestions see Kelman I. (2008) ‘Island Evacuation’, *Forced Migration Review* 31, 21. See also <http://www.islandvulnerability.org/> (17.05.2009).

Importantly, the rights of citizens in those cases would need to be clarified. In case that no territory is ceded or new land is created, citizens of the ‘submerged’ country of origin would live next to citizens of the host State. Here it could be necessary to regulate collective rights of citizens of the ‘submerged’ State (e.g. right to live together with other citizens).

5.2 OPTION: COUNTRY OF ORIGIN (AND CITIZENSHIP) CEASE(S) TO EXIST

An international body would need to be made responsible for determining when the State ceases to exist. Further, the exact conditions, under which a State can be deemed to cease to exist, would need to be regulated. In general, rules regarding State succession would not be applicable³⁵⁸ and the legal status of the population (and of individual members) of this ‘ceased’ State would not be clear. It is questionable whether the statelessness regime (1954 Convention relating to stateless persons, 1961 Convention on the reduction of statelessness) or international protection obligations are applicable. In general, the determination that a person is considered to be ‘stateless’ would have following consequences:

- The person could be accorded protection according to the statelessness regime.
- The person could be accorded protection according to the GRC – if all other requirements are fulfilled (in particular persecution, nexus clause; see chapter 4.1).³⁵⁹ Only if one comes to the conclusion that persons affected can be regarded as ‘stateless’, they could qualify for protection under the Geneva Refugee Convention. However, if a whole population was displaced, the granting of a special status similar to the status of a national minority seems worthwhile: the former population of the ‘submerged’ population could be given collective rights to perform their culture and tradition in the host State or the right to live together with other former citizens. This will be also true for groups, which have formed an indigenous population in the country of origin.³⁶⁰

In any case, special rules regulating the obligation of the ‘host State’ to issue documents and to foresee a fast-track procedure for citizenship would seem worthwhile.³⁶¹

5.2.1 Application of the statelessness regime?

While UNHCR argues that in case that ‘submerging’ States are considered to have disappeared together with their territory, the populations concerned would be left ‘stateless’ unless they acquired other

³⁵⁸ Hampson F. (2005) paras. 11-12.

³⁵⁹ art. 1A (2) GRC: ‘[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [...] 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. [...]’. This phrase in the GRC definition relates to stateless refugees (UNHCR Handbook (1992) paras. 101ff).

³⁶⁰ Hampson F. (2005) para. 18.

³⁶¹ Hampson F. (2005) para. 21.

nationalities,³⁶² it is not clear whether the statelessness regime really applies to this category of persons: The definition of statelessness according to the *1954 Convention relating to the Status of Stateless Persons* is based on the denial of nationality under the 'operation of law'.³⁶³ It is reasoned that this Convention assumes on purpose a very narrow understanding of statelessness and is not applicable to situations of *de facto* statelessness (i.e. person possess citizenship, which is in practice ineffective).³⁶⁴ According to this – prevailing and accepted – interpretation, populations of 'submerged' States would not qualify for protection under this provision.

Thus, there is a need to establish norms under international law regulating what norms are to be applied in such cases (e.g. new norms, norms of the statelessness regime). In any case, it could prove necessary to grant the population of a submerged States the right to form a national minority.

Apart from that, UNHCR has already announced that it would see some form of UNHCR role regarding citizens of sinking islands seeking for safety abroad or in the context of statelessness.³⁶⁵

5.2.1.1 Excursion: A right to citizenship?

It is disputed if an international legally binding and enforceable human right to citizenship (in the sense of a right not to be deprived arbitrarily of his/her citizenship) exists.³⁶⁶ If one comes to the conclusion that the issue of 'statelessness' applies to situations of 'submerging' States, it could be argued that an obligation of the country of origin (threatened to be 'submerged') to prevent statelessness of its citizens derives from the statelessness regime (or maybe also from the deducted right of citizenship, art. 15 UDHR).³⁶⁷

The *1961 Convention on the Reduction of Statelessness*³⁶⁸ regulates the avoidance of statelessness as well as the protection of stateless persons. It is argued that the principles contained in the 1961 Convention are reflected in the Council of Europe *European Convention on Nationality* and in the basic rules on citizenship and practice of most of the States. Thus, despite their low number of ratifications, these

³⁶² UNHCR (2008) 4f.

³⁶³ art. 1 (1) Convention 1954: 'For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.'

³⁶⁴ McAdam J., Saul B. (2008) 'An Insecure Climate for Human Security? Climate change-induced Displacement and International Law', 9.

³⁶⁵ UNHCR (2008) 5.

³⁶⁶ UN Doc. E/CN.4/Sub.2/1988/35, Z107, UN Sub-Commission's Special Rapporteur on the right of everyone to leave any country, including his own, and to return to his own country: '*In view of Human Rights Law, denationalization should be abolished. It constitutes a breach of international obligations [...] There is also a growing tendency to require the acquisition of another nationality as a precondition for the validity of denationalization. The recognition of the right to nationality as a basic human right, in effect, limits the power and freedom of a State arbitrarily to deprive its citizens of nationality.*'

³⁶⁷ Hampson F. (2005) para. 22, mentions e.g. Tsunami-Early-Warning-Systems in the Indian Ocean.

³⁶⁸ UN Treaty Series, vol. 989, 175. 30.08.1961, in force since 13.12.1975, as of 01.10.2008 ratified by 35 States. In contrast to the GRC (145 Parties) the *1954 Convention relating to the Status of Stateless Persons* und die *1961 Convention on the Reduction of Statelessness* has not been ratified by a great amount of States. The UNGA and UNHCR's Executive Committee ordered UNHCR to promote accession to or ratification of this instrument actively. See also EXCOM Conclusion No. 106 on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons (2006); EXCOM Conclusion No. 78 on Prevention and Reduction of Statelessness and the Protection of Stateless Persons (1995). It is argued that those two Conventions give meaning to art. 15 UDHR (according to which everyone has a right to citizenship and nobody must be denied the right to change his/her citizenship and nobody must be withdrawn citizenship arbitrarily).

provisions would reflect points of reference to determine customary international law.³⁶⁹ Further, in numerous international and regional human rights instruments provisions regarding the avoidance of statelessness are to be found.³⁷⁰

³⁶⁹ UN Special Rapporteur on Zaire, UN Doc. E/CN.4/1996/66, para. 85.

³⁷⁰ International Instruments: art. 7, 8, CRC; art. 24 ICCPR; art. 9 CEDAW; art. 5 CERD; regional instruments: art. 20 American Convention on Human Rights; 1997 CoE European Convention on Nationality.

6 SOLUTIONS

Given the definition of ‘international climate displacees’ (implying a serious threat to or harm of life or livelihood) and looking solely at international refugee law, it has become clear that the Geneva Refugee Convention as a human rights instrument could be interpreted in a way to cover not only the small proportion of ‘international climate displacees’ who are ‘targeted’ for one of the Convention grounds by the persecutor but also the bigger fraction disposing of characteristics, which make them particularly vulnerable to the impacts of climate change (e.g. poverty, gender, age, indigenous character). However, State practice suggests that States are currently not willing to interpret the Geneva Refugee Convention liberally. Similar is the situation in relation to complementary forms of protection: while international human rights law itself could be interpreted liberally, the practice is a rather restrictive one, which has manifested itself on EU level in the Qualification Directive – even though the Commission originally applied a rather liberal approach and the European Parliament recognised the need for protection of persons fleeing environmental degradation/disasters. While the EU Directive regarding Temporary Protection employs a wider concept than the Qualification Directive so that ‘international climate displacees’ might fall under the definition, the directive has never been applied so far due to a complicated trigger mechanism. In context of the unwillingness of EU Member States to apply a more liberal approach towards international protection obligations, it seems unlikely that the Council of the EU would take such a decision. Further, the temporary scope of protection makes this system inadequate as response to permanent displacement. Thus, even though a liberal interpretation would be possible to cover at least ‘international climate displacees’, States are not willing to do so. Apart from that, individualised decision-making mechanisms in context of the GRC or subsidiary protection are not necessarily apt to cope with large influx of persons.

However, bearing in mind that industrialised countries are responsible for the highest *per capita* emissions of greenhouse gases and that developing countries are the most vulnerable and affected by climate change but contributed least responsible to climate change, it seems **not equitable** that international protection instruments are not interpreted in a liberal approach by Western potential receiving States. At the same time, even if such a liberal approach was taken, the main burden (to which industrialised States have contributed to a considerable extent) would still remain on countries in the region, i.e. most likely developing countries, since there does not exist an **obligation** under international refugee law **to share the burden**. However, under international human rights law (in particular the ICESCR), developed States have a special responsibility to facilitate the fulfilment of ESCR in poorer developing States; this includes arguably the obligation to assist refugees and displaced persons.

Looking at international environmental law, in particular the UNFCCC, it becomes clear that this branch of international law already recognises an **allocation of responsibility according to the principles of equity and common but differentiated responsibilities and respective capabilities** – however, only in

context of preventive measures: developed country Parties should take the lead in protecting the climate system for the benefit of present and future generations. Specific needs of developing country Parties should be given full consideration. Developed countries as contained in Annex II to the UNFCCC should support developing countries, in particular the vulnerable ones, in the mitigation and adaptation to the adverse impacts of climate change (e.g. technical and financial support).

Thus, **international human rights law** and **international environmental law** have to be regarded as **complementary and mutually reinforcing**; each system on its own can hardly offer an adequate solution. Bringing both sources of law together, it becomes evident that ‘international climate displacees’ deserve international protection (since impacts of climate change make the country of origin unable to fulfil even core contents of human rights, exacerbate already existing vulnerabilities) and that economically well developed countries with high *per capita* emissions of greenhouse gases should bear at least a considerable part of the ‘protection burden’ (since it is greenhouse gas emissions of third countries, which finally contributed to a situation in which the country of origin is unable to protect individuals against harms): thus a **new instrument** should be based on a **fair allocation of resources** and **per capita emissions**, i.e. be in conformity with principles such as equity (in proportion to emissions per capita or adverse impacts of climate change and vulnerability) and common but differentiated responsibilities. The most promising solution (which needs to be a global solution since climate change is a global challenge) seems to lie in a **new instrument within the framework of the UNFCCC**. The UNFCCC contains already the desired principles in regard to preventive obligations – based on per capita emissions and resources; further it is widely ratified. However, so far this instrument does not **focus on the consequences of climate change on the individuals**.

The **new instrument** under the umbrella of the UNFCCC should contain **obligations of certain States** identified on the basis of resources and per capita emissions (e.g. based on Annex II Parties to UNFCCC). **Obligations** would relate to: firstly, the recognition of their contribution to ‘internal’ and ‘international climate displacement’; secondly, to the protection of ‘international climate displacees’ outside the region; thirdly, to the sharing of the responsibility of countries of origin regarding protection of ‘internal climate displacees’; fourthly, to become (at least partly) responsible for protection of those ‘international climate displacees’ within the region of origin; fifthly, to undertake research regarding the vulnerabilities and coping strategies of potentially affected areas and populations; sixthly, to support national efforts regarding resilience as far as they are not already covered by the UNFCCC; finally, to considering the granting of collective rights for citizens of ‘submerged’ States if certain conditions to be stipulated in an Annex to the instrument are met. The **form of burden- and responsibility-sharing** in relation to **protection obligations** could be similar to the one taking place within the refugee context (e.g. measures regarding the ‘**sharing of persons**’ (resettlement, temporary protection), sharing of the **financial burden**, sharing of the **material burden** such as stand-by arrangements to strengthen preparedness for mass influx, enhance local capacity, expertise and flexibility). In that regard, the Commission suggested in its 2008 Asylum Policy Action Programme a higher degree of solidarity also outside the EU through

Regional Protection Programmes (RPP) and Resettlement; they could provide models if they are protection-oriented and adequately funded and not aimed at decreasing the number of people seeking asylum in Europe.

Corresponding to those obligations, the new instrument would need to contain **rights of citizens** (and non-citizens with no stronger link to a third country) **of certain States** identified on the basis of the risk to be affected, resources (adaptive capacity) and per capita emissions (e.g. only in relation to non-Annex I Parties to UNFCCC). In addition, a **list of 'highly vulnerable' areas and populations** (based on risk and adaptive capacity) - which would need to be updated regularly - could be established by a body under the UNFCCC Conference of Parties (COP) composed of affected and obliged countries (double majority in decision-making) and advised by a scientific panel. Group based determination of protection need could be made possible in that way.

The new instrument would also need to include **rules relating to the cooperation between the country of origin and international actors** (e.g. UNDP, World Bank, UNEP, UNHCR). Since there is no institution with responsibility for climate change-induced displacement, there is the risk that otherwise this issue will be dealt with in ad hoc and fragmented manner.

At the moment a successor instrument to the Kyoto Protocol is being negotiated, which is to be adopted at the Conference of the Parties to the UNFCCC in December 2009 (COP 15) in Copenhagen; this would seem to be an appropriate forum to bring forward an idea of including the human consequence of climate change.

BIBLIOGRAPHY

Asia Pacific Forum, Human Rights and the Environment (2007) Reference Paper for the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions in Sydney, 24-27.09.2007.

Australian Labor Party (2006) 'Our drowning neighbours', Australian Labor's Policy Discussions paper on climate change in the pacific, 05.01.2006.

Bates D. (2002) 'Environmental Refugees? Classifying Human Migrations caused by Environmental Change', *Population and Environment*, vol. 23, no. 5, 467 et seq.

Black R. (2001) 'Environmental refugees: myth or reality?', *New Issues in Refugee Research* no. 34.

Burson B. (2008) 'Environmentally induced displacement and the GRC: Pathways to Recognition', Paper presented at the EFMSV Conference, October 2008.

Castles S. (2002) 'Environmental change and forced migration: making sense of the debate', *New Issues in Refugee Research* no. 70.

Centre for Research on the Epidemiology of Disasters (CRED) (2007) 'Annual Disaster Statistical Review, Numbers and Trends 2006'.

Cooper J. (1998), 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', 6 *N.Y.U. Environmental Law Journal*, 483.

EACH-FOR (2008) 'Preliminary Findings from the EACH-FOR project on Environmentally Induced Migration, Environmental Change and Forced Migration Scenarios Project'.

Edwards A. (2006) 'Refugee Status Determination in Africa', *RADIC*, vol. 14, no. 2, 204ff.

El-Hinnawi E. (1985) 'Environmental Refugees', United Nations Environment Program (UNEP), New York.

Foster M. (2007) *International Refugee Law and Socio-Economic Rights*, Cambridge University Press.

Global Humanitarian Forum (2009) 'The Anatomy of a Silent Crisis, Human Impact Report Climate Change'.

Goodwin-Gill G./McAdam J. (2007) *The Refugee in International Law*, Oxford University Press.

Grabewarter C. (2008) *Europäische Menschenrechtskonvention*, Beck Juristischer Verlag.

Greens/EFA group (2008) 'Declaration on Climate Migrations; adopted at conference on Climate migrations organised in the European Parliament', 11.06.2008.

Hampson F. (2005) 'Expanded working paper on the human rights situation of indigenous peoples in states and other territories threatened with extinction for environmental reasons', Commission on Human

Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2005/28, 16.06.2005.

Hathaway J. (2005) *The Rights of Refugees under International Law*, Cambridge University Press.

Intergovernmental Panel on Climate Change (2007) 'Climate Change, Fourth Assessment Report'.

International Council on Human Rights (2008) 'Climate Change and Human Rights, A Rough Guide'.

International Peace Academy (2007) 'Climate Change and Conflict: The Migration Link'.

Jacobson, J. L. (1988) 'Environmental Refugees. A Yardstick of Habitability', Worldwatch Paper 86, Washington: Worldwatch Institute, 37 ff.

Jakobeit C., Methmann C. (2007) 'Klimaflüchtlinge – Die verleugnete Katastrophe', University of Hamburg, Fakultät Wirtschafts- und Sozialwissenschaften, study on behalf of Greenpeace.

Kälin W. (2008) 'Annotations to the Guiding Principles on Internal Displacement'.

Kälin W. (2008) 'The Climate Change – Displacement Nexus', Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Panel on disaster risk reduction and preparedness: addressing the humanitarian consequences of natural disasters, ECOSOC Humanitarian Affairs Segment, 16.07.2008.

Kälin W. (2009) 'Climate Change, Migration Patterns and the Law', Keynote Address by the Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons, International Association of Refugee Law Judges, 8th World Conference, 28.01.2009.

Kelman I. (2008) 'Island Evacuation', *Forced Migration Review* 31, 21.

King T. (2006) 'Environmental Displacement: Coordinating Efforts to Find Solutions', *Georgetown International Environmental Law Review*, vol. 18.

Kolmannskog V. O. (Norwegian Refugee Council) (2008) 'Future floods of refugees, A comment on climate change, conflict and forced migration'.

Lafontaine E. (2007) 'The Need for A New Instrument to Deal With "Environmental Refugees"'

Lambert J. (2002) 'Refugees and the Environment, The forgotten element of sustainability'.

Marcus C. (2008) 'Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm with the Meaning of the Refugee Convention', *International Human Rights Law and the Protection of the Environment, Academy on Human Rights and Humanitarian Law, American University International Law Review*, vol.24 no. 1, 32-71.

McAdam J., Saul B. (2008) 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law'.

Myers N. (1993) 'Environmental refugees in a globally warmed world', in: *Bioscience*, vol. 43, 752ff.

- Myers N. (2005) 'Environmental Refugees: An emergent Security Issue', 13th Economic Forum, 22.05.2005.
- Myers N., Kent J. (1995) *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute, Washington DC.
- Nowak M. (2003) *Introduction to the International Human Rights Regime*, Brill Academic Publications.
- Osofsky H. M. (2007) 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights', *American Indian Law Review*, vol. 31, 688ff.
- Pedersen O. W. (2008) 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?', *Georgetown International Environmental Human Rights*, vol. 21 no. 1.
- Piguet E. (2008) 'Climate change and forced migration', *New Issues in Refugee Research* no. 153.
- Renaud F. (United Nations University) (2007) 'Control, adapt or flee: How to face environmental migration?'.
 Robinson M., 'Climate Change and Justice', Barbara Ward Lecture, 11.12.2006.
- Sands P. (2003) *Principles of International Environmental Law* (Cambridge, 2nd edition).
- Scheinin M. (2004) 'Extraterritorial Effect of the ICCPR', in Coomans, F., Kamminga M.T. (eds.) (2004) *Extraterritorial application of Human Rights Treaties*, 73ff.
- Sepúlveda M. (2009) 'The obligations of "international assistance and cooperation" under the International Covenant on Economic, Social and Cultural Rights', *The International Journal of Human Rights*, vol. 13, no. 1 (2009).
- Shelton D. (2002) 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies', Background Paper No. 2, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16.01.2002.
- Stern, Sir Nicholas (2006) 'The Stern Review on the Economic Effects of Climate Change' (Report to the British Government).
- Vandenhoele W. (2005) 'A Partnership for Development: International Human Rights Law as an Assessment Instrument'.
- Verdross A., Simma B. (1984) *Universelles Völkerrecht: Theorie und Praxis*, Duncker & Humblot.
- Weinstein T. (2005) 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?', *Georgetown International Environmental Law Review* 17 no. 4, 719.
- Williams A. (2008) 'Turning the Tide: Recognizing Climate Change Refugees in International Law', *Law & Policy*, vol. 30, No. 4, 502-529.

United Nations

Human Rights Council, A/HRC/10/L.10, 07.04.2009, 10th Session, Draft report on its tenth session, Report relating to the organization of the session and the items on the agenda.

Human Rights Council, A/HRC/10/L.11, 31.03.2009, 10th session, Draft report on its tenth session (text of resolutions and decisions adopted and the President's Statement agreed upon).

Human Rights Council, Resolution 10/4 Human Rights and Climate Change, adopted at 41st meeting, 25.03.2009.

Human Rights Council, Resolution 7/23 on human rights and climate change, UN Doc. A/HRC/7/L.21/Rev.1 (26.03.2008).

Inter-Agency Standing Committee (IASC) (2006) 'Operational Guidelines on Human Rights and Natural Disasters', Washington, D.C.: Brookings-Bern Project on Internal Displacement.

Inter-Agency Standing Committee (IASC) (2008) 'Field Manual on Human Rights Protection in Situations of Natural Disasters'.

Kyung-wha Kang, Deputy High Commissioner for Human Rights, 'Climate Change, Migration and Human Rights', Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities, 19.02.2008, Geneva.

OHCHR (2007) The human rights impact of climate change, United Nations Joint Press Kit for Bali Climate Change Conference, 03-14.12.2007.

OHCHR (2009) Report on the relationship between climate change and human rights, A/HRC/10/61, 15.01.2009.

Sub-Commission on Prevention of Discrimination and Protection of Minorities Human Rights and the Environment: Final Report prepared by Mrs Fatima Zohra Ksentini, Special Rapporteur, e/cw.4/Sub.2/1994/9.

UN Economic Commission for Europe, Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.

UN Permanent Forum on Indigenous Issues (2007) Climate Change: An Overview, November 2007, 4. UN Doc E/C.19/2008/CR2.

UNHCR (2008) 'Climate change, natural disasters and human displacement: a UNHCR perspective', 23.10.2008.

UNHCR (2008) 'Global Trends 2007: Refugees, Asylum-seekers, returnees, internally displaced and stateless persons'.

World Commission on Environment and Development, 'Our Common Future', UN Doc. A/42/427 (20.03.1987).

Council of Europe

Committee of Ministers, Reply to Rec. 1614 (2003), 21.01.2004, Doc. 10041.

Manual on human rights and the environment, Principles emerging from the case-law of the European Court of Human Rights (2006).

Parliamentary Assembly (2003) Environment and Human Rights, 24th Session, Rec. 1614 (2003), 27.06.2003.

Parliamentary Assembly (2008) Environmentally induced migration and displacement: A 21st century challenge, 23.12.2008, Doc. 11785, Committee on Migration, Refugees and Population, Rapporteur Tina Acketoft.

European Union

Commission (2007) EU Action against Climate Change, working with developing countries to tackle climate change.

Commission (2007) Green Paper on the Future of a Common European Asylum System, COM(2007) 301 final.

Commission (2007) Report to the Council and to the European Parliament on the Application of Directive 2003/9/EC, COM(2007) 745 final, 26.11.2007.

Commission (2008) EU Action against Climate Change, Leading Global Action to 2020 and beyond.

Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies', COM(2008) 611/3.

High Representative and the European Commission, Climate Change and International Security, Paper to the European Council, 14.03.2008.